

11/106
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INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL**, the High Courts of **ALLAHABAD**,
BOMBAY, **CALCUTTA**, **LAHORE**, **MADRAS**,
PATNA and **RANGOON**, the Chief Court of
ODDH, and the Courts of the Judicial Commissioners
of **CENTRAL PROVINCES** and **SIND**

Many of which are not reported elsewhere.

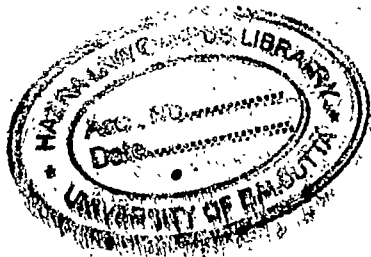
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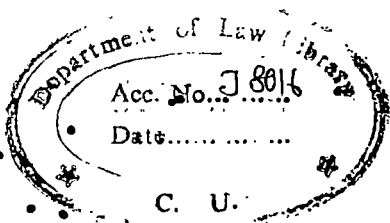
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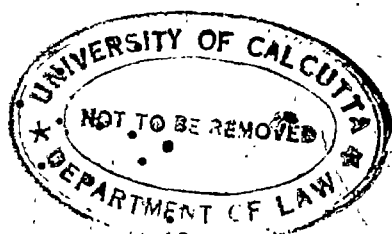
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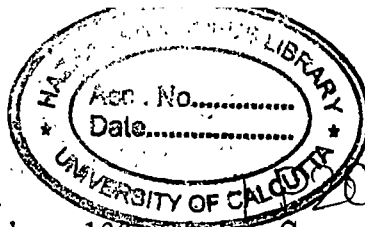
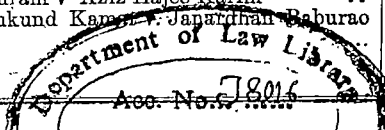


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127	Commissioner of Income-Tax, Madras v. Binny & Co. Ltd.	...	53 M. L. J. 672; 26 L. W. 679; 39 M. L. T. 481; (1927) M. W. N. 837; A. I. R. 1927 Mad. 1039; 50 M. 920 F. B.
128	Madhu Sudan Kundu v. Chhalimaddin Ahammad	...	A. I. R. 1928 Cal. 167.
129	Makam Chandrayudu v. Madasu Pedda Rangappa	...	26 L. W. 533; 53 M. L. J. 655; 39 M. L. T. 456; A. I. R. 1927 Mad. 1000.
130	Smail v. Gajjan	...	*Lahore High Court.
131	Venkataraman v. Ponnusami Padayachi	...	A. I. R. 1927 Mad. 1023.
133	Talagdar Khan v. Khairulnissa	...	4 O. W. N. 1045; A. I. R. 1928 Oudh 33.
134	Devi Ramanujacharyulu v. Alapati Sriramulu	...	(1927) M. W. N. 759; 26 L. W. 591; A. I. R. 1927 Mad. 1033.
136	Ramanath Bhattacharjee v. Jagannath Mondal	...	A. I. R. 1928 Cal. 169.
138	Veluswami Naicken v. Balasubramania Chettiar	...	A. I. R. 1928 Mad. 393.
140	Kaliappa Nadar v. Muthu Vyaija Thumbayasami	...	A. I. R. 1927 Mad. 984; 39 M. L. T. 442.
141	Court of Wards v. Devidas	...	8 Lah. 351; A. I. R. 1927 Lah. 633; 28 P. L. R. 692.
142	Batchu Perraju v. Bachu Venkateratnam	...	A. I. R. 1928 Mad. 1.
143	Re Fazoo Mia v. Sultan Ahmad Choudhury	...	31 O. W. N. 1050; A. I. R. 1927 Cal. 817; 55 O. 108.
144	Commissioner, Corporation of Madras v. Ekambara Naicker	...	53 M. L. J. 603; 39 M. L. T. 367; 26 L. W. 569; A. I. R. 1927 Mad. 980 F. B.
146	Dasarathi Ghose v. Kartick Ch. Ghose	...	31 O. W. N. 1052; A. I. R. 1927 Cal. 782.
147	Bhukhandas Lallubhai v. Thakoreram Kapilram	...	29 Bom. L. R. 1465; A. I. R. 1927 Bom. 640; I. L. T. 40 Bom. 14.
149	Hanuman Prasad v. Irshad Ali	...	1 Luck. Cas. 576; A. I. R. 1927 Oudh 526; L. R. 9 A. (O) 117.
150	Ganshamdoss Narayandoss v. Gulab Bi Bai	...	39 M. L. T. 431; 53 M. L. J. 709; 26 L. W. 697; A. I. R. 1927 Mad. 1054; 50 M. 927 F. B.
156	Delhi Cloth and General Mills Co. Ltd. v. Income-Tax Commissioner, Delhi	...	A. I. R. 1927 P. C. 242; 4 O. W. N. 1053; 8 P. T. T. 791; 25 A. L. J. 964; 53 M. L. J. 819; 47 O. L. J. 1; 30 Bom. L. R. 60; I. L. T. 40 Lah. 1; 32 O. W. N. 237; 54 I. A. 421; 29 P. L. R. 37; (1928) M. W. N. 95; 27 L. W. 179 P. C.
158	Padmanabha Ayyar v. Sitaramma Ayyar	...	26 L. W. 586; A. I. R. 1928 Mad. 28; 51 M. L. J. 96.
165	Nathu Ram v. Chand Kaur	...	A. I. R. 1927 All. 684; 26 A. L. J. 60; I. L. T. 40 All. 49.

167	Muhammad Qasim Ravuthar v. Nagaraja Moopnar	*Madras High Court.
169	Vaddiraju Venkata Jegga Rao v. Pillai Ranganayakulu	39 M. L. T. 458; A. I. R. 1928 Mad. 48.
170	Govinda v. Murlidhar	23 N. L. R. 141; 10 N. L. J. 228; A. I. R. 1928 Nag. 48 F. B.
172	Govinda Chetty v. Rangammal	(1927) M. W. N. 411.
176	Ulfat Rai v. Tej Narain	8 Lah. 632; I. L. T. 40 Lah. 9; A. I. R. 1928 Lah. 83; 29 P. L. R. 132.
181	Nabin Chandra Deb v. Mi Robeya	5 R. 619; A. I. R. 1928 Rang. 7.
183	Mauluk Chand Kishanji v. Daya Kishan	I. L. T. 40 Lah. 6.
184	Nensukhgavri v. Rajabally Mulla Abdul Kadar	29 Bom. L. R. 689; A. I. R. 1927 Bom. 405.
189	Jokhu Gossain v. Ganesh Singh	8 P. L. T. 704; A. I. R. 1928 Pat. 54.
192	Bohra Sri Ram v. Jwala Shanker Sahai	25 A. L. J. 839; 50 A. 178.
193	Brij Raj-Rang Lal v. Commissioner of Income-Tax	8 P. L. T. 686; A. I. R. 1927 Pat. 390.
194	Narayan Sahu v. Thakurji Ramji	8 P. L. T. 712; A. I. R. 1928 Pat. 49.
195	Lakshmi Kumara v. Narayanappa Naidu	*Madras High Court.
196	Kaniyur Ganapathi Bhatta v. Beeru Bhandary	A. I. R. 1927 Mad. 1039; 27 L. W. 206.
200	R. M. M. Chettyar Firm v. U Hla Bu	5 R. 623; A. I. R. 1928 Rang. 23; I. L. T. 40 Rang. 8.
201	Veeraswami Pillai v. Kalyanasundaram Mudaliar	A. I. R. 1927 Mad. 1009.
201	U Teza v. Ma E Gywe	5 R. 626; A. I. R. 1928 Rang. 3; I. L. T. 40 Rang. 10.
204	Chitar Ket Singh v. Kanhaiya Bakhsh Singh	4 O. W. N. 930; A. I. R. 1927 Oudh 481; L. R. 9 A. (O) 100.
205	Subramania Mudaliar v. Chairman, Municipal Council, Coimbatore	(1927) M. W. N. 740; 53 M. L. J. 816; 39 M. L. T. 591; A. I. R. 1928 Mad. 141.
206	Ravji Andu Nikam v. Bama Krishna Mane	29 Bom. L. R. 1346; A. I. R. 1928 Bom. 14.
208	Alaganan Chettiar v. Ramanathan Chettiar	(1927) M. W. N. 795; A. I. R. 1927 Mad. 1030.
209	Emperor v. Fardunji C. Gora	29 Bom. L. R. 1470; A. I. R. 1927 Bom. 630; 28 Cr. L. J. 1025.
212	Zahuri Sahtu v. Emperor	6 Pat. 623; 28 Cr. L. J. 1026; 8 P. L. T. 847; A. I. R. 1928 Pat. 103.
213	Ram Lal v. Emperor	1 Luck. Cas. 579; 28 Cr. L. J. 1029; A. I. R. 1928 Oudh 15; 9 A. I. Cr. R. 217.
216	Kallasani v. Emperor	29 Bom. L. R. 1478; A. I. R. 1927 Bom. 629; 28 Cr. L. J. 1032; I. L. T. 40 Bom. 3.
218	Ibraja Rowthan, In re	(1927) M. W. N. 788; 26 L. W. 537; A. I. R. 1927 Mad. 976; 53 M. L. J. 762; 28 Cr. L. J. 1034; 39 M. L. T. 658; 51 M. 178.
219	Loka Mahton v. Kali Singh	6 Pat. 553; 8 P. L. T. 716; A. I. R. 1927 Pat. 351; 28 Cr. L. J. 1035.
220	Khem Chand v. Emperor	28 Cr. L. J. 1036; 9 A. I. Cr. R. 202; A. I. R. 1928 Lah. 187.
221	Parsotim Das v. Emperor	6 Pat. 504; A. I. R. 1927 Pat. 369; 8 P. L. T. 757; 28 Cr. L. J. 1037; I. L. T. 40 Pat. 14.
222	Jagannadhaswami Naidu v. Manikyam	28 Cr. L. J. 1038; 27 L. W. 81; I. L. T. 40 Mad. 20; A. I. R. 1928 Mad. 101; 9 A. I. Cr. R. 200; 51 M. 259; 54 M. L. J. 570.
223	Latifan v. Mohammad Ibrahim	28 Cr. L. J. 1039.
224	Tahiru v. Jallu	9 Lah. L. J. 351; 28 Cr. L. J. 1040.
225	Umra v. Durga Devi	8 Lah. 541; A. I. R. 1927 Lah. 539; 29 P. L. R. 112.
226	Commissioner of Income Tax, Madras v. Mohideen Sahib of Bellary	26 L. W. 655; 53 M. L. J. 719; A. I. R. 1927 Mad. 1052; (1927) M. W. N. 874; 39 M. L. T. 612 F. B.
228	Secretary of State for India v. Haji Bakha-Fazal Din	I. L. T. 40 Lah. 20.
229	Chinnan Chetty v. Vilathan	39 M. L. T. 415; A. I. R. 1928 Mad. 27; 27 L. W. 30.
230	Narayanan Nambudiri v. Puthisseri Theva Amma	A. I. R. 1927 Mad. 1043; 26 L. W. 775; 53 M. L. J. 824; 51 M. 46 F. B.
239	Secretary of State for India v. Abdul Husen Dosaji Godwala	29 Bom. L. R. 1350; A. I. R. 1927 Bom. 601.
242	Ammakutti Achi v. Doraiswami Iyer	A. I. R. 1928 Mad. 140.
243	Mahadeo Lal Marwari v. Dalip Narayan Singh	I. L. T. 40 Pat. 16; A. I. R. 1928 Pat. 190.
244	Ram Dat v. Chhotak	4 O. W. N. 1019; A. I. R. 1928 Oudh 23.

247	Great Indian Peninsula Ry. Co. v. Chakravarti Sons & Co.	32 C. W. N. 53; 47 C. L. J. 32; I. L. T. 40 Cal. 25; A. I. R. 1928 Cal. 170; 55 C. 142.
250	Sita Ram v. Nanku	25 A. L. J. 833; A. I. R. 1928 All. 16; I. L. T. 40 All. 22; 50 A. 145.
252	Great Indian Peninsular Railway Co. Ltd. v. Jesraj Patwari	46 C. L. J. 428; 32 C. W. N. 76; A. I. R. 1928 Cal. 65; 55 C. 132.
255	Shyam Lal v. Sohan Lal	25 A. L. J. 777; A. I. R. 1928 All. 3; I. L. T. 40 All. 33.
261	Arunadoya Chakrabarty v. Muhammad Ali	46 C. L. J. 433; I. L. T. 40 Cal. 13; A. I. R. 1928 Cal. 138.
265	Gopal Narayan Kulkarni v. Sanmukhappa Ningappa Angadi	29 Bom. L. R. 1325; A. I. R. 1927 Bom. 603.
268	Raghunath v. Muhammad Ali Hasan Khan	L. R. 8 A. 292 Rev.; I. L. T. 40 All. 46; A. I. R. 1928 All. 117.
270	Muhammad Abdul Sattar v. Umraobi	A. I. R. 1928 Nag. 115.
272	Durga Prasad Thakur v. Basawan Pandey	A. I. R. 1928 Pat. 209.
277	Imperial Tobacco Co. v. A. Bonnan	46 C. L. J. 455; A. I. R. 1928 Cal. 1.
298	Kamakhyia Narain Singh v. Ramsaran Lal	8 P. L. T. 669; A. I. R. 1927 Pat. 353.
299	Balkaran Dube v. Har Bilas	4 O. W. N. 950; A. I. R. 1927 Oudh 504.
300	Kamala Prosad Sukul v. Chandra Nath Paramanik	I. L. T. 40 Cal. 40; A. I. R. 1928 Cal. 180.
303	Ram Sarn Das v. Bhagwan Singh	I. L. T. 40 Lah. 24; A. I. R. 1928 Lah. 160.
305	Jagan v. Jagdish	4 O. W. N. 1035; A. I. R. 1928 Oudh 17.
305	Kisan Ghule v. Puransa	A. I. R. 1928 Nag. 119.
307	Ganga Narain v. Manik Lal	L. R. 8 A. 295 Rev.; A. I. R. 1927 All. 727; I. L. T. 40 All. 45.
308	Commissioner of Income Tax v. Mahomed Kassim Rowther	26 L. W. 659; A. I. R. 1927 Mad. 1053; (1927) M. W. N. 869; I. L. T. 40 Mad. 43; 54 M. L. J. 219 F. B.
309	Ohuni Lal Mandal v. Hira Lal Mandal	32 O. W. N. 44.
311	Bala Prasad v. B. N. W. Ry. Co.	4 O. W. N. 909; A. I. R. 1927 Oudh 478.
313	Saru Khan v. Jan Muhammad	A. I. R. 1928 Lah. 43; I. L. T. 40 Lah. 17.
315	Narayandoss Balakrishnadoss v. Bachraj Chordia	39 M. L. T. 353; 53 M. L. J. 812; A. I. R. 1928 Mad. 6.
324	Bonomali Gope v. Fakir Chand Pal	46 C. L. J. 452; A. I. R. 1928 Cal. 46.
325	Jodh Singh v. Mahla	28 P. L. R. 601; A. I. R. 1928 Lah. 55.
326	J. M. Gregory, <i>In re</i>	54 O. 858; I. L. T. 40 Cal. 37; A. I. R. 1928 Cal. 50.
328	Jamuna Kunwar v. Madari Singh	4 O. W. N. 903; A. I. R. 1927 Oudh 469.
331	Yerra Venkata Reddi v. Krishna Reddi	A. I. R. 1927 Mad. 1010.
332	Kalu Ram v. Gaya Din	4 O. W. N. 1002.
333	Ronya v. Baliram	A. I. R. 1928 Nag. 111.
334	Sadagopa Iyengar v. Tinnevely Municipal Council	(1927) M. W. N. 277; 39 M. L. T. 256; A. I. R. 1927 Mad. 1020.
335	Bidhu Bhuesan Bakhshi v. Kala Chand Roy	31 C. W. N. 1045; A. I. R. 1927 Cal. 775.
337	Parma Nand v. Emperor	29 Cr. L. J. 1.
338	Srinivasulu Naicken, <i>In re</i>	39 M. L. T. 409; A. I. R. 1928 Mad. 21; 29 Cr. L. J. 2.
339	Waryam Singh v. Emperor	29 Cr. L. J. 3; 29 P. L. R. 52; 9 A. I. Cr. R. 315.
340	Mohammed Hussain v. Emperor	29 Cr. L. J. 4; 29 P. L. R. 54; 9 A. I. Cr. R. 323.
341	Abbas Ali Sahib, <i>In re</i>	(1927) M. W. N. 853; 53 M. L. J. 732; 29 Cr. L. J. 5; A. I. R. 1928 Mad. 144; 9 A. I. Cr. R. 248; I. L. T. 40 Mad. 126.
342	Sai v. Emperor	8 Lah. 496; A. I. R. 1927 Lah. 671; 23 P. L. R. 688; 29 Cr. L. J. 6.
343	Guturi Nagadu, <i>In re</i>	(1927) M. W. N. 796; 29 Cr. L. J. 7; A. I. R. 1928 Mad. 138; 9 A. I. Cr. R. 263.
347	Mangta v. Emperor	29 Cr. L. J. 11; 9 A. I. Cr. R. 303.
348	Emperor v. Asadali	29 Cr. L. J. 12; 9 P. L. T. 186.
350	Emperor v. Ahmad	29 Cr. L. J. 14; A. I. R. 1928 Lah. 144; 9 A. I. Cr. R. 316.
353	Emperor v. Probhat Chandra Barua	31 C. W. N. 1017; A. I. R. 1927 Cal. 793.
355	Backer Khorasane v. Ahmed Esmail Jamal	5 R. 633; 6 Bur. L. J. 238; A. I. R. 1923 Rang. 28.
356	Deeki Nandan Singh v. Jawad Hussain	A. I. R. 1928 Pat. 199.
358	Maung Mon v. Ma Kin Oh	5 R. 636; A. I. R. 1928 Rang. 47.

360	Mathura v. Udey Bhan Singh	...	4 O. W. N. 913; A. I. R. 1927 Oudh 482; L. R. 9 A. (O.) 106.
362	Hira Bibi v. Lachmi Narayan	...	I. L. T. 40 Pat. 35.
363	Sardar Singh v. Ganga Bakhsh Singh	...	2 Luck. 437; A. I. R. 1928 Oudh 20.
366	Ramlal Lodhi v. Indraj Singh	...	23 N. L. R. 156; A. I. R. 1928 Nag. 76.
368	U Po Thein v. O. A. O. K. R. M. Firm	...	5 R. 699; A. I. R. 1928 Rang. 34.
370	Ganapathi Ayyar v. Rangaswami Iyengar	...	39 M. L. T. 607; A. I. R. 1928 Mad. 168.
371	Deven Mandal v. Dhurba Kumar Mandal	...	45 C. L. J. 588.
372	Umrao Singh v. Mohan Kunwar	...	A. I. R. 1927 All. 699; 25 A. L. J. 1095.
375	Gurunadham Yogi v. Raghavayya	...	A. I. R. 1928 Mad. 401.
377	Bindeshri Upadhyaya v. Sital Upadhyaya	...	A. I. R. 1927 All. 702; 25 A. L. J. 734; 50 A. 163.
377	Yahya Ally Saheb v. Secretary of State for India	...	39 M. L. T. 508; 53 M. L. J. 769; A. I. R. 1928 Mad. 97.
387	R. N. W. Railway v. Baij Nath Prasad	...	25 A. L. J. 899.
389	Madho Lal v. Mahadeo Rai	...	I. L. T. 40 Pat. 34; 9 P. L. T. 259; A. I. R. 1928 Pat. 202.
389	Ganga Charan v. Ram Chandra	...	25 A. L. J. 902; A. I. R. 1928 All. 33; 50 A. 165.
391	Konatam Kotigadu v. Kotturi Subbayya	...	39 M. L. T. 336.
392	Muhammad Ali v. Jhao Lal	...	4 O. W. N. 1039; A. I. R. 1928 Oudh 10.
395	Parambath Parkun v. Chathoth Parkun	...	A. I. R. 1928 Mad. 38; I. L. T. 40 Mad. 136.
397	Mohammad Hamid v. Municipal Committee, Drug	...	23 N. L. R. 161; A. I. R. 1928 Nag. 71.
398	Koppula Subbiah v. Thammana Manikkam	...	39 M. L. T. 654; A. I. R. 1928 Mad. 199.
399	Udai Pratap Nath Sahi Deo v. Jagat Mohan Nath Sahi Deo	...	6 Pat. 638; A. I. R. 1928 Pat. 66; 9 P. L. T. 25.
420	G. I. P. Ry. Co. v. Mahadeo Bari	...	23 N. L. R. 121; A. I. R. 1928 Nag. 30.
421	Thina Runa Ana Vellachami Servai v. Samusuva Rowther	...	A. I. R. 1928 Mad. 392.
422	Jeo Nath Jha v. Bishambhar Das	...	8 P. L. T. 495.
423	Doraiswami Ayyar v. Coimbatore Easwara Sahaya Nidhi, Ltd.	...	I. L. T. 40 Mad. 127.
423	Pranlachi Kuer v. Jageshar Sahi	...	9 P. L. T. 210; I. L. T. 40 Pat. 46.
426	Sundara Raju Dikshatulu v. Seshadri Dikshatulu	...	(1927) M. W. N. 556; 26 L. W. 739; A. I. R. 1928 Mad. 35; 54 M. L. J. 76.
429	Bari Bahu v. Ganesh Singh	...	10 N. L. J. 167; 23 N. L. R. 160; A. I. R. 1928 Nag. 39.
430	Gosain Das Baishnab v. Gopal Singh	...	8 P. L. T. 688; A. I. R. 1927 Pat. 382.
431	Kamta Singh v. Bhagwan Das	...	25 A. L. J. 943; A. I. R. 1923 All. 98; 50 A. 199.
433	Gahbar Pande v. Emperor	...	20 Cr. L. J. 17; I. L. T. 40 Pat. 28; A. I. R. 1928 Pat. 169; 9 P. L. T. 286.
436	Faiz Mohammad v. Nabu	...	29 Cr. L. J. 20; A. I. R. 1928 Lah. 178; 9 A. I. Cr. R. 295.
437	Emperor v. Mangu	...	L. R. 8 A. 158 Cr.; 25 A. L. J. 866; A. I. R. 1928 All. 22; 29 Cr. L. J. 21; 8 A. I. Cr. R. 551; 50 A. 186.
440	Mehr Shah v. Emperor	...	29 Cr. L. J. 24; 9 A. I. Cr. R. 285.
442	Karan Singh v. Emperor	...	L. R. 8 A. 153 Cr.; A. I. R. 1928 All. 25; 29 Cr. L. J. 26; 26 A. L. J. 92; 8 A. I. Cr. R. 426.
446	Local Fund Overseer v. Pakkirisami Thevan	...	29 Cr. L. J. 30; 27 L. W. 66; A. I. R. 1928 Mad. 166; I. L. T. 40 Mad. 108; 9 A. I. Cr. R. 289.
448	Allah Din v. Emperor	...	29 Cr. L. J. 32; 29 P. L. R. 59; 9 A. I. Cr. R. 309.
449	Karam Ilahi v. Emperor	...	29 Cr. L. J. 33; 9 A. I. Cr. R. 313.
450	Babu Mall v. Ghasi	...	29 Cr. L. J. 34; A. I. R. 1928 Lah. 185; 9 A. I. Cr. R. 321.
451	Emperor v. Radhia	...	29 Cr. L. J. 35; 9 A. I. Cr. R. 279.
451	Nihal Singh v. Emperor	...	9 Lah. L. J. 262; A. I. R. 1927 Lah. 516; 28 P. L. R. 674; 29 Cr. L. J. 35.
454	Mohammad Zaman v. Emperor	...	29 Cr. L. J. 38; A. I. R. 1928 Lah. 134; 9 A. I. Cr. R. 327.
455	Moti Lal v. Emperor	...	9 Lah. L. J. 508; 29 Cr. L. J. 39; A. I. R. 1928 Lah. 97; I. L. T. 40 Lah. 46; 9 A. I. Cr. R. 328.
456	Gopal Singh v. Emperor	...	29 Cr. L. J. 40; A. I. R. 1928 Lah. 180.
457	Khandu v. Emperor	...	29 Cr. L. J. 41; 9 A. I. Cr. R. 311.
459	Public Prosecutor v. Ratnavelu Mudali	...	29 Cr. L. J. 43; 27 L. W. 69; 54 M. L. J. 158; A. I. R. 1928 Mad. 147; 9 A. I. Cr. R. 243; I. L. T. 40 Mad. 142; 51 M. 248.
463	Phuman Singh v. Emperor	...	29 Cr. L. J. 47; 9 A. I. Cr. R. 325.
464	MacCarthy v. Shannon	...	29 Cr. L. J. 48; A. I. R. 1928 Mad. 135; 9 A. I. Cr. R. 297.

465	G. I. P. Ry. v. Kashinath Chinnaji	...	29 Bom. L. R. 1544; A. I. R. 1928 Bom. 1; 52 B. 45.
468	Ah Choon v. T. S. Firm	...	5 R. 653; A. I. R. 1928 Rang. 55; I. L. T. 40 Rang. 25.
470	Bombay Steam Navigation Co., Ltd. v. Vasudev Baburao Kamat	...	29 Bom. L. R. 1551; A. I. R. 1928 Bom. 5; 52 B. 37.
474	Shera v. Ghanna	...	28 P. L. R. 303.
476	Ma Saw v. Maung Ba	...	5 R. 650; A. I. R. 1928 Rang. 32; I. L. T. 40 Rang. 23.
477	Debendra Lal Khan v. Cohen	...	54 C. 485; A. I. R. 1927 Cal. 908.
481	Nan Greenwood v. L. V. Greenwood	...	5 O. W. N. 163; A. I. R. 1928 Oudh 218.
481	Nur Din v. Allah Ditta	...	29 P. L. R. 68; A. I. R. 1928 Lah. 246.
482	Desu Ratamma v. Kakaraparthi Krishnamurthy	...	54 M. L. J. 40; A. I. R. 1928 Mad. 326; 27 L. W. 639.
484	Bhola v. Sheo Chand	...	*Lahore High Court.
485	Adivi Krishnayya v. Thummalapally Sriramulu	...	A. I. R. 1928 Mad. 142.
486	Shankar Das v. Hukam Chand	...	29 P. L. R. 67; A. I. R. 1928 Lah. 192.
486	Virjilal Virchand v. Dharamdas Thawerdas	...	A. I. R. 1928 Sind 85.
487	Kailasanatha Ayyar v. Nallasivam Pillai	...	A. I. R. 1928 Mad. 361.
488	Jam Budha v. Dasu Ram	...	9 Lah. L. J. 545; 29 P. L. R. 131.
488	Jagmohan Saran v. Deoki Nandan	...	4 O. W. N. 832; 53 M. L. J. 301; A. I. R. 1927 P. O. 229; 46 C. L. J. 280; (1927) M. W. N. 742; 29 Bom. L. R. 1386; 32 O. W. N. 153; I. L. T. 40 All. 4; 27 L. W. 449 P. C.
489	Mahadeo Singh v. Har Bukhsh Dube	...	4 O. W. N. 1077; A. I. R. 1928 Oudh 13.
491	Barkat Ali v. Fattu	...	A. I. R. 1928 Lah. 215.
491	Ram Lal v. Badal Khan	...	1 Luck. Cas. 663; A. I. R. 1928 Oudh 99.
493	Wadhawa v. Jai Kishan Das	...	29 P. L. R. 425; I. L. T. 40 Lah. 48.
494	Gauri Shankar v. Nisam-ud-Din Khan	...	4 O. W. N. 1081; A. I. R. 1928 Oudh 19.
495	Shrinivas Balkisandas v. Municipal Committee, Nagpur	...	A. I. R. 1928 Nag. 118.
498	Braj Rani v. Sibta Din	...	4 O. W. N. 1173; A. I. R. 1928 Oudh 108.
498	Narayanawami Iyer v. Vedambal Ammal	...	39 M. L. T. 399; A. I. R. 1927 Mad. 1065.
500	Yenamandra Ganapati Rao v. Pendam Naganna	...	*Madras High Court.
502	Chinna Nadan v. Arumugam Chetti	...	*Madras High Court.
503	Maung Kin Lay v. Maung Tun Thaing	...	5 R. 679; A. I. R. 1928 Rang. 53.
505	Meddai De Lavoit Tirumalayappa Mudaliar v. Karuppayi Ammal	...	A. I. R. 1928 Mad. 375.
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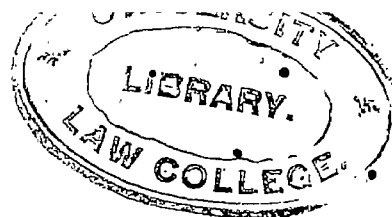
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INDIAN CASES.

1927.

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PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

July 26, 1927.

Present:—Viscount Sumner, Lord Sinha, Lord Blanesburgh, Sir John Wallis and Sir Lancelot Sanderson.

THE SECRETARY OF STATE FOR
INDIA—DEFENDANT—APPELLANT
versus

GIRJABAI—PLAINTIFF—RESPONDENT.

Saranjam—*Resumption*—*Saranjamdar*, *whether entitled to claim occupancy rights*—*Right of Government to levy rent*—*Grant of revenue only, effect of—Decisions as to inams, applicability of—Burden of proof—Acceptance of onus in trial Court—Objection at late stage, maintainability of.*

A *saranjamdar* is not entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made, or held by others then but forfeited on one ground or another during the subsistence of the grant. On resumption of a *saranjam* by the Government, such lands also become the property of the Government who become entitled to levy not merely the Government revenue assessed on such lands but actual rent. [p. 5, cols. 1 & 2.]

This principle applies not only to grants of the soil itself but also to grants of the land revenue only. [p. 4, col. 1.]

[Incidents and history of *saranjam* grants considered.]

Secretary of State for India v. Laxmi Bai (2), applied.

Ramchandra Mantri v. Venkatrao (3), explained.

Gunpatrav Trimbak Patwardhan v. Ganesh Baji Bhat (4) and *Hari Sadashiv v. Shaik Ajmudin* (5), dissented from.

Although the word '*inam*' is sometimes vaguely applied to all grants of revenue-free land without reference to perpetuity or any specified conditions, it would be unsafe to apply to a peculiar grant like the Mahratta *Saranjam* rules which are held applicable to grants in perpetuity. [p. 4, col. 2.]

A party who accepts the onus on the issues as framed and allows the trial to proceed on that basis cannot be permitted at a subsequent stage of the case to contend that the onus was wrongly thrown upon him. [p. 3, col. 2.]

Appeal against the judgment and decree of the High Court of Bombay (Sir Lallubhai Shah, Kt., Acting Chief Justice and

Mr. Justice Fawcett), in Cross-Appeals Nos. 245 and 254 of 1920, dated the 15th August, 1924, reported as 89 Ind. Cas. 539, varying the decree of the District Judge, Nasik, in Civil Suit No. 5 of 1914, dated the 28th February, 1920.

Sir George Lowndes, K. C., and Mr. Kenworthy Brown, for the Appellant.

Messrs. De Gruyther K. C., and Raikes, for the Respondent.

JUDGMENT.

Lord Sinha.—This is an appeal against a decree of the High Court of Bombay, dated August 15, 1924, which varied the decree of the District Court of Nasik, dated February 28, 1920, and made in Civil Suit No. 5 of 1914.

The suit arose under the following circumstances:—

Manmad village, now grown to an important Railway Junction, was held by the Vinchurkar—one of the lesser Mahratta chiefs—together with many other villages in "*saranjam*" grant from the Peishwa, the then ruler of the country. The last holder of the entire *saranjam* was the late Sardar Raghunathrao Vinchurkar, commonly known as Annasaheb, who held it from 1836 till 1889, when he died. On his deathbed he adopted as a son the plaintiff Shivdevrao, but the Government refused to recognise the adoption, and in 1892 re-granted half of the *saranjam* to the late Sardar's brothers and their sons and resumed the other half, which included Manmad village. The adopted son, though thus excluded from any share in the *saranjam*, would still be entitled to the *private* as opposed to the *saranjam* property of his adoptive father. Between 1892 and 1913 there were disputes between Government and Shivdevrao Vinchurkar as to certain lands in Manmad (the subject-matter of the present suit) which he

claimed as his adoptive father's *mirasi* or private property by virtue of a sale-deed of 1755. These are five plots in the village site (described as A to E in the plaint) and six plots of agricultural lands within the village limits but not forming part of the village site, and described as Plots F to K in the plaint.

These disputes led to an order by the Commissioner of Revenue O. D. on April 9, 1913, whereby it was held that the lands in dispute were not covered by the sale-deed relied upon but "must have passed into the possession of the Vinchurkars by forfeiture of lands through the *khatedar's* (i. e., modern occupancy tenant) family being extinct or through default in the payment of land revenue." The Commissioner held that on the lapse of the *saranjam* to Government these lands also became the property of Government, who thereupon became entitled to levy not merely the Government revenue assessed thereupon, but the actual ground rent in respect of the plots included in the village sites, the tenants being liable to pay these rents to Government and not to the Vinchurkars; and, further, that in respect of the other plots, i. e., the agricultural lands, Government as owner was entitled to recover from the Vinchurkars not the assessed Government revenue, but the market rent, which was considerably larger, and in default of payment the Vinchurkars were ordered to be evicted.

This order of the Commissioner was in due course given effect to, and Shivdevrao Vinchurkar instituted the present suit for declaring the Commissioner's order illegal and for recovery of possession of the first five plots and an injunction against the threatened eviction in respect of the other six plots, and for mesne profits in respect of both.

In his plaint he based his title primarily on the sale-deed of 1755 above-mentioned, by which the then Patils of the village conveyed half of their rights to the ancestor of the Vinchurkar. He also relied on adverse possession "for over 150 years", and claimed that by virtue of certain admissions at different times on the part of various Government officials, Government was estopped from disputing the *mirasi* or private rights of the Vinchurkar family. But he alleged as an alternative basis of his title, and apparently in view of the Commissioner's finding, that "even if

perchance the Court comes to the conclusion that the right of *mirasi* ownership... did not pass to the plaintiff's ancestors under the sale-deed of 1755 A. D., but that the property in suit must have gone into the possession of the plaintiff's ancestors by reason of the extinction of the *khatedar's* family or by reason of its resumption for arrears of assessment, still no manner of right whatever has accrued or accrues to the defendant in law over the said property. The said property is in law of the absolute personal and *mirasi* ownership and *vahiwat* of the plaintiff and his ancestors." (Para. 3 of plaint).

By his written statement the defendant denied all these allegations of fact and submissions of law by the plaintiff, and contended that the lands in suit were held by the plaintiff's ancestors as *saranjam-dars* and all *saranjam* rights, including the right to hold lands that had passed into his possession and enjoyment by the death of the *khatedars* without heirs or by forfeiture, had lapsed on the death of Annasaheb and had been resumed by Government (except as to one-half not now in question).

On the question of title by adverse possession and by estoppel, both the District Judge and the High Court held against the plaintiff, and their Lordships see no reason to differ from them.

Of the remaining issues the first was as follows:—Does the plaintiff prove that he (i. e., his ancestors) purchased the suit land by a sale-deed of 1755 A. D.?

The District Judge held that the construction of the deed in question presented some difficulty; for "it is in archaic language, and deals with a state of affairs to which no one now has the key," but on a review of the whole evidence, including village papers and accounts, he came to the conclusion that the lands sold by that deed did not include the lands in suit, and he found the first issue in the negative.

The High Court accepted this.

Notwithstanding this concurrent finding, some argument was addressed to their Lordships to prove that some, though not all, of the lands in suit are, in fact, covered by the sale-deed of 1755. After careful consideration, their Lordships see no reason to differ from the finding of both the Courts in India on this point.

Issue No. 2 was to the following effect:—

Does the plaintiff prove that his ancestors became owners of the suit lands either through forfeiture or through extinction of the *khatedar's* line?

The concurrent finding of both Courts on this issue appears to their Lordships to be that the lands in suit originally belonged to *khatedars* or *mirasi* tenants, and on their interests coming to an end in the manner mentioned the *saranjamdar* caused his own name to be put in their place in the *khata*s or village papers, and assumed possession of those lands.

The only other material issue remaining to be considered is Issue No. 6, *viz.*:—

Was the suit land included in the half of the *saranjam* resumed by the Government?

This is intended to raise the question whether as an effect of the resumption, the Government was entitled to oust plaintiff from the possession of those lands.

The answer depends on the legal effect of the finding on Issue No. 2.

Both the Courts below have answered it in the plaintiff's favour, the District Judge, on the ground that he was bound by the decision of the High Court reported as *Gururao Shirinivas v. Secretary of State for India* (1) (then under appeal to this Board and subsequently reversed), and the High Court on the ground that the judgment of this Board in *Secretary of State for India v. Laxmi Bai* (2), though it reversed the decision in *Gururao Shirinivas v. Secretary of State for India* (1), had not decided this particular point, with regard to which the High Court was of opinion that decisions of that Court had established the law in the manner contended for on behalf of the plaintiff. One of the learned Judges, Mr. Justice Fawcett, expressed his personal dissent from that view of the law, but considered himself bound by previous decisions of the High Court.

It is necessary, therefore, to consider what are the incidents of a *saranjam* grant, and how far the same can be gathered from Statutes or judicial decisions, in the absence of the deed of grant.

But, before doing so their Lordships think it necessary to deal with two points

argued by Mr. DeGruyther on the respondent's behalf:—

1. That the onus of proof has been wrongly placed on the plaintiff, who, having been dispossessed, was entitled to succeed unless the Government affirmatively proved its own title to the lands in question.

The plaintiff accepted the onus on the issues as they were framed. Evidence was gone into on that basis, and the parties proceeded to trial evidently on the assumption that the plaintiff could derive title only in one or other of the ways mentioned in paras. 2 and 3 of the plaint. But for that, the procedure might have been different in many respects, and it appears to their Lordships too late to raise any such question at this stage.

Their Lordships would further observe that no basis of title other than those mentioned in paras. 2 and 3 of the plaint has up to the last been suggested on behalf of the plaintiff.

2. The second point was that the village papers, kept by the village officials, having entered the name of the Vinchurkar as *khatedar* in respect of the lands in suit, this must be taken to have been acquiesced in and accepted by the Collector on behalf of the Government, and it amounted in effect to a new agreement for a permanent tenancy, which remained unaffected by the subsequent resumption of the *saranjam*. This is a new case not suggested till the last moment, and even if their Lordships were inclined to entertain it (which they are not) it seems to have little foundation in fact. The position of the *saranjamdar* enabled him to have complete control over the management of the village and the village officials, and there is no reason to assume that these entries, or the papers themselves, were in any way brought to the cognizance of, or acquiesced in, and much less sanctioned by the Collector.

It is, no doubt, correct to say, as Mr. Justice Shah does, that "the fact that the *saranjamdar* is in a sense a life tenant does not alter the ordinary incidents of a grant by way of *saranjam*." But what those ordinary incidents are, must be ascertained, when there is no deed of grant forthcoming, from (a) the evidence, if any, in the case; (b) from legislative enactments; and (c) from judicial decisions. Failing all these, there would be nothing else but general principles of law to apply.

(1) 39 Ind. Cas. 65; 41 B. 408; 19 Bom. L. R. 117.

(2) 72 Ind. Cas. 898; 50 I. A. 49; 25 Bom. L. R. 527; 37 C. L. J. 461; 47 B. 327; A. I. R. 1923 P. O. 6; 17 L. W. 405; 44 M. L. J. 471; 32 M. L. T. 111; 28 C. W. N. 49 (P. C.).

Now we find from Wilson's Glossary that amongst the Mahrattas the term "*saranjam*" was applied specially to a temporary assignment of revenue from villages or lands for the support of troops or for personal military service, usually for the life of the grantee; also to grants made to persons appointed to civil offices of the State to enable them to maintain their dignity, and to grants for charitable purposes. These were neither transferable nor hereditary, and were held at the pleasure of the Sovereign. They were divided into two classes, *viz.*, (a) grants of revenue only, *i. e.*, of the royal share of the produce of the lands comprised in the grant, and (b) grants of the soil itself. It would seem to follow from the nature of *saranjams* that whether they were grants of the soil itself or of the revenue only of specified lands, they could not and were not meant to interfere with rights in those lands existing previously to and at the time of the grant. If and so far as there were occupancy tenants on those lands, they would retain their right of possession (whether it can be called ownership or not is immaterial) but subject to paying the assessed land revenue (*i. e.*, the royal share of the produce) payable before the grant to the Government and after the grant to the grantee. On principle, the grantee would not, unless specially authorized, be able to convey a title larger than his own. He could not convey a permanent title to any portion of the land, either by sale or by lease. Such sale or lease might be good as against himself but would be void as against the grantor.

In the case of a grant of the soil itself, it has been decided by this Board that, on the grant coming to an end, the Government representing the original grantor is entitled to resume actual possession; *Secretary of State for India v. Laxmi Bai* (2). But it is urged that in the case of the other kind of grant, Government can take back only what it granted, *viz.*, the royal share of the produce; in other words assess the land revenue payable in respect of the land, but it cannot interfere with the possession of the grantee. This would be quite consistent with principle, if the grant made the grantee a charge holder pure and simple. But if the grant also conveys by implication or otherwise the right to take possession of the land itself under certain circumstances, it is difficult to hold that

though the charge might come to an end the possession taken under and by virtue of that charge should still continue, or, as Mr. Justice Fawcett put it, that the incident should survive the grant.

There is no legislative enactment which is applicable in the circumstances of this case. The *Saranjam* Rules of 1898 do not apply *proprio vigore* as this *saranjam* was resumed in 1897, and even if they can be held to be merely declaratory of the previous law, they do not throw any light on the question under consideration.

As regards judicial decisions, those with regard to *inams* do not seem to be necessarily applicable. The word *inam* is sometimes vaguely applied to all grants of revenue-free land, without reference to perpetuity or any specified conditions. But it would be unsafe to apply to a peculiar grant like the Mahratta *Saranjam* rules which were held applicable to grants in perpetuity.

Mr. Justice Shah refers to what he calls a "long course of decisions" in Bombay as establishing two propositions. The first is admittedly overruled by the decision of this Board in *Secretary of State for India v. Laxmi Bai* (2). His second is that in the case of a *saranjam* grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit, *i. e.*, to appropriate the lands to his own use, subject to the payment of the royal share of the revenue and to create rights of occupancy in his own favour or in favour of third parties.

On examination it appears that there are only three decisions which directly bear on the point, *viz.*, *Ramchandra Mantri v. Venkatrao* (3), *Ganpatrav Trimbak Patwardhan v. Ganesh Baji Bhat* (4) and *Hari Sadashiv v. Shaikh Ajmudin* (5).

In the first of these cases Mr. Justice Melvill said at page 608* :—

"The *saranjamdar* may...deal with all unoccupied lands as may be best for the purposes of revenue, and may either cultivate them himself or through tenants."

And it was observed by Batchelor, J., in *Balvant Ramchandra v. Secretary of State for India* (6) that since Mr. Justice Melvill's judgment in 1882 the law in Bombay has

(3) 6 B. 598; 3 Ind. Dec. (N. S.) 854.

(4) 10 B. 112; 5 Ind. Dec. (N. S.) 460.

(5) 11 B. 235; 6 Ind. Dec. (N. S.) 154.

(6) 32 B. 432; 10 Bom. L. R. 531.

*Page of 6 B.—[Ed.]

always been that a grantee of the revenue is entitled to make such profit as he can out of the unoccupied lands.

But this is very far from holding that the right to make such profit survives the grant and continues after the grant has been resumed.

This construction was, however, placed on Mr. Justice Melvill's words quoted above in *Ganpatrav Trimbak Patwardhan v. Ganesh Baji Bhat* (4) where Sargent, C. J., after quoting the passage from Mr. Justice Melvill's judgment in *Ramchandra Mantri v. Venkatrao* (3) paraphrased it as follows (page 117*) :—"in other words, that the *saranjamdar* may acquire occupancy rights which...remain unaffected by the resumption of the *saranjam*, except as to the assessment thenceforth payable to Government."

These observations were not necessary for the decision of that case, and their Lordships are unable to agree that the language of Mr. Justice Melvill in *Ramchandra Mantri v. Venkatrao* (3) bears the meaning or has the effect attributed to it by Sargent, C. J.

The same observations would apply to the case of *Hari Sadashiv v. Shaikh Ajmudin* (5). The Government was not a party to either of these cases, and the lands in dispute were held on the evidence in both cases to be the private property (*sheri* lands in the one case and *mirasi* lands in the other) of the grantee. Their Lordships are, therefore, unable to hold that there is any long course of decisions in the High Court of Bombay laying down with regard to *saranjams* of this nature the broad rule enunciated by Mr. Justice Shah—that the grantee would be entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made or held by others then but forfeited on one ground or another during the subsistence of the grant.

The question whether he could create such rights in favour of third persons by virtue of the powers of management above referred to does not arise in this case, and their Lordships refrain from expressing any opinion upon the point. But their Lordships hold that he could not create such rights in his own favour, and that when the *saranjam* was resumed, the Government became entitled to resume not

only the land revenue, but also all the rights and benefits that the grantee had secured by virtue of his grant.

Their Lordships will humbly advise His Majesty that this appeal should be decreed with costs and the plaintiff's suit dismissed with costs in both the Courts in India.

A. N. A.

Appeal allowed.

Solicitor for the Appellant:—*The Solicitor, India Office.*

Solicitors for the Respondent :—Messrs. T. L. Wilson & Co.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 98 OF 1926.

July 29, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Cargenven.

L. KRISHNASWAMI NAIDU AND ANOTHER

—APPELLANTS

versus

SRIRAM SRIRAMULU NAIDU—

RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 8, 13—Suit by shrotriendmar to collect rent and swatantram from tenant, whether of Small Cause nature.

The words 'by reason of his interest' in Art. 13 of the Provincial Small Cause Courts Act confine the cesses or other dues contemplated by the Article to payments to be made to a person claiming to be entitled to them by reason of his interest in the immoveable property, and operate to exclude payments which a landholder receives not for his personal benefit but for some public or communal purpose. [p. 6, col. 2.]

A suit for *swatantram* which a *shrotriendmar* collects from his tenants towards the cost of the village agency does not come within Art. 13 and is not excluded from the jurisdiction of a Small Cause Court. [p. 6, cols. 1 & 2.]

Letters Patent Appeal against the judgment of Mr. Justice Spencer, dated the 8th January, 1926, and passed in S. A. No. 1518 of 1923, preferred to the High Court against the decree of the District Court, Chingleput, in A. S. No. 179 of 1922, preferred against that of the Court of the Principal District Munsif, Chingleput, in O. S. No. 936 of 1919.

Mr. L. S. Veeraraghava Iyer, for the Appellants.

Mr. A. V. Viswanatha Sastri, for the Respondent.

JUDGMENT.—This Letters Patent Appeal is from the judgment of Spencer, J., in S. A. No. 1518 of 1923, dismissing the second appeal on the ground that under s. 102, Civil Procedure Code, no such appeal

lay, "inasmuch as the suit was of a nature cognizable by a Court of Small Causes and the value of the subject-matter did not exceed Rs. 500. The suit which was valued at Rs. 354 was brought by a *shrotriendrar* to recover *melvaram* and *swatantrams* from his tenant. *Melvaram*, it is not disputed, is rent, and under Art. 8 of the Second Schedule of the Provincial Small Cause Courts Act, a suit for rent is cognizable by a Court of Small Causes which has been expressly invested with the power to try such a suit. All Subordinate Judges and District Munsifs within the Madras Presidency have been invested with powers to try rent suits upon the Small Cause side, provided that they fall within the pecuniary limits of their Small Cause Jurisdiction, so that the effect of this Article read with the empowering notification, is to exclude all such rent suits from the Second Schedule and to make them cognizable by a Small Cause Court. In other words, the effect of the notification is to delete Art. 8 from the Schedule, and it only remains to inquire, therefore, whether, by reason of the circumstance that the claim to *swatantrams* can be brought under any other Article of the Schedule the suit for *melvaram* and *swatantrams* was of a nature not cognizable by a Small Cause Court.

The only Article which requires consideration is No. 13 which excludes "a suit to enforce payment of the allowance or fees respectively called *malikana* and *hagq* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immoveable property or in an hereditary office or in a shrine or other religious institution." It has been suggested to us that a *swatantram* is a cess payable to a person by reason of his interest in immoveable property, namely, to the *shrotriendrar* whose interest in the land in respect of which this cess is payable is that of landlord. It is not disputed that a *swatantram* is a contribution, collected in this instance at least by the landlord, towards the cost of the village agency. If any authority be required for this view of the nature of the payment, it is to be found in *Vadamalai Thiruvannatha Savuga Pandia Thevar v. Sankara Moorthi Naidu* (1), but

(1) 49 Ind. Cas. 688; 42 M. L. J. 109; 9 L. W. 218; 25 M. L. T. 248; (1919) M. W. N. 690.

the point is conceded. It is for consideration, therefore, whether a cess which the landowner collects, but collects for disbursement of the proceeds to the village servants, and not for his own benefit, can be deemed to be payable to him "by reason of his interest in immoveable property."

The case of *Maharajah of Vizianagaram v. Kota Veeranna* (2) which is the only case cited to us under this Article, related to the recovery of land-cess from an *inamdar* by a *zemindar*, and although that is not a parallel case, we may quote with approval the opinion, which the judgment contains, that "the cesses and dues contemplated in Art. 13 are payments which a person is entitled to as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property."

We think it is clear that the words "by reason of his interest" confine the cesses or other dues contemplated by the Article to payments to be made to a person claiming to be entitled to them by reason of his interest in the immoveable property, and that they operate to exclude payments which a landholder receives not for his personal benefit but for some public or communal purpose. Although, no doubt, it is customary and convenient that the landowner should collect the *swatantrams* yet he only does so as the administrator of a fund created for a special purpose, and it would be possible to make arrangements for collecting the money without his instrumentality. We think that the Article relates only to payments of money due to a person in consideration of his interest in the property, and that accordingly *swatantrams* do not fall within its scope.

We agree, therefore, with the learned Judge that the suit was of a nature cognizable by a Small Cause Court and that no second appeal lay. The Letters Patent Appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

A. N. A.

(2) 11 Ind. Cas. 760; 21 M. L. J. 819; 10 M. L. T. 167; (1911) 2 M. W. N. 139; 36 M. 18.

NAGPUR JUDICIAL COMMISSIONER'S COURT.MISCELLANEOUS CIVIL APPEAL No. 2-B
OF 1925.

September 12, 1927.

Present :—Mr. Macnair, A. J. C.

YADEO GHIRNIKAR—PLAINTIFF

—APPELLANT

versus

KRISHNAJI DORLE—DEFENDANT

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 16—Suit for mesne profits of immoveable property situate outside British India, whether triable in British India—Tests.

Though the Civil Procedure Code does not forbid the institution of a suit in British India even if it involves an adjudication regarding plaintiff's title to immoveable property outside British India, yet under general principles of law Courts in British India should refuse to entertain suits in which an estate in land in a foreign country or a right annexed to such an estate is claimed. [p. 7, col. 2; p. 8, col. 1.]

This principle does not apply to suits for mesne profits where no question of title is involved and the decree can effectually be enforced by the personal obedience of the defendant within the jurisdiction of the trial Court. [p. 8, col. 1.]

British South Africa Co. v. Camphania deMocambique (2) and *Deschamps v. Miller* (3), followed.

Appeal against an order of the First Sub-Judge, First Class, Khamgaon, dated the 30th September, 1924, in Civil Suit No. 9 of 1924.

Mr. M. B. Niyogi, for the Appellant.

Messrs. S. B. Gokhale and V. N. Bapat, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued the defendant for the recovery of mesne profits in respect of certain immoveable property in Gwalior State. He stated that his right to the property had been decided by a judgment of that State and that the defendant resided within the jurisdiction of the Khamgaon Court.

The main defence was that an appeal was pending against the Gwalior decision, so that under the explanation to s. 10, Civil Procedure Code, the Courts in British India would still have to decide the question of the plaintiff's title to the property. The learned Judge held that, as it would be necessary to go into the question of the plaintiff's title to lands situate outside British India, he had no jurisdiction to try the case and returned the plaint for presentation to the proper Court.

The plaintiff has appealed against this order. The respondent admits that the plaintiff's title to the property has been finally upheld by the Gwalior Court, and

does not contend that the order was correct because the state of affairs was different when it was passed. It is then not disputed that the suit should have been kept pending till the final decision of the title suit in Gwalior, if that final decision gives the plaintiff a right to sue in the British Courts.

Section 20 of the Civil Procedure Code permits, subject to the limitations contained in the preceding sections, a plaintiff to sue in a Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides. Section 16 has no application to this case, for the explanation states that in this section 'property' means 'property situate in British India'. The Civil Procedure Code then does not forbid the institution of the suit such as the present even if the decision in the suit involves adjudication regarding the plaintiff's title to immoveable property outside British India.

There is, however, a general principle which prevents the trial of a suit involving such adjudication. In *Goculdas v. Chaganlal* (1), Page, J., was considering the interpretation of a clause of the Letters Patent (1865), but passages cited by him show that Indian Courts are, apart from specific provisions limiting their jurisdiction, under the necessity of avoiding the insuperable difficulties which would result from an attempt to found a jurisdiction over immoveable property situate in another country.

The following passages show the nature of the principle:—

"(Foote's Private International Law, page 223) 'The defendant's Judge' wrote Vattel—'is the Judge of the place where the defendant has his settled abode or the Judge of the place where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends.'

"(B. 2, Ch. 8, s. 103).

"Story lays down that—

'in respect to immoveable property, every attempt of any foreign tribunal to found a jurisdiction over it must, from the very

(1) 101 Ind. Cas. 721; 54 C. 655; A. I. R. 1927 Cal. 763.

nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*. We have seen, indeed, that by the Roman Law a suit might in many cases be brought either where the property was situate or where the party had his domicile. This might well be done within any of the vast domains over which the Roman Empire extended; for the judgments of its tribunals would be everywhere respected and obeyed. But among the independent nations of modern times there would be insuperable difficulties in such a course. And hence even in countries acknowledging the Roman Law it has become a very general principle that suits *in rem* should be brought where the property is situate: and this principle is applied with almost universal approbation in regard to immoveable property. The same rule is applied to mixed actions, and to all suits which touch the reality."

Following this principle District Courts in British India must refuse to entertain suits in which an estate in land in a foreign country, or a right annexed to such an estate is claimed.

But every suit for mesne profits is not affected by this principle. While Courts of Equity have never claimed to act directly upon land situate abroad they have purported to act upon the conscience of persons living here [Per Lord Herschell in *British South Africa Co. v. Companhia de Mocambique* (2) quoted at page 662* in *Goculdas v. Chaganlal* (1)]. The general rule is that the Court will not adjudicate on questions relating to the title to, or the right to the possession of, immoveable property out of the jurisdiction: [*Deschamps v. Miller* (3) quoted at page 661* in *Goculdas v. Chaganlal* (1)]. But if no question of title is involved and the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction, a claim for mesne profits may be entertained and a decree may be passed on such a claim.

The lower Court was then correct in entertaining the plaintiff's case as the plaintiff stated that there was no subsisting dispute regarding title of land in the Gwalior State, and was right in thinking that when the defendant showed there was an existing

dispute, it was necessary either to stay the suit or to put an end to the proceedings. But I accept the contention that the suit should have been stayed. There is now no subsisting dispute regarding title to the land, and it is not contended that there is any other obstacle to the trial of the claim for mesne profits by the lower Court.

The order of the lower Appellate Court is, therefore, set aside and the learned Judge is directed to proceed with the trial. Costs in this Court will, in the circumstances, be borne as incurred. Pleader's fee: Rs. 75.

G. R. D.

A. N. A.

Order set aside.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 142 OF 1927.

October 21, 1927.

Present:—Mr. Justice Raza and Mr. Justice Pullan.

Raja Bahadur BISHUNATH SARAN SINGH—PLAINTIFF—APPELLANT

versus

SURAJ PAL SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 116—Under-proprietor in possession of land—Execution of kabuliyat—Estoppel—Agreement to take theka, whether destroys rights in sir lands.

Section 116 of the Evidence Act is designed to meet the case of a tenant who has been put in possession by his landlord and is not applicable where the tenant has not been so put into possession. [p. 9, col. 2.]

The execution of a *kabuliyat* by a person who is already in possession as an under-proprietor does not, therefore, estop him from setting up his under-proprietary rights. [*ibid.*]

An under-proprietor does not lose his rights as such in the *sir* plots by obtaining a *theka* of the whole village from the *taluqdar* until the end of the settlement. [p. 9, cols. 1 & 2.]

Second appeal against the decree of the District Judge, Rae Bareilly, dated the 20th January, 1927, upholding that of the Additional Sub-Judge, Rae Bareilly, dated the 28th January, 1925.

Mr. Radha Krishna, for the Appellant.

Mr. Mahabir Prasad, for the Respondent.

JUDGMENT.—This appeal arises from a suit brought by a *taluqdar* for a declaration that the defendants are not under-proprietors in certain specific plots in the village of Asapur in the Rae Bareilly District. It appears that the ancestors of the defendants were at one time proprietors in the village. We do not know

(2) (1893) A. C. 602; 63 L. J. Q. B. 70; 6 R. 1; 69 L. T. 604.

(3) (1903) 1 Ch. 856; 77 L. J. Ch. 416; 98 L. T. 564.

*Pages of 54 O.—[Ed.]

when they ceased to be proprietors, but we do know that in the year 1861 they were able to show that they were *sir* holders in these plots, and the Court decided that the *taluqdar* could not enhance their rents. We also know that in the year 1868 they applied to be given a sub-settlement, but a compromise was entered into in that year, which was incorporated in a decree, by which they were given a *theka*, or lease of the whole village until the end of the settlement but without rights of transfer. In the year 1899 the *taluqdar* ejected them by suit from the *theka* but they retained possession of the *sir* land as is shown by a report made by the *Qanungo* in March 1901. In August of that year certain members of the family executed a *kabuliyat* which is a bare agreement to pay rent on these plots, for a period of years, written on a printed form. This *kabuliyat* was succeeded by another *kabuliyat*, but no *kabuliyat* exists after the year 1917. In the year 1918 the *taluqdar* issued a notice of ejectment on the defendants, and in reply the latter filed a suit claiming under-proprietary title in these plots. The Revenue Court decided in favour of the defendants, and that decision has become final. This suit was filed in the Civil Court in the year 1923 and both the Subordinate Judge and the lower Appellate Court have held that the defendants are under-proprietors. The *taluqdar* has come to this Court in second appeal and pleads that the under-proprietary title of the defendants has never been established. Now there is a clear finding of fact in both the Courts below that the defendants were under-proprietors in the year 1861 and in the year 1868 when they brought their claim for a sub-settlement. We are not prepared to go behind that finding in second appeal, but we have assured ourselves that the finding is based upon admissible and *prima facie* sufficient evidence. It is, however, argued that, even if the under-proprietary title existed in 1868, it was brought to an end by the execution of the compromise filed in Court. The effect of that compromise was, as we have stated above, to give the defendants a *theka* of the whole village until the end of the settlement. We see no reason why an under-proprietor should not enter into an agreement of this sort with the *taluqdar* without in any way damaging his own rights as under-proprietor in the *sir* plots. When the

theka came to an end by the ejectment of the defendants they were, as has been pointed out by the Courts below, ejected only from their rights as *thekadar* but retained possession of the *sir* plots, and this possession has continued till the present day. Thus, in our opinion, the compromise of 1868 had no effect upon the defendants' rights to be regarded as under-proprietors in the specific plots.

There remains the question of the effect of the *kabuliyats* entered into by some members of the family. Upon this point there is a concurrent finding of fact by the Courts below that these *kabuliyats* were entered into by certain members of the defendants' family on account of a misapprehension or mistake as to their legal position, but whether this be so or not it is only by estoppel, as laid down in s 116 of the Evidence Act, that the defendants' title as under-proprietors could be affected by the execution of these *kabuliyats*. Section 116 is designed to meet the case of a tenant who has been put in possession by his landlord and it was based on the provisions of English Law which enacted that a tenant who has been so let into possession could not deny his landlord's title. This has been held by their Lordships of the Privy Council in *Bilas Kunwar v. Desraj Ranjit Singh* (1). In the present case the defendants were not put into possession by these *kabuliyats* or by any lease executed by the landlord. They remained in possession of their own *sir* plots, and the execution of these *kabuliyats* had no effect upon their possession or upon their title. Moreover, it is not the case that the landlord's title was impugned during the tenancy. It was not impugned until the suit was brought, by the defendants two years after the last *kabuliyat* had expired. Thus on this point also we are prepared to agree with the view of the Court below, and to find that the under-proprietary title of the defendants has been established and has never been lost.

The Court of first instance held that the Civil Court had jurisdiction in this matter and it does not appear that this question was argued in the lower Appellate Court. In view of our findings above,

(1) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P.C.).

we do not think it incumbent upon us to enter into a discussion on this question. We dismiss the appeal with costs.

G. H. *Appeal dismissed.*
A. N. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1782 OF 1922.

January 5, 1927.

Present:—Mr. Justice Harrison and Mr. Justice Agha Haidar.

PHUL CHAND-FATEH CHAND—
DEFENDANT—APPELLANT

versus

JUGAL KISHORE-GULAB SINGH—

PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 39, 94, 107—Sale of goods—Notice of arrival—Separate notices as to arrival of portions, validity of—Refusal to perform—Right to retract refusal before due date—Place of delivery—Buyer's duty to take delivery at seller's place of business—Re-sale—Reasonable time—Question of fact—New plea in appeal, whether allowable—Continuing sale for successive days without fresh notice, legality of—Sale by shipments—Tender of goods of different shipment, legality of—Waiver of condition, what amounts to.

Where a contract for sale of goods contemplates the arrival of the goods piece-meal or in one lot as the shippers or the other carriers may be able to deal with them, the fact that the goods contracted for arrived on two different days and the seller gave notice to the buyer of the separate arrivals without waiting for the arrival of the whole of the goods, does not constitute a breach of the condition regarding notice of the arrival of goods, provided the buyer has received notice of the arrival of all the goods contracted for. [p. 12, col. 1.]

A party to a contract who has refused to perform his part of the contract, is not precluded from retracting his refusal before the due date expires and giving notice of his readiness and willingness to perform. [p. 12, col. 2.]

Section 39 of the Contract Act applies to all breaches of contract which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches. [*ibid.*]

In view of s. 94 of the Contract Act a seller is not bound to offer delivery of the goods at the buyer's place of business, but it is the duty of the buyer to take delivery at the seller's place of business. [p. 13, col. 1.]

The fact that a re-sale advertised for a particular day was continued on subsequent days without fresh notice of proclamation in the hope of getting better price, does not vitiate the re-sale. [*ibid.*]

The question of reasonable time is one of fact and a buyer cannot be allowed to set up, for the first time in appeal, the plea that a re-sale was not conducted within a reasonable time. [*ibid.*]

A seller who has agreed to sell goods of a shipment of a particular month is not entitled to make a valid tender of goods of the same description of a different shipment. [p. 14, col. 1.]

The mere fact that a bill of lading showed that the goods tendered by the seller were those of a different shipment, and the buyer took no exception to this irregularity though he objected to shortage, does not amount to waiver of this irregularity. [*ibid.*]

Nannier v. Rayulu Iyer (1) and *Gulab Rai-Sagar Mal v. Nirbhe Ram-Nagar Mal* (2), distinguished.

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 26th June, 1922.

Bakhshi Tek Chand, Messrs. M. L. Puri and Hem Raj, for the Appellants.

Lala Sardha Ram, R. S., Messrs. G. S. Salariya and Bishen Narain, for the Respondents.

JUDGMENT.—The firm of Jugal Kishore-Gulab Singh sued the firm of Phul Chand-Fateh Chand for a sum of Rs. 18,533 being the difference between the price actually realised for 25 bales of piece-goods when sold in February, 1919, and June, 1919, and the contract price. The goods in question were to have been of three shipments, May, June and July; 9 bales of May, 8 of June and 8 of July, and the plaintiff succeeded in proving his case so far as the May and June shipments were concerned, but failed as regards July, it being found that there was a fatal defect in his case so far as this shipment was concerned, in that instead of his having offered 8 bales of July shipment he offered 6 of July and 2 of August. A decree was, therefore, given for Rs. 11,651-10. Against this the defendant firm appeals and the plaintiff firm presents cross-objections regarding the balance of their claim.

The facts of the case are simple enough. The contract is clear. The defendant was bound to take delivery and make payment as soon as he was informed of the arrival of the goods and the plaintiff, on the other hand, was under the contemporaneous obligation of accepting the money and delivering the goods. On the 25th and 27th of September, the plaintiff advised the defendant that the goods of the May shipment had arrived in Delhi. On the 30th of September, 1918, the plaintiff wrote again calling upon the defendant to take up the goods against payment within ten days and stating that if he failed to do so, he would dispose of the goods. In answer to this the defendant wrote a letter on the 1st October, 1918, alleging that he had sent his man several times to ask for delivery of the goods but without success and that "at last they had advised their bankers,

Messrs. King, King and Co., to take delivery of the 9 bales of muslin on payment to you of the price thereof in full settlement. Therefore (the letter continues), please receive your money in full on account of the 9 bales of muslin from Messrs. King, King and Co., and deliver the goods and the papers relating to costs to them within three days. If you fail to do so, you shall be liable for any loss that will be suffered by us as also by our customers. Please note this." In answer to this a letter was written on the 3rd of October, 1918, in the following terms:—"In reply to your notice, dated 1st instant, regarding 9 packages of mulls, we have to inform you that until you give us the delivery of the above goods (i. e., two bales described in the heading) your notice cannot be accepted in any case; please note."

In the interval a letter dated 2nd October, 1918, was written by Messrs. King, King and Co., to the plaintiff which ran as follows: "We have received instructions from Messrs. Phul Chand-Fateh Chand to pay for the above draft *plus* Rs. 2,475 as profit at Rs. 1-6 per piece. Kindly send us the goods and memo. and receive the money." No money was sent. To this the plaintiff did not reply and on the 10th of October, he wrote again to the defendant calling upon him to take delivery:—

"We are ever ready to deliver the goods. Messrs. King, King and Co. sent us a letter only but not the money, hence please either send the money yourself or King, King and Co., and take the goods.

"Regarding original invoice please note you can see same at our shop."

The goods were sold in February and the question to be decided is whether the plaintiff was justified in acting as he did.

It is urged on appeal by Mr. Tek Chand that the contract was broken by the plaintiff, and that the defendant was in no way bound to do his part after receipt of the letter dated the 3rd of October, 1918. He contends that s. 39 of the Indian Contract Act does not apply to the case, and that it is sufficient for him to show that the plaintiff was not willing and ready on one particular occasion to deliver the goods and, if this is established, his obligations ceased. He also takes exception to the invoices sent to him by the plaintiff, in that they referred to the consignment in two lots. He states that because a contract must be per-

formed in its entirety, a man who has undertaken to deliver 9 bales of a certain shipment is bound to give notice of the arrival of the total number of bales which constitute the shipment at one time and that if he writes, as the plaintiff did in this case, to intimate the separate arrivals of the two portions which made up the whole he has committed a breach which entitles the buyer to disclaim all sort of liability under the contract and that he can take the objection for the first time five years after the due date. Further he contends that if the plaintiff was justified in re-selling the goods, the sale was belated, that the plaintiff has wholly failed to show that it was conducted within reasonable time and that, therefore, at the worst, he, the buyer, can only be liable to pay damages. Such is the case regarding the May shipment.

As regards the June shipment the same points are urged with this exception that Messrs. King, King and Co., do not come into the correspondence and that on receiving a notice, dated the 2nd of December, from the plaintiff the defendant wrote as follows on the 7th of December: "We came to know that these goods have arrived since long and you give its arrival information now, hence we are not responsible for these goods owing to your negligence, which please note." To this the plaintiff replied that, as a matter of fact, they had made a mistake and the goods had not arrived at all. On the 11th of February he wrote saying that they had come and the defendants must take delivery, to which the defendants replied on the 11th of March to the effect that the arrival notice was not given at a proper time and for this and other reasons they were not responsible. These goods were auctioned in the month of June.

We take first the question of whether the notice given by the plaintiff was sufficient and legal. The terms of the contract which are at page 59 of the printed paper-book contain the following sentence: "We shall receive invoice and pattern and take delivery of the goods as soon as we are informed of their arrival." Counsel relies on an unprinted ruling of this Court, being No. 2684 of 1922, which he says is precisely the converse case. The facts are, in our opinion, quite different, for there it was a question of the goods having arrived in one shipment, the contract having been.

for two, and naturally it was held that the buyer was not liable and that he was entitled to receive goods in accordance with the terms of his contract. In our opinion the actual wording of this contract contemplates the arrival of the goods piece-meal or in one lot just as the shippers and the Railway Company might be able to deal with them, and the fact that there was a two days' interval and that the plaintiff informed his buyer as soon as these consignments arrived did not, in our opinion, constitute any sort of breach of the conditions inasmuch as he did receive the notice of the arrival of the whole of the consignment, which was of the correct shipment.

It is contended that, however long the interval, the seller should have waited until all the goods had arrived rendering his buyer liable for godown rent in the interval in accordance with the terms of the contract and should have intimated the arrival of the goods as soon as they were complete and not before. There is, in our opinion, no force in this contention though the buyer would doubtless have been entitled to hold his hand and take no action until and unless the whole of the consignment had arrived and he was told of its arrival: provided always the goods were actually shipped in May, it is wholly immaterial whether they were on board one, two or nine ships and came up from Bombay in one or several trains.

The second and the most important point is whether the plaintiff was or was not ready and willing to perform the contract; in other words, had he control over the necessary goods and was he prepared to give delivery on the buyer performing his part of the contract. There was previously litigation between the seller and his own seller, and it is quite clear and is not disputed that the goods were in existence and lying in the custody of the Bank to be delivered on payment being tendered. That being so, it is clear that the plaintiff was ready and willing unless it be held that his letter of the 3rd of October in some way debarred him from exercising his control over the goods. The first thing to be seen is what was the due date. The plaintiff himself had called upon the defendant to take delivery before the 10th of October. The defendant wrote saying that he had deposited the necessary money with Messrs. King, King and Co. The plaintiff refused to give delivery except on certain condi-

tions but subsequently on the 10th October resiled from this position and called upon the buyer to perform. It is contended by Mr. Tek Chand that once the plaintiff had written this conditional refusal he had debarred himself for all time from performing or demanding performance of the contract. He does not rely upon s. 39 of the Contract Act and contends that the contract had actually come to an end, and there could be no question of delivery at any later date. In our opinion this is a wholly impossible position, and even though the plaintiff was not willing on that particular date—the 3rd of October—to give delivery except on conditions, which he was not justified in making, the due date had not expired and he was quite within his rights in demanding performance within a reasonable time. Even if the most extreme view be taken of this letter of the 3rd October, and it be treated as an absolute refusal, the position would, in our opinion, be governed by the terms of s. 39. There is much misunderstanding and much loose argument based on the unfortunate fact that the word “anticipatory” has somehow been associated with the section, and it is often said that the section only refers to anticipatory breaches in the sense of breaches which occur before due date. The word “anticipatory” nowhere occurs in the section and the very wording of the section and the illustration thereunder make it clear that it applies to all such breaches which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches. The defendant admittedly took no action on receipt of the letter of the 3rd of October. It was, therefore, open to the plaintiff to change his mind and to offer to deliver the goods unconditionally before the expiry of the due date, and this he did.

Further before the defendant can challenge the conduct of the plaintiff it is for him to show that he performed his part of the contract and made a proper and sufficient demand accompanied by the necessary sum of money, for the facts of this case show that the goods were lying in the custody of the Alliance Bank and could not be withdrawn until a certain draft was cleared by payment of money. It was, therefore, absolutely essential that money should accompany the demand. It

was also necessary under s. 94 of the Contract Act that the buyer should ask to have the goods made over to him at the seller's place of business and not at his own. There were, therefore, two fatal defects in the so-called demand, for Messrs. King, King and Co. asked to have the goods sent and further to have them sent without any money being paid.

This brings us to the question of whether the re-sale was defective. It is contended by Mr. Tek Chand that it never took place, that there was no real sale in the sense that there was no real purchaser, that there was a fatal flaw in the proceedings in that the sale having been advertised for one day was twice continued on subsequent days without notice or proclamation and finally that the sale was wholly bad as being belated.

In the pleas the sale was objected to as "fictitious, unwarranted and illegal." There is no definite plea that it took place after the expiry of reasonable time. Mr. Tek Chand contends that the word "illegal" covers all possible defects, and that the burden lay heavily upon the plaintiff to prove that all the conditions precedent as required by s. 107 of the Indian Contract Act were fulfilled. On the other hand, it is urged, and we think with greater force, that it is wholly impossible for any man to meet a plea of this sort until it is made, that the question of reasonable time is one of fact depending upon the peculiar circumstances of the case, that had the plea been taken the plaintiff would have had to produce such evidence as would have satisfied the Court that the delay was not unreasonable and that the failure to take the plea is fatal to the defendant's case. The objection to the re-sale on the ground of its being fictitious appears to us to be entirely frivolous. Witnesses were produced with their books to show that they purchased some of the bales and objections were taken to them *seriatim* according to their position in life. The partners in the firm were objected to as not being *munims* and the *munims* as not being partners, and it was pointed out that both were unable from their own knowledge to prove both the sale and the entries in support of it. The objection regarding the adjournment is also, in our opinion, quite immaterial, for the buyer could in no way be injured by such adjournment. The auction took place on

the advertised date, and in the hope of getting a better price the auctioneer went on and did more work than he need have done. The bids on the later days were precisely the same and a higher price could not be realised.

Regarding the June shipment there is no point which is not common to the May shipment except that of the date of the bill of lading. This was raised in this Court by Mr. Tek Chand, but Counsel for the plaintiff was able to dispose of it by showing us on the record a copy of one of the original portions of the bill of lading which is made out in triplicate (Ex. P-39). The same objections were taken regarding the re-sale and Counsel further contended that the great delay in the arrival of this shipment proves that it cannot have been a June shipment at all. This objection, in our opinion, is disposed of by the bill of lading itself, and it is noticeable that this objection was not taken at any stage of the case until today.

The cross objections of the plaintiff deal with the July shipment, the claim regarding which has been disallowed because instead of tendering 8 bales of this shipment the plaintiff tendered 6 of the July shipment together with two of August. The Subordinate Judge has held that this is a fatal flaw and has dismissed his case so far as it relates to this shipment. The invoices are to be found at pages 41 and 42, the first describing the six bales of the July shipment and the latter the two bales of the August. To this invoice the defendant objected in a letter of the 9th October 1918, in which he took exception to the fact that there was a difference in pieces according to the contract terms meaning that the last bale No. 25 of the August shipment was 37 pieces short. To this the plaintiff replied on 14th October, 1918:—"In reply to yours, dated the 9th instant we have to bring to your notice that no number of pieces are entered in the contract and besides this there are 8 cases in our one shipment of 18-25 and the total number of pieces in the above 8 cases are correct." This letter was apparently based on a note Ex. P-75 made on the letter to which it was a reply:—"No detail of pieces, etc., is given in our contract. One *chalan* comprises 8 cases Nos. 18 to 25. Please check and examine the pieces contained in all the 8

cases. They are all right". Counsel now contends that as the bill of lading, which was quoted in the second notice showed that the shipment was of August and the buyer took no exception to this irregularity, he must be taken to have waived his right to object and this more especially as he did take exception to the shortage. He relies on *Nannier v. Rayulu Iyer* (1) and *Gulab Rai-Sagar Mal v. Nirbhe Ram-Nagar Mal* (2), but the correspondence read as a whole does not, in our opinion, support the plaintiff's contention. In his later letter he spoke himself of one shipment, when admittedly there were two of different months, and now interprets this as meaning "the two shipments which were converted into one by your kindly overlooking the irregularity, regarding the second shipment." This is quite impossible, and we think it clear that the buyer who wished to get out of the bargain overlooked the date which does appear on the invoice but not against any words indicating that it is the date of the bill of lading though doubtless in commercial circles this is understood. The point which he did notice and apparently thought was a good ground for putting an end to the transaction was that of shortage, and, in our opinion, the facts are not sufficiently similar to those contained in the two rulings to make them applicable, and while reading *Nannier v. Rayulu Iyer* (1) it is necessary to bear in mind that it is in continuation of and does not dissent in any way from *Parthasarathy Chetty v. Gajapathy Naidu & Co.* (3). Further, even if it were possible to hold that there had been a complete waiver it would still be for the plaintiff to show that the goods sold by him at the time of the re-sale were the actual goods, by tendering which he performed his contract. No tender of August goods was sufficient and valid, and there is no getting away from the fact that the goods sold were not in their entirety those contracted for, and, therefore, in a suit of this nature it is wholly impossible for the plaintiff to succeed.

The result, therefore, is that both the appeal and the cross-objections must be dismissed with costs.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 of 1927.

September 26, 1927.

Present :—Mr. Findlay, J. C.

NAGO—DEFENDANT No. 4—APPELLANT
versus

TARACHAND AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. III—Property under management of Collector—Mortgage by proprietor, validity of—Property not under Collector's management, whether affected—Lease by mortgagor in ordinary course of management, validity of.

The incompetency of a mortgage during the period of Collector's management extends only to the property of which the Collector has expressly assumed management. [p. 15, col. 2.]

Gangaram v. Ram Gopal (1), followed.

The lease of *khudkasht* land by a mortgagor during the continuance of a mortgage of the village is valid and binding on the mortgagee only, when it is made in the ordinary course of the village management. [p. 16, col. 1.]

If the lease is given with the express object of making a large profit or seriously depreciating the value of the security, which the mortgagee may be entitled to, it cannot be said to be one in the ordinary course of management. [*ibid.*]

Shanker Singh v. Hukumchand (3), relied on.

Appeal against the decree of the First Class Sub-Judge, Nagpur, dated the 30th September, 1926, in Civil Suit No. 33 of 1924.

Mr. M. R. Bobde, for the Appellant.

Mr. W. R. Puranik, for the Respondents.

JUDGMENT.—In the present mortgage suit, the facts of which are sufficiently clear from the lower Court's judgment, the present appellant, who was defendant No. 4 in the lower Court, was impleaded in view of the fact that he had obtained a perpetual lease of *khudkasht* field No. 47 of *Mouza Jolwadi* from the first three and seventh defendants. The connected 2-anna 8-pie share of *Mouza Jolwadi* has been released under the decree passed by the lower Court on the ground that at the time the mortgage came into being, the said share was under the manage-

(1) 93 Ind. Cas. 673; 49 M. 781; A. I. R. 1926 Mad. 778; 24 L. W. 535.

(2) 79 Ind. Cas. 194; 4 Lah. 423; A. I. R. 1924 Lah. 239.

(3) 91 Ind. Cas. 568; 48 M. 787; 49 M. L. J. 215; 22 L. W. 417; (1925) M. W. N. 756; A. I. R. 1925 Mad. 258.

ment of the Collector. The Subordinate Judge, First Class, for reasons which are sufficiently clear from his judgment, has, however, held that the *khudkasht* field No. 47, which was the subject of the present appellant's lease, was liable under the mortgage and it has accordingly been included in the mortgage-decree. I, am, therefore, solely concerned in this appeal with the question as to whether the inclusion of this field is correct or not.

In this connection, I have been referred by the Pleader for the appellant to para. 6 of the plaintiffs' written statement dated 10th July, 1925. It has been suggested that therein the plaintiffs rested their case on the fact that the 2-anna 8-pie share of *Mouza Jolwadi* mortgaged was not the same 2-anna 8-pie share as was under the control of the Collector at the time being. It is perfectly clear that the plaintiffs' first plea in this connection was that the mortgagors had a 5 anna 4-pie share in each of the two villages *Jolwadi* and *Bhojgadh* and that it was the 2-anna 8-pie share which was unaffected by the Collector's control and which was mortgaged. The lower Court, in its finding on issue No. 8 has, however, found this point against the plaintiffs and there has clearly been no proof that the mortgagors had more than 2-anna 8-pie share in *Mouza Jolwadi*.

It has now been suggested on behalf of the present defendant-appellant, apparently for the first time, that the *khudkasht* fields Nos. 47, 17 and 9 with a total acreage of 9.14 acres must be the same as the *khudkasht* fields Nos. 10 and 52 with a total acreage of 9.15 acres, which the lower Court holds were under the management of the Collector along with a 2-anna 8-pie share of *Mouza Jolwadi*. I do not think, however, this contention can possibly be now accepted, offered as it is for the first time in the Appellate Court. If we turn to para. 6 of the plaintiffs' written statement, it is perfectly clear that there the latter offered an alternative plea. Even supposing that the contention the mortgagors owned a 5 anna 4-pie share in the village and that it was the free portion of that share which was mortgaged failed, the plaintiffs clearly offered a further distinct plea that anyhow the rest of the property covered by the mortgage was not included in the Collector's proceedings and that the mortgage would hold good

as regards such further property. Now, if the present defendant-appellant's case had been that numbers 10 and 52, in reality, referred to the same lands as the numbers 47, 17 and 9, I should certainly have expected to find a specific plea from him to this effect in his written statement, dated 24th September, 1925. The said written statement is, however, absolutely silent on the point and he therein rested his case on the fact that the lease of field No. 47 had been given to him in the ordinary course of management and that, in any event, the mortgage having been executed when the Collector's proceedings were pending, the whole of it was void irrespective of the fact whether the subjects covered by the mortgage were all at the time in the hands of the Collector. On this latter point, I see no reason to differ from the decision of Kotval, A. J. C., in *Gangaram v. Ram Gopal* (1); the incompetency of the mortgage only extended to the property of which the Collector had expressly assumed management.

It has next been urged in this connection on behalf of the appellant that whatever interest he had in the 2-anna 8-pie share, necessarily must be considered as having been under the management of the Collector and that, therefore, *khudkasht* field No. 47 came within the said head. I am unable, however, to accept this contention in the circumstances of the present case. Apparently, only specific *khudkasht* fields, viz., numbers 10 and 52 of *Jolwadi*, were under the management of the Collector. The obvious presumption must be that any other *khudkasht* field not so specified was not affected so far by the Collector's proceedings, and there having been neither allegation nor proof that *khudkasht* field No. 40 corresponds to any portion of *khudkasht* fields Nos. 10 and 52, the inference must be that *khudkasht* field No. 47 was not under the management of the Collector.

I now pass to the first and second grounds of appeal. The first ground, which is to the effect that the present appellant took the lease of field No. 47 without notice of the mortgage, has obviously not got the slightest basis. The lease deed itself states that the field is mortgaged

(1) 61 Ind. Cas. 579; 18 N. L. R. 131; A. I. R. 1922 Nag. 243.

and that the lessors would be responsible to the mortgagees. Even so, however, it has been urged on behalf of the appellant that the fact that the lessee had notice of the mortgage is immaterial; that the lease was one given in the ordinary course of management and that the mortgagors at the time were competent to give such a lease. In this connection, I am wholly at a loss to understand the finding of the lower Court to the effect that the lease in question was given to the appellant in the ordinary course of management—a finding relating to issue No. 10 (b). In para. 38 of the lower Court's judgment, where the reasons for that finding are given, you can find no discussion, whatever of the relevant question involved.

I accept the principles laid down by Hallifax, A. J. C., in his judgment in *Karu v. Pandia* (2), but I find it wholly impossible to apply in a sense favourable to appellant the said principle to the circumstances of the present case. It is impossible to imagine that the giving of this lease of what apparently formed a large portion of the *khudkasht* field attached to the village share was an ordinary and reasonable incident of village management. The test is would the mortgagors have been likely to have given this lease themselves if they had known that they would continue indefinitely as the owners of the property? I think this question must undoubtedly be answered in the negative. The circumstances all suggest that the lease in question was not given in the ordinary course of management but was granted with the express object of meanwhile making a large profit for the mortgagors, or seriously depreciating the value of the security which the mortgagees were entitled to. In this connection, I find myself in full agreement with the remarks of Mittra, A. J. C., in *Shanker Singh v. Hukumchand* (3). The present lease was given in perpetuity. If the land was so valuable that a *nazarana* of Rs. 1,000 could fairly be demanded for it, it is impossible to suppose that the most serious loss would not be directly inflicted on the mortgagees when they subsequently came into the possession of the villages, for all

they would receive would be a sum of Rs. 15-4 per year rental. The discrepancy between the capital sum of Rs. 1,000 paid and the yearly rental is sufficiently startling, and when we keep in mind also the fact that the lease was a perpetual one, it seems to me utterly impossible to postulate of the circumstances of the present case that the lease in question was an ordinary and reasonable act of ordinary management of the share on the part of the mortgagors.

The respondents have also raised, apparently for the first time in the course of argument in this Court, the contention that there has been no proof that the mortgagors were entitled to grant the lease and that presumably this power rested with the *lambardar*. This was a matter for a specific pleading in the lower Court and I am not prepared to entertain this plea now, but, altogether apart from it, I find it wholly impossible to hold that the lease in question was a *bona fide* act in the course of ordinary management. Over and above this, there is the undoubted fact that the present appellant had notice of the mortgage and under the lease-deed expressly assumed responsibility with reference thereto. On the fact of the present case, therefore, the said lease not being, in my opinion, an ordinary *bona fide* one carried through in the course of the ordinary management of the village and the lessee having accepted it on the terms he did, there can, in my opinion, be no question but that field No. 47 is liable under the decree obtained by the respondents.

The appeal is accordingly dismissed. The appellant must bear the respondents' costs. Costs in the lower Court as already ordered.

G. R. D.

A. N. A.

Appeal dismissed.

(2) 75 Ind. Cas. 874; A. I. R. 1924 Nag. 226.

(3) 47 Ind. Cas. 99; 14 N. L. R. 117 at p. 120.

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

July 26, 1927.

Present:—Lord Sinha, Lord Blanesburgh,
Lord Salvesen, Sir John Wallis and
Sir Lancelot Sanderson.

MAUNG PO NYUN—DEFENDANT—
APPELLANT

versus

MA SAW TIN—PLAINTIFF—RESPONDENT.

*Burmese Buddhist Law—Husband and wife—
Desertion—Divorce—Forfeiture of husband's property
—'Virgin couple', meaning of.*

Under the Burmese Buddhist Law although desertion by husband is a ground for adjudging divorce, it does not cause forfeiture to the wife of the whole of the property of the husband joint or separate. [p. 18, col. 2.]

But in view of the general rules of the Burmese Buddhist Law as regards the interest which the wife obtains in the husband's property at the time of the marriage the Court may award a reasonable share of the husband's property to the wife on her divorce. [p. 19, col. 2.]

[The meaning of 'virgin spouse' considered but not decided.]

Appeal from a judgment and decree of the High Court, Rangoon (Heald and Chari, JJ.), dated the 27th February, 1925, reported as 88 Ind. Cas. 402, affirming a decree of the District Judge, Myaungmya, dated the 13th December, 1923.

Messrs. Dunne K. C. and Raikes, for the Appellant.

Mr. Pennell, for the Respondent.

JUDGMENT.

Sir Lancelot Sanderson.—This is an appeal by Maung Po Nyun, who was the defendant in the suit, against a decree of the High Court of Judicature at Rangoon, dated the 27th February, 1925, affirming a decree of the District Judge of Myaungmya, dated the 13th December, 1923.

The plaintiff, who is the respondent in this appeal, brought the suit against her husband, claiming a divorce on account of his desertion and a partition of the properties specified in the Schedules A and B of the plaint. She alleged that she was entitled to one-third of the properties in Schedule A and to one-sixth of the profits in Schedule B.

The learned District Judge made a decree granting the plaintiff a divorce and the shares in the above-mentioned properties which she claimed. The defendant appealed to the High Court, which dismissed his appeal with costs.

At the hearing of the appeal before their Lordships, the learned Counsel, who appear-

ed for the appellant-defendant, did not contest the plaintiff's right to a decree for divorce, and the arguments on both sides were confined to that part of the decree which awarded to the plaintiff one-third of the properties mentioned in Schedule A and one-sixth of the profits specified in Schedule B.

The learned Counsel for the appellant-defendant did not contest the plaintiff's right to the one-sixth of the profits in Schedule B, but he argued that the plaintiff was entitled merely to one-sixth of the property comprised in Schedule A and not to one-third thereof, as decreed by the Courts in Burma.

The appeal, however, involves much more than the point which has been stated above, and that is by reason of a principle which was adopted by the Courts in Burma and upon which they based their judgments.

For the moment it may briefly be referred to in the words of the learned District Judge as follows:—"Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse."

It is clear, therefore, from the above-mentioned statement, that this appeal involves a question of great importance, and it is necessary for their Lordships to decide whether this statement of the law, which must obviously have far-reaching effects, can be supported.

The facts of the case may be shortly stated as follows:—

The defendant had married another wife before he married the plaintiff. The first wife lived with the defendant and his adoptive mother for some time, and then, in consequence of quarrels, the first wife left the defendant and went to live with her parents.

A few months later the defendant expressed a desire to marry the plaintiff, and his mother accordingly approached the plaintiff's parents with a view to their daughter's marriage.

The defendant had told his mother that he had severed his connection with his first wife, and accordingly the defendant's mother, when asked by the plaintiff's parents as to the first marriage, assured them that the defendant had divorced his first wife.

The plaintiff's parents, having received this assurance, consented to their daughter's marriage. She was married the same day and she went to live with the defendant and his mother.

A few months later the defendant's mother died.

The defendant continued to live with the plaintiff for about two months longer, and then, in or about April, 1920, he left her and went to live with his first wife, whom, in fact, he had not divorced. The suit was filed in September, 1923, more than three years after the plaintiff was deserted by the defendant, and it was found by the learned District Judge, and his finding has not been disputed, that during the period from April, 1920, up to September, 1923, the defendant did not resume conjugal relations with the plaintiff, and did not give her any maintenance.

The learned Judge found that the defendant deserted the plaintiff and that the marriage was brought about by the above-mentioned misrepresentation, that his connection with his first wife had been severed, and he held that the plaintiff was entitled to a decree for divorce. The High Court agreed that the plaintiff was entitled to a decree for divorce, and that part of the decree, as already stated, has not been contested before their Lordships.

It appears that the defendant's mother died in January, 1920, and that about four months before she died she had given to the defendant by deed about 185 acres, which were part of the 233·38 acres mentioned in Schedule A.

After her death her inheritance was divided, the defendant getting the house and the remainder of the property mentioned in Schedule A, which included 29 acres which had been given shortly after the defendant's marriage with the plaintiff.

On the question of partition, both the Courts in Burma held that, inasmuch as the plaintiff was entitled to a divorce on the ground of the defendant's desertion, she was, strictly speaking, entitled to all the husband's property, except the first wife's interest therein; or, stating the same proposition in another way, that the plaintiff was entitled to all the husband's interest in the property, which would be considerably more than the shares which the plaintiff had claimed in her plaint. The learned Judges of the High Court expressed the opinion that it was difficult to understand

on what principle the plaintiff's claim, was based; but they came to the conclusion that as she had confined her claim to the shares mentioned in the plaint and had obtained a decree in respect thereof, they saw no reason for saying that the decree was wrong or that the defendant had been prejudiced by it.

The question whether the plaintiff was entitled to all the husband's interest in the property was argued at great length, and the attention of their Lordships was drawn to the translations of many of the *Dhammathats* and to many reported decisions.

Their Lordships do not think it necessary to refer to them in detail, because it is clear as was admitted by the learned Counsel who appeared for the plaintiff, that there is no text which imposes forfeiture of property upon a husband who deserts his wife, and that there is no reported case in which a decree for forfeiture of his property has been made against a husband by reason of his desertion of his wife or one of his wives.

Further, the learned Judges of the High Court stated that "it is admitted that the Burmese law books do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status, and that there is no case-law on the subject. It is, therefore, necessary to decide the matter in accordance with the principles of justice, equity and good conscience, having regard...to the general rules of Burmese Buddhist Law so far as those rules can be applied."

Their Lordships desire to make it clear that the opinion expressed by them is confined to the particular facts of this case and the question arising in respect thereof; viz., assuming that the defendant deserted the plaintiff, his second wife, in April, 1920, and that for more than three years he did not resume conjugal relations and gave her no maintenance, and that consequently the plaintiff was entitled to a decree for a divorce, was she entitled to the whole of the husband's interest in the property, which was the subject-matter in the suit?

The learned Counsel for the appellant argued strenuously that on the true construction of the plaint, the suit was really based on an allegation of divorce by mutual consent.

Their Lordships are not able to accept that argument, and the case must be con-

sidered upon the basis of the findings of fact of the Courts in India.

The learned District Judge began his judgment on this part of the case by saying, "The parties will have to be considered as virgin couple."

Before his marriage with the plaintiff, the defendant had been married to another woman, who was alive at the time of the marriage with the plaintiff, and from whom he had not been divorced.

The plaintiff, of course, had not been married before, and, while some indications are to be found in the texts to the effect that where the spouse in that position is the aggrieved party, the union may be so described in proceedings for divorce, in their Lordships' opinion, it is not necessary in this case to decide the point and they must not be taken as affirming the above mentioned proposition.

The learned District Judge then proceeded to the statement which has already been quoted, and which for convenience may be re-stated, as follows:—

"Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse; but of course, the share of the head wife must be excluded."

In their Lordships' opinion, this statement is made in too wide and too general terms.

In the first place, it takes no account of the difference between the position, rights and duties of the husband and those of the wife in Burmese Law.

It is clear that the *Dhammathats* recognised the difference in many respects, which it is not necessary to mention in detail.

In the second place, as has already been stated, there is no case in which a wife has obtained a decree of forfeiture of all her husband's interest in the property on the ground of his desertion.

It is also the fact that there is no case in which a wife has claimed such a forfeiture, and even in the case before their Lordships the plaintiff has not made such a claim.

As already mentioned, the *Dhammathats* do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property.

In the Digest of Burmese Buddhist Law arranged by U Gaung, Vol. II, dealing with Marriage, §. 312 (Manugye), desertion is

dealt with, and some of the rights of the parties ensuing upon desertion, such as the right to marry again, are described.

If it had been the law that the husband would forfeit all his interest in the property, joint or separate, if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the *Dhammathats* a statement of the law to that effect.

The proposition which the Courts in Burma adopted as the basis of their judgment, viz., that because the defendant deserted the plaintiff she was entitled to divorce with possession of all the husband's interest in the property, the subject-matter of the suit, is in itself a startling proposition, and, if adopted, would have very far-reaching effects.

There is no text in the *Dhammathats* or in the Burmese Buddhist law books to support it, there is no case-law on the subject, and the respondent's learned Counsel was not able to draw their Lordships' attention to any case in which even a claim based on such a proposition had been made.

In these circumstances, their Lordships are not prepared to accept and endorse the above-mentioned proposition.

This, however, does not dispose of the appeal, because it still remains to be considered whether the appellant-defendant has succeeded in showing sufficient reason to justify their Lordships in interfering with the decree which the plaintiff in fact obtained as to her shares in the property and the profits thereof.

In deciding this question, their Lordships think it is material to take into consideration the general rules of the Burmese Buddhist Law as regards the interest which the wife obtains in the husband's property at the time of the marriage, and in the property acquired by him after the marriage, and the fact that the *Dhammathats* treat the division of property as part of the law of divorce, as to which there does not seem to be any serious dispute.

In their opinion, it is also material and important to consider the facts of this case, as, for instance, that the marriage with the plaintiff was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that, shortly stated, the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and that desertion, where there is a duty

to comfort and support, is regarded by the Burmese as a serious offence.

Taking these matters into consideration and the above-mentioned rules of the Burmese Law as to the wife's interest in her husband's property, their Lordships are not prepared to say that the decree appealed from, which awarded to the plaintiff the shares in the properties in suit specified therein, was unreasonable or contrary to justice, equity and good conscience.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the Appellant:—Messrs. Douglas, Grant & Dold.

Solicitor for the Respondent:—Mr. J. E. Lambert.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NOS. 324 OF 1924
AND 410 OF 1925.

July 20, 1927.

Present:—Sir Grimwood Mears, Kt,
Chief Justice, and Mr. Justice Lindsay.
GANGA DIN AND ANOTHER—DEFENDANTS—
APPELLANTS
versus

RAM PRASAD—PLAINTIFF—
RESPONDENT.

Evidence Act (I of 1872), s. 115—Will by testator having defective title—Estoppel of person who takes possession under Will from disputing validity of Will.

One who obtains, or accepts, or retains possession of property under a Will and who neither has, nor professes to have, any title thereto except under the Will, is estopped, as against any remainderman or other person claiming under the same Will from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and, generally, from setting up any title to the property in himself which is independent of, and adverse to, the Will, or any interest of a different kind from that which he would have taken if the property had passed by the Will as it was impliedly represented by him to have passed. [p. 22, col. 4¹]

Board v. Board (1), followed.

Paine v. Jones (2), distinguished.

First appeals from the decrees of the Sub-Judge, Budaun, dated the 31st May, 1924.

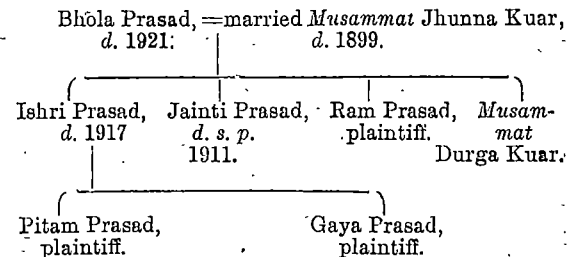
Sir Tej Bahadur Sapru and Mr. Harnandan Prasad, for the Appellants.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.—These two appeals arise out of two suits which were tried separate-

ly by two Subordinate Judges of Budaun. But as the claims were based upon similar causes of action and relate to the same property, and as the same questions arise for determination in both cases the two appeals have been heard together and may be disposed of by one judgment.

The following pedigree will serve to show the nature of the claim put forward in either suit:



The property in respect of which the two suits were brought was admitted in the Court below to have been at one time the absolute estate (*stridhan*) of a lady named Radhika Rani, who was the mother of Musammat Jhuna Kuar, wife of Bhola Prasad.

On the death of her mother the property descended to Musammat Jhuna Kuar who, on the 13th August, 1899, executed a Will (Ex. 1, page 20, of the paper-book of F. A. No. 324 of 1924). She claimed to be the full owner of the property and disposed of it in favour of her husband Bhola Prasad and her three sons, Ishri Prasad, Jainti Prasad and Ram Prasad.

The construction of this Will is in controversy in both the appeals now before us; for the present it is sufficient to say that the plaintiffs in the two suits are founding their title upon the Will. Jhuna Kuar died a few days after this Will had been executed, and it is an admitted fact that her husband Bhola Prasad then came into possession of the property.

In the year 1902 Bibi Durga Kuar, the daughter of Jhuna Kuar, put forward a claim to this property on the ground that she was entitled to it by inheritance from her mother. She disputed the right of her father Bhola Prasad to get the property under Jhuna Kuar's Will, and she was, apparently, about to bring a suit to enforce her claim when she and her father agreed to submit their respective claims to arbitration by a deed executed on the 10th August, 1902, (Ex. 11, page 21, paper-book

of F. A. No. 324 of 1924). On the 14th August, 1902, an award was delivered, which declared that Bhola Prasad was the owner of the lands now in dispute under the Will of Jhuna Kuar. The arbitrators, however, were of opinion that Bhola Prasad should be generous towards his daughter and they awarded her a 3-biswa share in the item of landed property situated in Mauza Dudhari.

Subsequently, and before his death, which took place in 1921, Bhola Prasad lost the rest of the immoveable property which came to him by the Will. It passed into the hands of Ganga Din and his wife Musammât Dulari, who are the contesting defendants in both the suits and are in possession. The first of the two suits, the one which has given rise to First Appeal No. 324 of 1924, was brought by Ram Prasad, the only surviving son of Bhola Prasad. He put forward the case that Bhola Prasad took only an estate for life under the Will of Jhuna Kuar, and that he (plaintiff), as remainderman, was entitled to possession after his father's death.

The defence to the claim was that Bhola Prasad was not a mere life-tenant of the property, but was the absolute owner. It was pleaded, first, that the Will gave Bhola Prasad an absolute estate and that there was no valid gift over to the sons. In the next place it was pleaded that Bhola Prasad had acquired an absolute estate by adverse possession. This defence was based upon the assertion that Jhuna Kuar herself having succeeded by inheritance to her mother's *stridhan* had no more than a life-interest and could not dispose of the property by Will. The real heir, after Jhuna's death, was her daughter, Musammât Durga Kuar, and, therefore, Bhola took possession without title, and, having been in for more than twelve years, had acquired a full title by prescription.

Again it was pleaded that the arbitration proceedings in 1902, to which we have already referred, constituted a "family settlement" which was binding upon the plaintiff Ram Prasad, and which conferred an absolute title upon Bhola Prasad; and lastly it was suggested that the suit was barred by estoppel, both under s. 41, Transfer of Property Act and s. 115, Evidence Act.

The Subordinate Judge overruled these defences, and gave Ram Prasad a decree for one-half of the property in suit. His

decision, in substance, was that Bhola Prasad having entered under the Will was estopped from denying the title of his testatrix. He found that the Will gave Bhola Prasad only a life-interest and that there was a gift over by way of remainder to the sons of Bhola Prasad, which neither Bhola nor the defendants who are his successors-in-interest could be permitted to dispute.

One of the three sons to whom an estate in remainder was given had died without issue in 1911: his name was Jainti Prasad. His vested interest, therefore, passed to his two brothers Ishri and Ram Prasad enlarging their shares to one-half each. Ram Prasad was, therefore, declared to be entitled to a half share in the property in suit and a decree was made accordingly.

After Ram Prasad's suit had been decreed, the two sons of Ishri Prasad, who had died in 1917, came forward to claim the other half of the property. They too founded their case upon the Will of Jhuna Kunwar, but their suit failed. The Subordinate Judge who dealt with their suit was of opinion that the arbitration award of 1902 put these plaintiffs out of Court. He held that the arbitration proceedings amounted to a family settlement under which the rightful owner, i. e., Musammât Durga Kunwar, gave the bulk of the property to her father, Bhola Prasad, who thereupon acquired an absolute title.

First Appeal No. 410 of 1925 is directed against this decree in the second suit. The plaintiffs are the appellants and maintain that they ought to have been given a half share on the same grounds as Ram Prasad, their uncle, got a half share in the earlier suit.

To come now to the questions for determination in the two appeals, it is to be observed, first, that it is common ground that Musammât Jhuna Kunwar had no interest in this property extending beyond her lifetime. It was the *stridhan* of her mother Radhika Rani, and descended, in the first instance, to Jhuna Kunwar who took merely the ordinary Hindu female's estate. On her decease the property ought to have descended in turn to her daughter Durga Kunwar with a similar estate. After Durga Kunwar's death (she is still alive) the son of Jhuna Kunwar, that is Ram Prasad, would take as heir if he survived his sister. Bhola Prasad, the husband of

na Kunwar, had no title whatever to this property.

The situation, then, is that Jhuna Kunwar, with only a life-estate in the property, but believing herself to have an absolute estate which she could devise made this Will of the 13th August, 1899, which purported to confer upon her husband an interest which was to take effect immediately upon her death. It is not to be doubted that Bhola Prasad did enter under the Will. This is quite plain from the recital contained in the deed by which he and Durga Kunwar agreed to submit their dispute to arbitration: (cf. Ex. 11, page 21, paper-book, F. A. No. 324 of 1924). We cannot accept the contention that Bhola Prasad got possession otherwise than under the Will.

As to the construction of the Will both Subordinate Judges have held that Bhola Prasad took nothing more than a life-estate, and, in our opinion, that decision is correct. When the document is read as a whole there can be no doubt as to the intention of Jhuna Kunwar. She first declares that, if she dies before her husband, he will be the owner of her entire property, but she then goes on to say that "he may enjoy the income from the said property up to the time of his death" and that, after his death, her sons will be entitled to the estate. The Will concludes with a direction that in no event shall Bhola Prasad's issue by a second wife, in case he marries again, take any portion of Jhuna Kunwar's estate.

It is plain beyond all argument, therefore, that nothing more than a life-interest was conferred upon Bhola Prasad.

As for the arbitration award, which settled the dispute between Bhola Prasad and Durga Kunwar in 1902, it can have no effect upon the interests of the plaintiffs in the present suits. They were no parties to the proceedings and are in no way bound by them. The case was not one of a family settlement. Bhola Prasad's two eldest sons, Ishri and Jainti, were alive then and of full age (see the recital in the Will of 1899), and it is not possible to conceive that there could be any arrangement by way of family settlement to which they were not parties.

The Subordinate Judge who tried the second suit was wrong in holding that the award could affect the plaintiff's rights

either as a family settlement or in any other way.

The matter in dispute, therefore, is reduced to a narrow compass. There are two sets of plaintiffs setting up title to property under a Will. Admittedly their testator had no devisable interest in the property and the plaintiffs can succeed only by showing that the defendants who derive their title from Bhola Prasad are estopped from denying the right of Jhuna Kunwar to make this Will.

The Subordinate Judge who decided the earlier of the two suits was of opinion that the defendants were so estopped. The other Subordinate Judge thought that, if Bhola Prasad's title was derived from the Will, then he and his representatives-in-interest would be so estopped; but, as already explained, he came to the conclusion that Bhola Prasad's title was acquired under the award and not under the Will—a conclusion which we consider erroneous. The first Subordinate Judge was, in our opinion, clearly right. The case is covered by the rule laid down in the leading case of *Board v. Board* (1), namely, that a person who claims under a Will, and retains possession under the Will, is estopped from denying its validity as against everybody interested in the Will.

There has been much case-law on this subject, and in the course of the arguments we have been referred to practically all the authorities in the English reports.

We think the law is correctly reproduced in the following passage taken from *Spencer Bower on Estoppel by Representation*, para. 734:

"One who obtains, or accepts, or retains possession of property under a Will and who neither has, nor professes to have, any title thereto except under the Will, is estopped, as against any remainderman or other person claiming under the same Will from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and, generally, from setting up any title to the property in himself which is independent of, and adverse to, the Will, or any interest of a different kind from that which he would have taken if the property had passed by the Will as it was impliedly represented by him to have passed. The above formula,

(1) (1874) 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206.

it will be observed, is confined to cases where the party not only professes to have, but actually has, no title to the property except under the Will."

It is this rule which has to be applied to the case now before us. We have already explained that when his wife died Bhola Prasad had not, and could not have had, any title to the property except under the Will made by his wife. The person entitled in law to the property on Jhuna Kunwar's death was her daughter Durga Kunwar.

Bhola Prasad, as we have said, entered into possession under the Will and the consequence is that he and those who claim under him are debarred now from asserting that Jhuna Kunwar was not entitled to such an estate in the property as she purported to devise. Nor can the defendants now representing Bhola Prasad set up any title in him or themselves independent of and adverse to the Will. The plaintiffs, who claim under the same Will as remaindermen, are entitled to the benefit of this estoppel.

It has, however, been strenuously argued that the rule in *Board v. Board* (1) should not be applied here. It is said that the principle of estoppel laid down in that case has been held not to apply to a certain type of cases of which *Paine v. Jones* (2) is an example.

This question is discussed by Stirling, J., in his judgment in *Dalton v. Fitzgerald* (3). Speaking of the cases which have arisen under Wills he divides them into two classes.

The first is, where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a person for life with remainders over. *Board v. Board* (1) is a case of this class where the testator being simply a tenant by courtesy, had nothing to devise. In such cases the doctrine of estoppel is applied and, according to Stirling, J., no doubt has ever been thrown upon that class of cases.

The second class is the one where a testator having a good title to property has not effectually devised it and the tenant for life of the property effectually devised by the Will has entered just as if it had been included in a valid devise and acquired

by possession a title against the heir. Such cases, of which *Paine v. Jones* (2) is a leading example, arose most frequently under the law as it stood prior to the Wills Act when a testator was incompetent to devise land acquired subsequently to his Will. Stirling, J., points out that there is a conflict of opinion regarding the application of the doctrine of estoppel in cases of this type.

However that may be, it is manifest that the case we are now considering does not fall within this second class: it clearly falls within the first. It is not pretended that Jhuna Kunwar had a good title to this property, that is, a title which she could effectually devise; and that she failed to dispose of it by Will effectually. On the contrary the case is that she had a defective or limited title which she disposed of on the assumption that it was absolute and perfect. That is the case of *Board v. Board* (1) where the testator, a mere tenant by the courtesy, assumed that he had a devisable interest. He created a life-estate in favour of his daughter with remainder to his grandson. The daughter entered under the Will, and it was held that the defendant claiming through her was estopped as against the plaintiff, the assignee of the remainderman, from disputing the validity of the Will.

For these reasons we hold that in the two suits now under appeal the plaintiffs were entitled to succeed; there was in neither case any valid defence to the claim.

In First Appeal No. 324 of 1924 judgment of the trial Court was in favour of the plaintiff and was right. This appeal, therefore, fails and is dismissed with costs.

In First Appeal No. 410 of 1925 the claim was dismissed wrongly by the Subordinate Judge. The appeal is, therefore, allowed, the decree of the Court below is set aside and the suit is decreed with costs to the plaintiff in both Courts.

By the Court.—As First Appeal No. 410 of 1925 has been decreed, the result is that the case will go back to the Court of first instance for determination of the mesne profits which were claimed in the plaint.

A. N. A. Appeal No. 324 of 1924 dismissed.
Appeal No. 410 of 1925 allowed.

(2) (1874) 18 Eq. 320; 43 L. J. Ch. 787; 30 L. T. 779; 22 W. R. 807.

(3) (1897) 1 Ch. 440.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION.

October 18, 1926.

Present:—Mr. Justice Mirza.

BAI PANBAI—APPLICANT

versus

MORARJI KANJI—OPPOSITE PARTY.

Succession Act (XXXIX of 1925), s. 317—Probate—Inventory and accounts, how to be filed—Procedure—Remedy of parties interested.

The intention of the Legislature under s. 317 of the Succession Act appears to be that the inventory and accounts filed under that section should, so far as the proceedings on the Testamentary Side are concerned, be regarded as final. The protection afforded to parties interested in the Will is that if the inventory and the accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Penal Code. Another remedy open to the interested parties would be to file an action against the executor or administrator questioning the correctness of the accounts. [p. 24, col. 2; p. 25, col. 1.]

The practice of the Bombay High Court is to require an executor to file the inventory and accounts with the Testamentary Registrar. The executor is not required to pass his inventory and accounts before the Commissioner for taking accounts. [p. 24, col. 2.]

FACTS.—One Amarsey died leaving a Will providing for the payment of Rs. 100 per month to his widow Bai Panbai for maintenance. She was also allowed the use of certain ornaments of the value of Rs. 5,000 during her life. The executor Morarji did not file his accounts as he was bound to do under the Indian Succession Act. Panbai applied to the Court for compelling him to do so and he filed the accounts under the orders of the Court. Panbai alleged that the accounts were incorrect and prayed that a Commissioner should be appointed before whom the executor may be ordered to pass his inventory and accounts.

Mr. Kanga, Advocate-General, for the Applicant.

Mr. Taraporewala, for the Opposite Party.

JUDGMENT.—[His Lordship stated the facts and proceeded:—] Bai Panbai's application is based on the English practice in the Probate Division. Williams on Executors, Vol II, page 1663, (11th Edition), quotes that practice to be as follows:—

"An executor or administrator may be compelled to exhibit an inventory, and render an account of his administration of the personal estate of his testator or intestate in the Probate Division at the instance of a legatee or next of kin, or of a creditor; but neither an executor nor administrator can be

cited by the Probate Division *ex officio* to account."

According to Tristram and Coote's Probate Practice, page 324 (latest edition), the proceedings are instituted by means of a summons in Chambers.

The Advocate-General on behalf of the applicant contends that our Court is bound to follow the English practice under the provisions of r. 609 of the High Court Rules. That rule provides that:—

"In cases not provided for by this Chapter, or by the rules of procedure laid down in the Indian Succession Act or by Probate and Administration Act, 1881, or by the Civil Procedure Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with this Chapter and the said Acts."

Section 317 of the Indian Succession Act, 1925, provides that:—

"(1) An executor or administrator shall, within six months from the grant of Probate or Letters of Administration, or within such further time as the Court which granted the Probate or Letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of....."

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under s. 193 of that Code (The Indian Penal Code)."

The practice of our Court has been to require an inventory and accounts to be filed with the Testamentary Registrar. The executor or administrator is not required to pass his inventory and accounts before the Commissioner for taking accounts.

I am of opinion that the practice followed by our Court so far is correct. The intention of the Legislature under s. 317 of the Indian Succession Act appears to be that the inventory and accounts filed under that section should, so far as the proceedings on the Testamentary Side are concerned, be regarded as final. The protection afforded to parties interested in the Will is

that if the inventory and the accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Indian Penal Code. The other remedy open to the interested parties would be to file an action against the executor or administrator, questioning the correctness of the accounts.

In *Sarat Sundari Barmani v. Uma Prosad Roy Chowdhry* (1) the point before the learned Judges was whether it was open to the District Judge of his own motion to re-open an account which was certified by his predecessor as "accounts checked and reported to be correct" and to compel the executor to pass his accounts before an officer of the Court. The Appeal Court held that all that the District Judge had to do was to see that the inventory and accounts satisfied the requirements of the section, that is, that the inventory appeared on inspection to be a full and true estimate of all the property, credits and debts and that the account on inspection appeared really to be a true one showing the assets and their disposal (page 636*):—

"To ascertain this it would be necessary that the inventory and account should be passed under some examinations by the Judge's staff so as to detect manifest mistakes or omissions. If such were discussed, the papers would not satisfy the section; and the Judge would have power to require the executor or administrator to amend the account in order to comply with the section; and for this purpose the section empowers him to extend the time."

The learned Judges at page 639* mentioned that reference had been made to the English practice and held that English practice was hardly a guide in India because the provisions of the Indian Succession Act differed very materially from the law in England.

In my opinion, whatever rights the applicant had, as the legatee under the Will, are now merged in the agreement of December 20, 1923.

The learned Advocate-General contends that she is entitled to come in under the provisions of the English practice as next of kin. The English practice refers to next of kin in connection with an administrator and not an executor. If the applicant has any rights *dehors* the Will,

her proper remedy is to file an action against the executor of her husband's estate to claim an enhanced maintenance or a widow's life-estate as she may be advised. The present proceedings, in my opinion, are misconceived. The summons, therefore, will be discharged.

Having regard to the fact that this point had not before come up for decision in any case in this Court of which I am aware, and as the applicant appears to have been misled by the English practice on the point, I think the proper order will be that there should be no order as to costs. Counsel certified.

Z. K.

Summons discharged.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 416
TO 419 OF 1925.

July 15, 1927.

Present :—Mr. Justice B. B. Ghose
and Mr. Justice Roy.

BANGSHIRAM MANDAL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

PRASANNOYOYI DEBI—PLAINTIFF
AND ANOTHER—*Pro forma* DEFENDANT—
RESPONDENTS.

Landlord and tenant—Construction of patta—Rent payable partly in kind and partly in cash—Market price of grain fixed—Suit for arrears of rent—Fluctuation of market price—Landlord, whether entitled to value of paddy at current rate or rate fixed in patta—'Unavoidable reason', indefiniteness of.

A patta after stating that rent will be payable in cash and in paddy provided that, if for an unavoidable reason the tenant is unable to pay the paddy, its market-price at the rate of Rs 4 per *pali* should be paid. This amount was fixed at Rs. 31-5 and the total price of the paddy together with road and public cesses were to be paid according to certain *kists*. In a suit for rent the landlord claimed the price of paddy which was not delivered at its market price on the date of suit :

Held, (1) that the landlord was not entitled to claim the value of paddy at its market-price at the date of suit but only its price as stated in the *patta* ; [p. 26, col. 2.]

(2) that the fact that no unavoidable reason was pleaded by the tenant was quite immaterial as it is too vague an expression for any Court of Justice to take cognisance of. [*ibid.*]

Appeals against the decrees of the District Judge, Khulna, dated the 4th of November, 1924, modifying those of the Munsif, Third Court, Bagerhat, dated the 17th of December, 1923, in Nos. 416, 418 and 419 and No. 417 dated the 22nd of January, 1924, respectively.

(1) 31 C. 628; 8 C. W. N. 578.

*Page of 31 C.—[Ed.]

Dr. J. N. Kanjilal (with him Babu Nripendra Chandra Das), for the Appellants.

Rai Dwarkanath Chakravarti Bahadur and Babu Hemendra Chandra Sen, for the Respondents.

JUDGMENT.—These four appeals arise out of four suits for rent. The only question in controversy is whether, according to the terms of the *patta* by which rent was payable partly in cash and partly in kind by delivering a certain quantity of paddy, for non-delivery of the paddy, the present market price should be recovered by the plaintiff or the price stated in the *patta*. After stating that the rent will be payable in cash and in paddy, the words in the *patta* are to this effect: "If for an unavoidable reason you are unable to pay the paddy its market price at the rate of Rs. 4 per *pali* should be paid. The amount is Rs. 34-5. The total price of the paddy together with road and public works cesses amounting to Rs. 50 should be paid according to the *kists* given below and you will take a receipt after payment of the money." Then it follows—"Except on the ground that all the lands of the *mahal* lay fallow, you shall not pay the price of the paddy." Then follow the other provisions which it is unnecessary to mention. At the end of the document, the *kists* are given. It is stated that the cash rent is Rs. 15-11 and the price of paddy is Rs. 34-5 making a total of Rs. 50. Lastly, different *kists* are given in which the amount of Rs. 50 was to be paid. The Munsif gave a decree to the plaintiff according to the price of the paddy fixed in the *patta*, that is to say Rs. 34-5-0. The District Judge reversed that decision and gave the plaintiff a decree at the rate claimed, *viz.*, the present market price of the paddy. On appeal by the defendants it is contended on their behalf that, having regard to the terms in the *patta*, they are not bound to pay more than the price of the paddy stated in that document. It is contended on behalf of the plaintiff-respondent that that price was fixed in the happening of one event only, that is, if for any unavoidable reason the tenant was unable to pay the value stated instead of the paddy if the whole of the land remained fallow, otherwise, the plaintiff is entitled to get the present market value of the paddy. Upon reading the entire *patta* we are unable to agree with the District Judge and to accept the contention on behalf of the respondent.

ent. Even if it be considered to be a suit for damages, the amount of damages is mentioned in the deed itself. That being so, we cannot say that the amount should be in lieu of the paddy at one rate if the tenant cannot deliver the paddy for any unavoidable reason and at a different rate for any other reason which the Court does not consider to be unavoidable. The question that no unavoidable reason was pleaded seems to us to be quite immaterial because it is too vague for any Court of Justice to take cognizance of. The defendant may say "I am too poor" or other things may be said in support of his inability to pay. These are matters which cannot be taken into consideration. Where, as a matter of fact, the landlord has chosen to fix the price and stated the *kists* in which the rent is to be paid on that basis it must be considered that at the time the landlord thought that the highest amount that could be realised on account of the paddy was fixed under the contract if by some chance the price of the paddy has increased subsequently, it does not seem to be right that that contract is to be given the go-by by giving the present market price to the plaintiff. In this view, the decree of the Subordinate Judge must be set aside and that of the Munsif restored with proportionate costs in both the Courts.

This judgment will govern all the four appeals

A. N. A.

Appeals allowed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 258 of 1927.

October 24, 1927.

Present:—Mr. Justice Pullan.

Thakur SUBHKARAN SINGH

AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Thakur GANESH BAKHSH SINGH

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Partition—Plot of land left joint—One co-sharer taking exclusive possession and planting trees—Right of other co-sharers to joint possession of land and trees.

In a partition between co-sharers a certain plot of land was left undivided for the joint use of all the co-sharers. One of the co-sharers took exclusive possession of the said plot and planted trees thereon. In a suit by the other co-sharers for joint possession,

Held, that the plaintiffs were entitled to joint possession of the land and the trees planted thereon.

Midnapur Zamindari Co. v. Naresh Narayan Roy (1), distinguished.

Appeal against the decree of the Subordinate Judge, Sitapur, dated the 4th June, 1927, in Civil Appeal No. 55 of 1926, modifying that of the Munsif, Bismar, dated the 29th November, 1926.

Mr. Ali Zaheer, for the Appellants.

Mr. Bishambhar Nath Srivastava, for the Respondents.

JUDGMENT.—The appellants in this case are co-sharers in the village who have taken exclusive possession of a plot which is recorded as being in the *Shamlat patti* of all the co-sharers. The appellants have planted trees in this plot in an attempt to incorporate it in their own grove. The plaintiffs in the suit are members of the co-parcenary body who put forward the reasonable plea that they should be given joint possession in the land which was actually given them as joint land by the partition. The suit has been resisted on many grounds but it is evident that the appellants' main interest is to retain their trees. In argument I have been referred to the decision of their Lordships of the Privy Council reported in *Midnapur Zamindari Co. v. Naresh Narayan Roy* (1). Their Lordships in that case remarked that "in India each co-sharer in common land is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers.....Such an exclusive use of lands held in common by a co sharer is not an ouster of the co-sharers.....When co-sharers cannot agree as to how any land held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co sharer of the lands held in common is to obtain a partition of the lands." On the basis of this ruling I am asked to hold that the proper course for the plaintiffs to have adopted was to file a suit for partition. Obviously such a course is impossible in a case where partition has already been effected, and all that the parties wish to do is to sub-divide a small portion of land left for the joint use of the co-sharers. In

my opinion this is a case in which the other co-sharers are fully entitled to get joint possession of the plot and so far the decree of the lower Appellate Court is correct. I do not, however, understand from that decree whether the lower Appellate Court meant to uphold the decision of the Court of first instance, to the effect that joint possession was to be given by uprooting the trees, nor do I see how joint possession can be given by uprooting the trees; rather it appears to me that by planting trees on joint land the appellants must be assumed to have been acting in the interests of all the co-sharers who will all alike profit from the planting of these trees. How they can enforce their rights to the profits of the trees by uprooting them is not clear to me. All that, in my opinion, the plaintiffs are entitled to is a further declaration of their rights in the enjoyment of the land, that is to say it should be made clear that they are entitled to the use of the land. It was the finding of the lower Court that the land was used for irrigation purposes and if it is found that the appellants' trees interfere with irrigation it might be necessary to remove them, but there is no such finding of the Courts and I have no reason to suppose that the planting of trees interferes in any way with the use of the land for irrigation. I, therefore, uphold the judgment of the lower Appellate Court but add to his decree these words, that "the trees along with the land remain in the joint possession of the parties and that all rights formerly exercised by the co-parcenary body of the land, such as the rights to irrigation, shall remain intact." Under the circumstances the parties will bear their own costs in this appeal. The orders as to costs in the Courts below are maintained.

G. H.

A. N. A.

Judgment upheld.

BOMBAY HIGH COURT.

INSOLVENCY CASE No. 36 OF 1925.

March 4, 1927.

Present :—Mr. Justice Tatyarkhan.
MOTOR EMPORIUM COMPANY

versus

N. H. MOOS.

*Companies Act (VII of 1913), ss. 223, 229, 230—
Presidency Towns Insolvency Act (III of 1909), s. 40*

(1) 80 Ind. Cas. 827; 51 I. A. 293; A. I. R. 1924 P. C. 144; 26 Bom. L. R. 651; 47 M. L. J. 23; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750 (P. C.);

—*Winding-up of company—Crown debts, whether entitled to priority—Prerogative of Crown—Construction of Statute.*

The Crown has a right, in the winding-up of a Company under the Companies Act, to the payment of its debts in priority to all the other creditors of the Company. [p. 29, col. 2.]

Section 229 of the Companies Act read with s. 228 of the Act makes the provisions of s. 49 of the Presidency Towns Insolvency Act applicable in the case of insolvent Companies. [*ibid.*]

Wherever a Statute has dealt with the powers of a Crown under its prerogative, the prerogative must be taken to be merged in the Statute and the powers previously within the prerogative can be exercised only in the manner and subject to the limitations contained in the Statute. [p. 28, col. 1.]

De Keyser's Royal Hotel Ltd. v. Regem (1) and *In re Webb & Co. (Smithfield)* (5), applied.

Mr. Kanga, Advocate-General, for the Secretary of State.

JUDGMENT.—An important question under the Indian Companies Act has been raised in this liquidation as regards the right of the Crown in a winding-up to payment of its debt in priority to all other creditors of the Company.

The Secretary of State for India is a judgment-creditor of the Company in liquidation for Rs. 3,922-15-8 including costs, for monies due in respect of certain trade or commercial dealings between the parties, and he claims that his debt is a Crown debt and that under the Indian Companies Act it is entitled in the winding-up to priority of payment over all other creditors of the Company.

It is not disputed that the debt is a Crown debt but the liquidator denies that it is entitled to priority under the Indian Companies Act.

It is to be observed at the outset that the Crown has two distinct prerogatives of which it may avail itself both in bankruptcy and in the winding-up of Companies. The one is that the Crown is not bound by the Statute unless by express mention or necessary implication, and can, therefore, pursue its remedies irrespective of any limitations imposed by such a Statute. The other prerogative is the right to be paid in priority to all other creditors of equal degree, whenever the rights of the Crown and the subject come into competition. Where, however, the Legislature has dealt with the powers under the prerogative, the prerogative must be taken to be merged in the Statute, and the powers previously within the prerogative can be exercised only in the manner and subject to the limitations con-

tained in the Statute. See *De Keyser's Royal Hotel Ltd., v. Regem* (1).

In these proceedings, however, no question of the aforesaid common law prerogative of the Crown arises, for the right of the Crown to priority has been dealt with by the Indian Companies Act and the argument on both sides has been confined to the provisions of that Act.

In the insolvency of an individual all Crown debts are entitled to priority of payment over all other debts under s. 49 of the Presidency Towns Insolvency Act; and the Advocate-General contends that these provisions of the Insolvency Law have been assimilated in the Indian Companies Act and made applicable in the winding-up of a Company in liquidation by s. 229 of the Indian Companies Act, thereby putting Crown debts in winding-up in the same position as Crown debts in insolvency. His case, therefore, rests on s. 229 read with s. 49 of the Presidency Towns Insolvency Act.

On the other hand the liquidator contends that s. 229 has no application. For, it does not refer to matters of substantive law in insolvency but only to the "rule" made under the Insolvency Act, and it is such "rules" only which are made applicable in winding up and these "rules" contain no provision for priority of Crown debts.

It is further contended on behalf of the liquidator that the only provision in the Indian Companies Act dealing with the priority of Crown debts is contained in s. 230 of the Act which expressly gives priority only to those Crown debts which are therein mentioned, and that, therefore, s. 230 must be regarded as exhaustive and Crown debts not included in the section must be taken to have been excluded from priority. It is urged that the Crown debt in question obviously does not fall under s. 230, for that section provides for priority only of all "revenue, taxes, cesses and rates payable to the Crown" whereas the Crown debt in question is merely a trading debt, and it has, therefore, no priority over the other creditors.

Put in the form of an issue, the contentions of the parties, therefore, come to this: whether the priority of payment of all Crown debts which prevails in insol-

(1) (1919) 2 Ch. 197 at p. 216; 88 L. J. Ch. 415; 120 L. T. 396; 63 S. J. 445; 35 T. L. R. 418.

veney under s. 49 of the Presidency Towns Insolvency Act obtains equally in the winding-up of a Company in liquidation by reason of s. 229 of the Indian Companies Act, or, whether only those Crown debts have priority in winding-up which are expressly mentioned in s. 230 of the Act. The answer to this depends on whether s. 229 introduces the provisions of s. 49 of the Presidency Towns Insolvency Act into the Indian Companies Act.

Section 49 (1) (a) of the Presidency Towns Insolvency Act provides that "in the distribution of the property of the insolvent there shall be paid in priority to all other debts—(a) all debts due to the Crown or to any local authority," so that in insolvency all Crown debts are given priority over all other debts of an insolvent. Section 229 of the Indian Companies Act provides that "in the winding-up of an insolvent Company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable...as are in force for the time being under the Law of Insolvency with respect to the estates of persons adjudged insolvent." It is, therefore, argued that under s. 229 debts due to the Crown in winding-up are entitled to the same priority which they have under s. 49 of the Presidency Towns Insolvency Act, and that, therefore, the Crown debt in this liquidation is entitled to priority.

So far as the argument is based on the use of the word "rules" in s. 229 I am unable to accept the liquidator's contention. The "rules" referred to in s. 229, have reference to "the rules that shall prevail and be observed with regard to the respective rights, etc." which can refer only to matters of substantive law, such as are contained in s. 49 of the Presidency Towns Insolvency Act. To place a construction that by these rules is meant the rules framed under the Presidency Towns Insolvency Act would be repugnant to the context. The words in s. 229 "the same rules shall prevail...as to debts provable" are wide enough to bring in that part of the insolvency law which directs which kind of debt is to be paid in priority to others, that is to say, the provisions of s. 49 of the Presidency Towns Insolvency Act apply in cases of winding-up of insolvent Companies. This construction is supported by English decisions. See *In re*

Leng (2), *In re Heywood* (3), *In re Whitaker* (4), *In re Webb & Co. (Smithfield)* (5), affirmed by the House of Lords in *Food Controller v. Cork* (6).

Relying on the last mentioned case the liquidator further argued that priority as regards Crown debts should be confined to the debts mentioned in s. 230 of the Indian Companies Act. Under the English Law, the provisions of the Bankruptcy Act as regards priority of Crown debts are the same as are contained in the English Companies Act of 1908, s. 209; and the difficulty which arises here from the difference between s. 49 of the Presidency Towns Insolvency Act and s. 230 of the Indian Companies Act does not now exist under the English Law. The ratio in *Food Controller v. Cork* (6) seems to be that whenever a Statute refers to the rights of the Crown the prerogative of the Crown should be confined within the limits mentioned in the Statute. Applying that principle, effect must be given to s. 229 read with s. 228 which make the provisions of s. 49 of the Presidency Towns Insolvency Act applicable in case of insolvent Companies. On these grounds, I am unable to accede to the argument of the liquidator, and must hold that the Crown has, in winding-up, the priority given to it under s. 49 of the Presidency Towns Insolvency Act. There is no reason why the creditors of an insolvent Company should be in a better position as regards priority of Crown debts than the creditors of a private individual.

I, therefore, hold, that the Crown debt in this liquidation is entitled to be paid in priority. Costs of both parties to come out of assets in the hands of the liquidator: those of the liquidator to be taxed as between attorney and client. Counsel certified.

Lastly, I may add that having regard to the different and various activities of Government in this country of a commercial nature, the Legislature might well consider whether the law in India should not be brought in line with the law prevailing

(2) (1895) 1 Ch. 652 at p. 657; 64 L. J. Ch. 468; 12 R. 202; 72 L. T. 407; 43 W. R. 408.

(3) (1897) 2 Ch. 593 at p. 598; 67 L. J. Ch. 25; 77 L. T. 423; 46 W. R. 72.

(4) (1901) 1 Ch. 9 at p. 14; 70 L. J. Ch. 6; 49 W. R. 106; 83 L. T. 449; 17 T. L. R. 24.

(5) (1922) 2 Ch. 369; 91 L. J. Ch. 741; 127 L. T. 373; 66 S. J. 438; 38 T. L. R. 579.

(6) (1923) A. C. 647; 92 L. J. Ch. 587; 67 S. J. 793; 39 T. L. R. 699.

in England, and by express enactment confine the preferential treatment of Crown debts to the debts mentioned in s. 230.

A. N. A.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 378 OF 1924.

April 1, 1927.

Present:—Mr. Justice Waller and

Mr. Justice Madhavan Nair.

T. VENKATASUBBA RAO—PLAINTIFF—
APPELLANT

versus

B. SIVAJI alias BALAJISWAMI—

DEFENDANT—RESPONDENT.

Inam—Service inam land—Resumption by Government—Suit by grantee for ejectment—Burden of proof of right to eject.

When the right of Government to resume an *inam* is questioned by a person who was not a party to the resumption proceedings, the Government or its assignees will have to substantiate the right. [p. 30, col. 2; p. 31, col. 1.]

There is no presumption that an *inam* grant is a grant of both the *varams*. A grantee who claims the right to eject, has, therefore, to prove that the *kudivaram* right was included in the original grant where the defendant does not admit that he came into the possession of the lands as a tenant. [p. 31, col. 1.]

Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi (1), followed.

Nainapillai Marakayar v. Ramanathan Chettiar (2), distinguished.

Second appeal against the decree of the Sub-Judge, Berhampore, in A. S. No. 62 of 1923, preferred against that of the Court of the District Munsif, Aska, in O. S. No. 892 of 1920.

Mr. S. T. Srinivasagopalachariar, for the Appellant.

Mr. K. N. Rajagopala Sastri, for the Respondent.

JUDGMENT.—The facts of the case so far as they are relevant to the present second appeal are very simple. The plaintiff is the proprietor of Devabhumi village. His suit is for possession of the suit lands and for arrears of rent. He alleged that the lands formed the emoluments of a barber's service *inam*, that the Government resumed the *inam* in 1916, and granted him a *patta* and that when the defendant refused to pay the rent demanded of him, he gave him a notice to quit and filed this suit. The defendant amongst other things contended that the suit lands did not form part of the barber's service

inam and that the plaintiff had on no account any right to eject him. Various issues were raised in the case; but the main issue was "whether the plaintiff has the right to eject the defendant?"

The District Munsif found that the lands formed part of the barber's service *inam* and that the plaintiff proved his right to eject the defendant. His conclusion on the latter point was mainly based on the ground that in the case of *inam* grants, the grant was of both the *varams* and that the defendant had adduced no evidence to show that the *inam* consisted only of the *melvaram* right. He further supported his conclusion by referring to the fact that "the Government also appeared to have dealt with the land as *inam*" in its resumption proceedings. He, therefore, came to the conclusion that the Government has a right to resume the grant and give *patta* to the plaintiff. A decree was, therefore, given in plaintiff's favour.

In appeal the learned Subordinate Judge held that in law there is no presumption that an *inam* grant is a grant of both the *varams*, that each case has to be judged on its merits and that in this case it was not proved by the plaintiff that the original grant was by one who owned the *kudivaram* right and that the *kudivaram* right was included in the grant. He, therefore, held that the plaintiff was not entitled to a decree. The learned Subordinate Judge also held that the Government's resumption proceedings will not in any way bind the defendant. The District Munsif's decree so far as it related to the recovery of possession was, therefore, reversed.

In second appeal the plaintiff-appellant first argued that the resumption proceedings of the Government in 1916 obviously related to a resumption of both the *varams* and that under s. 111, Regulation VI of 1831, and the Board's Standing O. LV, cl. 3 it is not now open to the Court to re-open the question and find out the nature of the original grant. We are not satisfied that these provisions in any way support the appellant's contention. No authority has been cited in justification of the argument. The defendant was not a party to the resumption proceedings. There is nothing to show as pointed out by the learned Subordinate Judge that "either the resumption or the grant of *patta* was made after notice to the defendant." It appears to us that when the right of Government to

resume an *inam* is questioned, the Government or its assignees will have to substantiate the right.

The real question for consideration is "what is the nature of the original *inam* grant?" Was the original grant by one who owned the *kudivaram* right and did the grant include the *kudivaram* right? According to the decisions of the Privy Council, there is no presumption that an *inam* grant is a grant of both the *varams*; each case has to be decided on its facts and merits [see *Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi* (1)] and since the appellant claims the right to eject, he has to prove that the *kudivaram* right was included in the original grant. The decision in *Nainapillai Marakayar v. Ramanathan Chettiar* (2) is inapplicable to the present case as the defendant does not admit that he came into the possession of the lands as a tenant.

The suit lands form a pre-settlement *inam*. It was originally in the possession of a barber but though the lineal descendants of that barber are alive, the lands have been in the possession of the defendant and his ancestors for a very long time. The defendant had been making money payments to the plaintiff, which payments, however, do not form the basis for this suit. How the defendant or his ancestors came into possession is not explained. The only evidence with regard to the nature of the grant is the *gudikat* account. It does not show that land itself constituted the emoluments of the service. The learned Subordinate Judge refers to the evidence regarding the nature of the grant in para. 9 of his judgment. We agree with his conclusion based on the evidence that the plaintiff has not proved that the Government has a right to resume the land and give him a *patta*. The Appellate Court's decree is, therefore, right.

We may note that the respondent before us has sought to support the lower Court's decision on other grounds also relying on *Ayyagari Venkata Suryanarayana v. Makka*

Venku Naidu (3) and the defendant's adverse possession against the plaintiff for over 12 years; but as we are of opinion that the decision of the learned Subordinate Judge, on the ground on which he has based it, is right, we did not hear his supplemental arguments. The second appeal is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

(3) 97 Ind. Cas. 253; A. I. R. 1926 Mad. 1155.

BOMBAY HIGH COURT.

LAND ACQUISITION REFERENCE NO. 4 OF 1925.

March 25, 1927.

Present:—Mr. Justice Talyarkhan.

GOVERNMENT OF BOMBAY

versus

N. H. MOOS.

Land Acquisition Act (I of 1894), ss. 11, 23 (2)—Acquisition of toka land—Claimant, whether entitled to 15 per cent. on entire market value or only on his interest—'Market-value,' meaning of.

The expression 'market value of the land' in s. 23, sub-s. (2) of the Land Acquisition Act *prima facie* means the market value of all interests in the land; but in cases where Government have an interest in the land that expression must mean the claimant's interest alone, that being the only interest acquired by Government. [p. 33, col. 2.]

Where land in which Government have an interest is acquired, the fifteen per cent. awardable under s. 23 (2) of the Act should, therefore, be calculated not upon the entire market value of the land but only upon the value of the claimant's interest after deducting the amount payable to Government. [*ibid.*]

Government of Bombay v. Esufali (4) and *Mangaldas Girdhardas v. Assistant Collector, Ahmedabad* (5), applied.

FACTS.—Certain lands held on *toka* tenure were acquired by the Government under the Land Acquisition Act. The Land Acquisition Officer fixed the entire value of the lands at Rs. 82,000, valued the Government claim at Rs. 38,908-7-8 and, deducting the latter amount from the entire value, awarded Rs. 43,351-8-4 with 15 per cent. on the said amount, to the claimant. The claimant contended that the officer should have awarded 15 per cent. not on the value of his own interest, namely, Rs. 43,351-8-4 but on the entire value of the land, namely, Rs. 82,000. The matter was consequently referred to the Court.

Mr. Kanga, Advocate General, for the Government.

Mr. Mulla (with him Mr. B. J. Desai), for the Claimants.

(1) 68 Ind. Cas. 538; 45 M. 586; 16 L. W. 102; 31 M. L. T. 54; (1922) M. W. N. 749; 43 M. L. J. 640; A. I. R. 1922 P. C. 292; 37 C. L. J. 199; 27 C. W. N. 245; 49 L. A. 286 (P. C.).

(2) 82 Ind. Cas. 226; 47 M. 337; A. I. R. 1924 P. C. 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 83; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

JUDGMENT.—[His Lordship stated the facts and proceeded:—] In his application the claimant sets out seven grounds of objection to the award, which may be grouped together under the following heads, namely.—

(i) That Government not being a "person interested" within the meaning of s. 4 (b) of the Land Acquisition Act they are not entitled to any portion of the compensation.

(ii) That in any event the amount awarded by the Land Acquisition Officer to Government is excessive.

(iii) That the Land Acquisition Officer ought to have added 15 per cent. not merely to the balance of the compensation after deducting the amount awarded to Government, but to the aggregate compensation, namely, Rs. 82,260.

The Government claim was valued by the Land Acquisition Officer on a particular basis. After the award was made a Divisional Bench of this Court laid down in *Moos v. Government of Bombay* (1) the principles on which Government claim for *toka* should be valued. If those principles were accepted in the present case, the Government claim would be reduced from Rs. 38,508-7-8 to Rs. 29,244. Government accordingly agreed to refund the difference, namely, Rs. 9,664-7-8 to the claimant, and they refunded the same with fifteen per cent. added thereto and interest thereon at 6 per cent. per annum.

At the hearing before me, Mr. Mulla for the claimant abandoned the first ground of objection. No question arises now under the second ground of objection as the parties are agreed as to the valuation of the Government claim. The only point, therefore, that remains to be considered is that raised by the third ground of objection.

To appreciate the points raised by the parties under the third ground, it is necessary to refer to certain provisions of the Land Acquisition Act.

The first section to be noted is s. 11 by which it is provided that the Collector after making the inquiry, prescribed by the section, shall make an award under his hand of—

- (i) the true area of the land;
- (ii) the compensation which in his opinion shall be allowed for the land; and
- (iii) the apportionment of the compensa-

tion among all the persons known or believed to be interested in the land...

Before passing further it may be observed that the expression "compensation" necessarily includes the value of *all interests* in the land for, the same has to be apportioned among *all* persons interested in the land. The Land Acquisition Officer, in the present case, does not state in his award the value of all interests, which is Rs. 82,260. To this extent his award does not comply with the provisions of cl. (ii). It is also to be observed, and it was conceded by the Advocate-General, that Government are not "a person interested in the land" within the meaning of s. 11 (iii).

The next section to which reference may be made is section 23. That section applies in terms to the Court; but its provisions have been made applicable to proceedings before the Land Acquisition Officer, by virtue of s. 15 of the Act. Section 23 says that:—

"In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration," six matters, being those comprised in the six clauses to that section. "The matter comprised in the first clause is 'the market value of the land.'"

Sub-clause (2) of s. 23, which is most material to the present case, is as follows:—

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market value, in consideration of the compulsory nature of the acquisition."

Pausing here for a moment it may be observed that the compensation to be awarded under s. 23 (1) may be the market value only or that it may consist of the market value and the remaining five items or some or one of them. The fifteen per centum provided for in s. 23 (2) has to be added only to the market value and not to any other item. Moreover, it has to be added to the market value of "the land" and the whole question in this case is what is meant by the expression "the land" in ss. 23 (2).

It has been contended by the claimant that the words "the land" mean the market value of *all* interests in the land under acquisition which, he says, in the present case, is Rs. 82,260, and that the Land Acquisition Officer ought to have added the fifteen per cent. in the first instance to Rs. 82,260, that he should have then deducted Rs. 29,244 being the amount of the Govern-

(1) 91 Ind. Cas. 357; 27 Bom. L. R. 1237; A. I. R. 1926 Bom. 47.

ment claim from Rs. 82,260+15 per cent., and awarded the balance to the claimant. The first because this contention is borne out by the decisions in *Collector of Belgaum v. Bhimrao* (2) and *Trustees for the Improvement of the City of Bombay v. Jalbhoy Ardesir Sett* (3) which were cited for the claimant.

The answer given to this by the Advocate-General on behalf of Government, is, first, that in cases where Government have an interest in the land under acquisition, the words "the land" mean the claimant's interest alone in the land, and, secondly, that if the claimant's arguments were to be accepted by the Court, the claimant would be receiving 15 per cent. on the amount of the Government claim,—a result which on the face of it is inequitable. In support of the first branch of the argument reliance was placed on a ruling of a Divisional Bench of this Court in *Government of Bombay v. Esufali* (4). In that case the relation between Government and the claimant was that of landlord and tenant and the question for the determination of the Court was whether Government were entitled to any portion of the compensation. It was held by Macleod, J., that they were not. But the decision was reversed in appeal. In the course of his judgment Batchelor, J., observed as follows (page 51*):—

"In *Trustees for the Improvement of the City of Bombay v. Jalbhoy Ardesir Sett* (3), following *Collector of Belgaum v. Bhimrao* (2), I expressed the opinion that the Act contemplates an inquiry to ascertain the value of the land itself considered as if all interests combined to sell; and I see no reason at present to alter that opinion as to the general scheme of the Act. It is, however, admitted that the point now before us was not decided in *Jalbhoy's case* (3), but is *res integra* for our decision now.....But... there is nothing in the Act which excludes from its operation cases where Government hold some interest in the land to be acquired."

The case was remanded to the trial Judge for the determination of the following issues:—

(i) At the material time what interest had the respondent (claimant) in the land (apart from the building itself)?

(2) 10 Bom. L. R. 657.

(3) 3 Ind. Cas. 757; 11 Bom. L. R. 674; 33 B. 483.

(4) 5 Ind. Cas. 621; 12 Bom. L. R. 34; 34 B. 618.

*Page of 12 Bom. L. R.—[Ed.]

(ii) To what compensation is he entitled in respect of that interest?

This decision is an authority for the proposition that where Government have some interest in the land to be acquired, all that the claimant is entitled to is the value of his interest in the land, and it is this value alone that has to be determined by the Court. This case was followed in *Mangaldas Girdhardas v. Assistant Collector, Ahmedabad* (5) and the ruling was accepted by Macleod, C. J., in *Moos v. Government of Bombay* (1) cited above.

It was pointed out by Mr. Mulla for the claimant that both in *Esufali's case* (4) and *Mangaldas' case* (5) the relation between Government and the claimant was that of landlord and tenant, while in the present case Government claimed no proprietary interest in the land under reference, but had only a right to levy *toka* assessment, with the additional right to increase the assessment in 1929-30. But in *Moos's case* (1) also the only claim of Government was for *toka* assessment, as in the present case, and Macleod, C. J., accepted the principle of the decision in *Esufali's case* (4) though it was a reversal of his own judgment delivered while he was a puisne Judge.

I think that *prima facie* the expression "market value of the land" in s. 23 (2) means the market value of all interests in the land. But in cases where Government have an interest in the land, that expression must mean claimant's interest alone, that interest being the only interest that is acquired by Government. In the present case, Government have admittedly an interest in the land, though it is an interest limited to their *toka* claim. The Land Acquisition Officer, it seems, followed the decision in *Esufali's case* (4) and he determined the market value of the claimant's interest alone and added fifteen per cent. to it.

As regards the contention that it would be inequitable if the claimant were to get 15 per cent. on the amount of the Government claim, I think that the Court has to determine the meaning of the section in question, and if the plain meaning of the section involved such a result, the Court must give effect to it, leaving it to the Legislature to remedy the defect. In the present case, however, the question of

(5) 61 Ind. Cas. 584; 23 Bom. L. R. 148; 45 B. 277.

inequity does not arise in view of the interpretation I put upon this section.

The reference must, therefore, be dismissed.

As regards costs, it is to be observed that after the reference was filed, Government paid to the claimant Rs. 11,114-3-8 in all, thus admitting the validity of the claimant's objection that the amount awarded by the Land Acquisition Officer to Government was too much. At the same time the only point argued before me was as to the 15 per cent. and on this Government have succeeded.

The order for costs, therefore, will be—

(i) Government to pay claimant's costs of the correspondence between the parties from July 18, 1925, to May 4, 1926, including the correspondence between the claimant's attorneys and the claimant's engineers between those dates in connection with the *toka* claim of Government.

(ii) Claimant to pay cost of Government up to July 8, 1925, and also costs of Government after May 4, 1926, up to February 27, 1927, including costs of all postponements.

(iii) As to costs after February 27, 1927, up to and including to-day, each party to bear his own.

(iv) Claimant to pay costs of Government after to-day.

A. N. A.

Reference dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 916 OF 1926.

April 5, 1927.

Present:—Mr. Justice Wallace.

RAMANATHA MUDALIAR AND AN-

OTHER—PETITIONERS

versus

T. K. VIJAYARAGHAVALU NAIDU

—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 74 (ii)—Summary administration of insolvent's estate—Appointment of interim Receiver, effect of—Purchaser in execution sale, rights of.

When summary administration of the estate of a debtor has been ordered the property of the debtor under s. 74 (ii) of the Provincial Insolvency Act vests in the Court as a Receiver on the date of admission of the insolvency petition, in the sense in which the term is used in s. 28 (2) and not merely as an *interim* Receiver, and when the property is so vested it cannot, without the permission of the Court, be the subject of an execution sale.

But if property which has so vested in the Court is sold in execution without the permission of the Court, a purchaser who has bought in good faith is entitled to retain the property, and the creditors of the insolvent are entitled only to the sale-proceeds of the property as assets for distribution among them.

Petition under s. 75, cl. 1 of Act V of 1920, praying the High Court to revise the order of the District Court, East Tanjore at Negapatam, in C. M. A. No. 73 of 1926, preferred against that of the Court of the Subordinate Judge of Negapatam, in E. A. No. 278 of 1926, in S. O. S. No. 2025 of 1921.

Mr. S. T. Srinivasagopalachariar, for the Petitioners.

Mr. K. S. Desikan, for the Respondent.

JUDGMENT.—Second petitioner seeks to have revised an order of the District Judge, Negapatam, setting aside a Court execution sale at which the second petitioner was the Court auction-purchaser. The date of sale was 16th April, 1926. On 7th April, 1926, the judgment-debtor had presented an insolvency petition to the District Munsif of Negapatam. The District Munsif passed an order on that petition which has occasioned a good deal of confusion. He appointed the Official Receiver an *interim* Receiver and directed that the property vest in him and then went on to say "summary administration has been ordered." Now, when summary administration has been ordered, the property of the debtor under s. 74 (ii) vests in the Court as a Receiver on the date of admission of the insolvency petition. Hence the appointment of an *interim* Receiver was not only superfluous but also misleading. The property had already vested in the Court "as a Receiver" and the Court, therefore, was the Receiver. It is contended by the petitioner that as only an *interim* Receiver had been appointed the vesting of the property in him could not avail to defeat the execution sale, and that s. 74 (ii) means no more than that the Court holds the property as an *interim* Receiver. I am not able to endorse this view. The language of s. 74 (ii) is almost the same as that of s. 28 (2) and the words "vesting" and "Receiver" must be interpreted in the same way in both sections; no one has contended that when the vesting in the Receiver within s. 28 (2) has come into force, the property is so vested that it can, without the permission of the Court, be the subject of an execution sale. Similarly under s. 74 (ii) I take it that when the pro-

perty is vested in the Court as a Receiver, it holds it, not as *interim* Receiver, but as a full Receiver in the sense in which the term is used in s. 28 (2). It follows then that on the admission of the insolvency petition (the Court held the judgment-debtor's property as a Receiver and was so holding it when the execution sale took place.

So far I do not disagree with the learned District Judge. But he has omitted to consider the provisions of s. 51 of the Act, especially sub-s. (3). As I read that section, if the petitioner was a Court-auction-purchaser in good faith, he is entitled to retain the property and the creditors of the insolvent are entitled only to the sale-proceeds of the property as assets for distribution among them, i. e., the sale would not be set aside but would prevail against the Receiver, and the property could not be returned to the Receiver, as the lower Court has ordered. The lower Court has, therefore, omitted to apply the proper law to the case and it will, therefore, have to go into this question and decide whether s. 51 (3) applies to the case.

I set aside its order and direct that it re-hear the appeal, both parties being allowed to adduce evidence. Costs in this Court and below will abide the event.

V. N. v.

Case remanded.

ODDH CHIEF COURT.

CIVIL REVISION No. 42 of 1927.

October 17, 1927.

Present:—Sir Louis Stuart, Kt.,
Chief Judge.Darogha AZAM ALI—PLAINTIFF—
APPLICANT

versus

SHAMSHER ALI—DEFENDANT—
OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 120—Money advanced for purchase of horse—Agent buying mare—Sale of mare by agent—Right of lender to follow proceeds in the hands of agent—Limitation.

A advanced money to S to buy him a horse. S bought a mare which A refused to take. S retained the mare and agreed to return the amount on selling the mare. S then sold the mare, whereupon A sued for recovery of the loan more than three years after the date of the loan.

Held, that A had an equitable right to follow the proceeds in the hands of S who was merely an agent and the suit being governed by Art. 120 of the first Schedule to the Limitation Act was within time.

Revision against a decree of the Subordinate Judge, Sitapur, dated the 26th May, 1927.

Mr. M. Ayub, for the Applicant.

Mr. S. M. Ahmad, for the Opposite-Party.

JUDGMENT.—The facts are as follows. Darogha Azam Ali asserts that he advanced Rs. 160 to Shamsheer Ali in order that Shamsheer Ali might purchase for him a horse of a price up to this amount. The money was advanced on the 25th December, 1923. Shamsheer Ali is alleged to have purchased a mare of this value. Darogha Azam Ali is alleged to have refused to accept the mare stating that he wanted a horse. It is alleged that Shamsheer Ali retained the mare and agreed to return the Rs. 160 and he is alleged to have sold the mare in May, 1924. The suit was brought on the 25th February, 1927. The learned Small Cause Court Judge has dismissed the suit holding that it was barred by limitation. I cannot agree with the learned Small Cause Court Judge on this point. It appears to me that this is clearly a case in which Shamsheer Ali is alleged to have sold goods as an agent entrusted to him by his principal Darogha Azam Ali and is alleged to have retained the proceeds which the principal had an equitable right to follow in his hands. The period of limitation applicable would thus be according to the decision of their Lordships of the Judicial Committee in *Gurudas Pyne v. Ram Narain Sahu* (1) a period of six years. The present Article of Limitation applicable would be Art. 120 of the First Schedule of Act IX of 1908. I hold that if it be proved that Azam Ali advanced Rs. 160 to Shamsheer Ali with which to purchase a horse, that Shamsheer Ali sold the mare in May, 1924, the suit is within time. I decide nothing more. I accordingly remit the suit to the learned Small Cause Court Judge in question for re-admission on its previous number and decision on the merits. Costs of this application will follow the result.

G. H.

Suit remitted.

(1) 10 C. 360; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. R. C. J. 543; 5 Ind. Dec. (N. S.) 575 (P. C.).

BOMBAY HIGH COURT.

INSOLVENCY PETITION No. 262-A OF 1927.

March 8, 1927.

Present:—Mr. Justice Talyarkhan.

In re HYDERBHAI HUSSEINBHAI.

Presidency Towns Insolvency Act (III of 1909), ss. 9 (e), 12 (c)—Attachment for over twenty-one days—Act of insolvency—Application for adjudication—Limitation—Three months, when begin to run—Continuing attachment, whether gives continuing cause of action.

Under s. 9 (e) of the Presidency Towns Insolvency Act, the act of insolvency is committed immediately on the expiry of the definitely fixed period of twenty-one days and there is no recurring or continuing act of insolvency where the attachment is continued for more than twenty-one days. [p. 33, col. 1.]

The period of three months within which a petition for adjudication on the basis of such an act of insolvency should be presented, by a creditor under s. 12 (c) of the Act, therefore, begins to run from the date of the expiry of the twenty-one days even though the attachment is continued for more than twenty-one days. [*ibid.*]

In re Beeston (1), followed.

Petition for adjudication.

Mr. Daphtary, for the Creditors.

Mr. Taraporewala, for the Debtor.

JUDGMENT.—This is a creditors' petition praying that Hyderbhai Husseinbhai who is alleged to be indebted to the several petitioners in the various sums set out in the petition, may be adjudicated insolvent. The act of insolvency alleged against the debtor is, that the property of the debtor consisting of the decree of the Bombay High Court passed in his favour in Suit No. 3668 of 1922 against one Ebrahim Ismail and others has been attached for a period of not less than twenty-one days in execution of a decree of this Court in Suit No. 383 of 1926 against the debtor. It is stated in the affidavit in support of the petition that the attachment was levied on or about March 23, 1926, and that the attachment is still subsisting. The petitioners contend that on these facts, which are not disputed, the debtor is guilty of an act of insolvency mentioned in s. 9 (e) of the Presidency Towns Insolvency Act, and is liable to be adjudicated insolvent on his creditors' petition.

Section 9 (e) provides that a debtor commits an act of insolvency "if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money."

It is clear that in this case the debtor

committed an act of insolvency for he allowed his property to remain under attachment for a period of not less than twenty-one days.

But Mr. Taraporewala for the debtor has argued that the petition does not comply with the requirements of s. 12 (1) (c) of the Presidency Towns Insolvency Act, which provides that "A creditor shall not be entitled to present an insolvency petition against a debtor unless—(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

It is argued that the attachment having been levied on March, 23, 1926, the act of insolvency was committed twenty-one days thereafter, that is, on April, 13, 1926, and the petition having been presented in February, 1927, the act of insolvency did not occur within three months from the date of the petition—it occurred ten months before that date—and that, therefore, under s. 12 (c) the petition cannot be entertained.

The decision on this point depends on the question whether the act of insolvency is completed once for all after twenty-one days after the attachment, or whether it is a succession of acts of insolvency after each successive period of twenty-one days during which the attachment continues, or whether the continued attachment for more than twenty-one days is a continuing act of insolvency.

The point raised by Mr Taraporewala is important both from the point of view of the insolvent and the creditors, and I find that it is not covered by any reported decisions of the Indian High Courts. It is, therefore, necessary to look to the English decisions under the Bankruptcy Act to see how a similar provision in the English Act has been construed by the English Courts, especially as the Presidency Towns Insolvency Act is based principally on the English Bankruptcy Act. In the case of *In re Beeston* (1) exactly the same question arose under s. 1 of the English Bankruptcy Act, 1890. Section 1 of that Act, which was similar to s. 1 (e) of the Bankruptcy Act of 1914, provided that "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceed-

(1) (1899) 1 Q. B. 626; 68 L. J. Q. B. 314; 47 W.R. 479; 80 L. T. 66; 6 Manson 27.

ing in the High Court, and the goods have been either sold or held by the Sheriff for twenty-one days."

In that case the Sheriff took possession in July, 1896, and the receiving order was not made until October, 1897. It was contended that the continued possession of the Sheriff for more than twenty-one days was a continued act of bankruptcy or may be a succession of acts of bankruptcy. But that argument was not upheld, and the Court of Appeal held that his subsequent continuing in possession by the Sheriff under the same seizure did not constitute a further or continuing act of bankruptcy, and that consequently there was no act of bankruptcy under the section available against the debtor. Mr. Taraporewala has relied on that case in support of his contention.

Mr. Daphtary for the petitioning creditors argued that *In re Beeston* (1) was not applicable as the wording of the English Act was different from that of the Indian Act inasmuch as in order to constitute an act of bankruptcy, the former Act contemplates holding by the Sheriff "for twenty-one days," whereas under s. 9 (e) the attachment is to be for a period of "not less than twenty-one days," and that, therefore, under the Indian Act, the act of insolvency is a continuing act. I confess I do not see any distinction between the wording of the Indian and English Acts respectively, for the expression "not less than twenty-one days" in plain English can mean nothing but for twenty-one days and not less, exactly as it is in the English Act. Therefore, twenty-one days is the period for which the property must remain attached under the Indian Act, twenty-one days is the period for which the property must be held by the Sheriff under the English Act, in order to constitute this particular act of insolvency. That being so, the decision in *In re Beeston* (1) is, in my opinion, a decision in point in construing s. 9 (e) to see whether such an act of insolvency is a recurring or continuing act. In his judgment in that case, Lindley, M. R., says (page 631*):—

"Now I will read the two sections which are important. The first is s. 1 of the Bankruptcy Act of 1890, which would avail the trustee if you could read it so as to make the act of bankruptcy come down to October, 1897, or within three months of it. But the dates are important. The *fi. fa.* was executed and the Sheriff took possession in July, 1896 and

twenty-one days after that would expire on August 17, 1896, and the receiving order, the title of the trustee, did not occur until October 1897. (The learned Judge read s. 1 of the Bankruptcy Act, 1890) Now, is it possible to fairly construe that section so as to make continued possession for more than twenty-one days either a continued act of bankruptcy, or, if it should be a succession of periods of twenty-one days, a succession of acts of bankruptcy? I do not think that is consistent with the language. We know perfectly well that acts of bankruptcy have to be regarded critically and carefully. There is no such thing as an act of bankruptcy except that which the Statute declares to be one, and when the Statute says an act of bankruptcy is committed if an execution has been levied by seizure and the goods have been held by the Sheriff for twenty-one days, that means that the seizure and holding for twenty-one days together are essential for the consideration of whether there is an act of bankruptcy or not. It seems to me it would be straining this section beyond all reason to say that there was a succession of acts of bankruptcy at the expiration of every period of twenty-one days, or that there has been one continued act of bankruptcy running over a year and a half. That appears to me to be the true construction of the section."

Rigby, L. J., and Vaughan Williams, L. J., concurred in this view of the law.

Having regard to the similarity between the Indian and English sections, in fact they are identically the same as pointed out above. I think that the view of the law taken in *In re Beeston* (1) is the correct view to take in construing s. 9 (e) of the Indian Act, and that is clear if we look to the reason of the rule as regards the period of twenty-one days. The reason appears to be that, if a debtor is unable to satisfy a decree against him, and his property is attached in execution, it shows, *prima facie*, that he is not in a position to pay his debts, and, therefore, is liable to be adjudged an insolvent in order that his property may be distributed rateably amongst his creditors. But the Legislature provides that a certain period, after attachment, should be given to the debtor as an allowance made to him in order to enable him to pay off the debt and redeem both his property and his character, and that period is fixed both in India and England at twenty-one days. It is then provided that if the debtor fails to do so within that

*Page. of (1899) I. Q. B.—[Ed.]

period, he will be held to have committed an act of insolvency. It is, therefore, clear that the act of insolvency is committed immediately on the expiry of the definitely fixed period of twenty one days; and just as the English section does not say that this becomes a recurring or a continuing act of insolvency if the attachment continues for more than twenty-one days, equally so there is nothing in the Indian section to that effect. It is, therefore, clear that the Legislature intended the act of insolvency to be one act committed on the expiry of twenty-one days after the attachment, and if this is not availed of by the creditor within the time fixed by s. 12 (c) of the Presidency Towns Insolvency Act his right to proceed against the debtor in insolvency would arise only under a fresh attachment.

Adopting, therefore, the reasoning in the case of *In re Beeston* (1), I hold that under s. 9 (e) of the Presidency Towns Insolvency Act the attachment for more than twenty-one days is not a continuing act of insolvency, nor is there a repetition of the act of insolvency at the expiration of every period of twenty-one days, and that the act of insolvency contemplated is committed on the completion of the first twenty-one days.

That being so, it only remains to be ascertained whether this act of insolvency on which the present petition is grounded, "has occurred within three months before the presentation of the petition," as required by s. 12 of the Presidency Towns Insolvency Act. In reckoning the twenty-one days, the day on which the attachment is levied is not to be computed: see *In re Noth, Ex parte Hasluck* (2). Therefore, the act of insolvency in the present case was committed on April 13, 1926, but the petition is not presented till February 22, 1927, therefore, the act of insolvency did not occur within three months before the date of the petition and, therefore, under s. 12 (c) the petition cannot be entertained.

I, therefore, dismiss the petition with costs.

A. N. A.

Petition dismissed.

(2) (1895) 2 Q. B. 264; 64 L. J. Q. B. 694; 14 R. 436; 72 L. T. 854; 2 Manson 326; 59 J. P. 724.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 130 OF 1926.

August 22, 1927.

Present:—Mr Findlay, J. C.

SIR GANGADHAR RAO MADHORAO

CHITNAVIS—PLAINTIFF—APPELLANT

versus

• PARASHRAM AND OTHERS

—DEFENDANTS—RESPONDENTS.

Usurious Loans Act (X of 1918), s. 3, applicability of —Contract Act (IX of 1872), s. 74—Agreement to pay enhanced compound interest on default, whether penal.

The Usurious Loans Act can have no application to a mortgage executed in 1911, long before it was enacted. [p. 39, col. 1.]

An agreement to pay compound interest at an enhanced rate on default of regular payment is penal. [p. 39, col. 2.]

Purshottam v. Sahu (3), followed.

Jagmohan v. Tikaitrai (1) and *Bhagwant Atmaram v. Ganpati Chowdhari Kunbi* (2), distinguished.

Appeal from the decree of the First Sub-Judge, First Class, Nagpur, dated the 30th October, 1926, in Civil Suit No. 21 of 1924.

Mr. M. R. Bobde, for the Appellant.

Messrs. M. R. Indurkar, M. B. Bhawalkar and W. B. Puranik, for the Respondents.

JUDGMENT.—I am only concerned with the question of allowance or disallowance of interest in the present case. The mortgage-deed in suit for Rs. 3,500 was executed on 30th November, 1911. The consideration was wanted for the following purposes. The mortgagors had to pay a decree for Rs. 3,014 odd outstanding in favour of another creditor; to the mortgagee also a decree for Rs. 333 odd was due and the small balance of consideration was apparently taken in cash. The first instalment was to be paid on a fixed date about 13 months later, and thereafter the remaining six instalments were to be paid year by year at the same time. With each instalment the interest then due at 1 per cent. per mensem was also to be paid. If each of the said instalment and interest were not paid, an enhanced rate of Rs. 1-4 compound interest was to be chargeable. The mortgage-bond in suit also contained the following two clauses:—

"(a) If owing to our not having paid the kist of Government demand, you are required to pay that amount, this (*sic*) may be treated as foreclosed before the stipulated period, and you may take possession."

"(b) If two of the instalments agreed by us for satisfaction of the said amount are defaulted by us, we will pay the en-

ture amount together with interest in a lump."

Such are the essential terms of the mortgage-deed (p-1).

The following payments have admittedly been made:—

Rs. 1,600	...	on 2nd April, 1915.
" 850	...	on 29th June, 1917.

In other words, within less than six years of the date of execution of the mortgage, an amount equivalent to practically the whole principal, except Rs. 50, had been paid. In spite of this, the present suit was brought for an amount of Rs. 5,784 4 on the basis of compound interest at Re. 1 per cent. per mensem being claimed instead of the enhanced rate of Rs. 1-4 per cent. per mensem.

The Subordinate Judge held that the conditions referred to above of the mortgage were not penal, particularly having regard to the fact that the plaintiff had charged only compound interest at Re. 1 per cent. per mensem. He, however, held that the case was one which was covered by the Usurious Loans Act of 1918, and he accordingly re-opened the transaction and allowed simple interest at Rs. 1-4 per cent. per mensem. On this basis, the lower Court awarded the plaintiff-appellant a decree for Rs. 3,851-6-0.

The plaintiff has now come up on appeal claiming that interest should have been allowed at the compound rate of 1 per cent. per mensem, and a total of Rs. 5,784-4 0 is accordingly claimed as having been due on the date of the suit.

The Pleaders for the respondents have admitted that the Usurious Loans Act as such could have no application to the present mortgage which was executed in 1911, and it is difficult to understand how an experienced Judge like the Judge of the lower Court held that it could apply. It has, however, been urged on behalf of the respondents that, in any event, the provisions of the mortgage as to payment of compound interest at an enhanced rate were penal and that it was open to this Court to allow a reasonable compensation under s. 74 of the Contract Act, entirely irrespective of the fact that the plaintiff has only claimed compound interest at the original rate of Re. 1 per cent. per mensem.

On behalf of the appellants it has been urged that the provision as to interest

was not penal and I have been referred in this connection to the old decision of this Court in *Jagmohan v. Tikaitrai* (1) wherein Neill, J. O., held that a stipulation that compound interest shall be paid on interest not paid up is not a penalty. The same view was taken in *Bhagwant Atmaram v. Ganpati Chowdhari Kunbi* (2) by Ismay, J. O. It has been suggested that it is erroneous to look at the present mortgage-deed as one which initially provided for simple interest and it has been pointed out that the question of compound interest did not arise unless and until the first or any other instalment was defaulted. That is, no doubt, perfectly true, but the fact remains that, if payments had been made regularly year by year, as provided for in the bond, the interest payable by the mortgagors was only simple interest at 1 per cent. per mensem. The indubitable fact, therefore, remains that, in case of default, compound interest at an enhanced rate of Rs. 1-4 per cent. per mensem was to be chargeable. It seems to me, therefore, that the Subordinate Judge was clearly wrong in holding that the conditions as to interest were not penal.

Although the facts of the case in *Purshottam v. Sahu* (3) were wholly different from those of the present case, yet the principles laid down in that case seem to me fully applicable in the present one also. Here we find only a provision for compound as opposed to simple interest and that at an enhanced rate, but we have also a condition of exigibility of the whole amount, if apparently any two of the instalments are defaulted. It is not even clear from the bond whether such default must be in any two instalments or any two consecutive instalments, but the point is immaterial for the purpose of the present appeal. Holding, therefore, as I do, that the provisions as to interest were penal, it seems to me that it is the duty of the Court, on the principles laid down in *Purshottam v. Sahu* (3) to decide what reasonable compensation should be awarded to the plaintiff, and the mere fact that the latter has himself deemed it advisable to only claim compound interest at the lesser rate of Rs. 1 per cent. per mensem, does not

(1) 6 O. P. L. R. 11.

(2) 1 N. L. R. 9.

(3) 91 Ind. Cas. 295; 22 N. L. R. 23; A. I. R. 1926 Nag. 90; 9 N. L. J. 34.

necessarily, in my opinion, preclude this Court from even granting a lower rate than that.

It has been urged on behalf of the respondents that the case, from the mortgagors' point of view, is a very hard one. Although practically all the principal was paid off within six years of the date of the execution of the mortgage deed, in suit, the amount now claimed has accumulated to the already stated large sum of Rs. 5,784-4-0. That is, no doubt, true, but the fact remains that in the case of a mortgage like the present, the respondents had it in their own hands all through to clear off what would have been, in reality, a petty sum as compared with the amount now claimed from them. Action under s. 60 of the Transfer of Property Act was always open to the mortgagors in this connection. It is doubtless a common custom amongst creditors and mortgagees in this country to wait until the last moment, or anyhow for an unduly long time before coming to Court on a mortgage like the present, and the practice may be reprehensible from a moral point of view, and, in my opinion, is. The fact, however, remains that, from the legal point of view, the mortgagor, if he is able and really anxious, so to speak, to force the hands of the mortgagee, has the remedy in his own hands as pointed out above, and he can thus defeat the policy of any mortgagee who deliberately delays bringing his suit on the mortgage.

In this aspect of the case, it seems, to me that I would not be justified in refusing the mortgagee's claim for compound interest at the original rate of Re. 1 per cent. per mensem. It seems to me that neither from the legal nor the equitable point of view, this relief cannot be refused to the appellant (mortgagee). The lower Court allowed interest at this rate up to 30th April, 1927, the date which was fixed for payment. I do not think that, in view of the circumstances of this case and of the large amount of interest which I feel myself bound to allow to the plaintiff, any further interest should be granted. A decree will, therefore, be made of the amount due up to 30th April, 1927, on the basis of a compound rate of interest at Re. 1 per cent. per mensem, and the amount so due will be substituted for the amount of Rs. 4,244-5-6 found due in the lower Court's decree. The defendants-respondents must

also bear the plaintiff-appellant's costs in both Courts.

G. R. D.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 757 OF 1927.

September 26, 1927.

Present :—Mr. Justice Addison.

FIRM KIRPA RAM-LACHHMAN DAS

AND OTHERS—DEFENDANTS—APPELLANTS

versus

FIRM SAWAN MAL GOPI CHAND—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 83, 85—Suit by commission agent against principal—Limitation—Mutual, open and current account, meaning of.

Where a commission agent buys goods for a principal and they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses falls within the purview of Art. 83 and not Art. 85 of first Schedule to the Limitation Act and limitation in such a case begins to run from the date of payment made by the agent on behalf of the principal and not from the date of the sale. [p. 41, col. 2.]

Manghi Ram v. Firm of Saran Das-Maman Chand (1), Sarab Dial-Ishar Dass v. Devi Ditta Mal-Gordhan Das (2), Kadari Pershad-Chhedi Lal v. Har Bhagwan (3), Munshi Ram v. Bhagwan Das (4) and Devisahai-Ramji Das v. Tirath Ram (5), followed.

The bare accident of there being several transactions between the commission agent and his principal all embodied in one account in consequence of which there is sometimes a credit in favour of one party and sometimes in favour of the other does not turn the account into a mutual, open and current account within the meaning of Art. 85 of first Schedule to the Limitation Act. [p. 41, col. 2.]

Numbermal Chetty v. Kotayya (6), Bihari Lal-Jai Narain v. Har Narain Das (7) and Ratan Chand-Jwala Das v. Asa Singh Bagha Singh (8), distinguished.

Second appeal against a decree of the District Judge, Rawalpindi, dated the 26th January, 1927, reversing that of the Fourth Class Sub-Judge, Gujarkhan, dated the 26th August, 1926.

Mr. Shamair Chand, for the Appellants.

Mr. Mehr Chand Mahajan, for the Respondents.

JUDGMENT.—The plaintiff firm, which carries on a commission agency business, sued the defendant firm for the recovery of Rs. 1,000. According to the plaint the defendant firm dealt with the plaintiff firm, receiving goods worth Rs. 7,016 6, there being an agreement to pay interest at 12 per cent. per annum, this interest being also chargeable accord-

ing to custom. It was stated further that the defendant firm paid Rs. 6,290-10-9 so that the balance due was Rs. 725-11-3. Interest was added to this sum so as to bring the amount up to Rs. 1,000. This suit was dismissed by the trial Court on the ground that Art. 83 of the Limitation Act applied and the suit was accordingly barred by limitation. On appeal the learned District Judge held that the plaint showed that there was an open, current account between the parties, leaving a certain amount unpaid by the defendant firm. In his opinion Art. 85 applied and the suit was within time. The appeal was, therefore, accepted by him and the suit was remanded to the trial Court for disposal on the merits. Against this decision this second appeal has been preferred.

At the time of issues a member of the plaintiff firm stated that the defendant firm bought through his firm 200 tins of oil and that what remained due was for the loss in that transaction together with other incidental expenses of that transaction. This shows that all the transactions of the commission agency between the parties were settled except the one in question. The oil referred to was bought by the plaintiff firm as agents of the defendant firm on the 9th December, 1920, and the price was paid by the plaintiff firm on the same date. The oil was sold on the 16th of February, 1922, and the amount on account of loss was debited that day. The present suit was brought on the 5th May, 1925. Further the issues framed show that all that the parties went to trial upon was the question of loss incurred in this oil transaction and the other charges connected therewith. It might also be mentioned that a member of the plaintiff firm as a witness admitted that all dealings were with the plaintiff firm in their capacity as commission agents working on behalf of the defendant firm.

It was held in *Manghi Ram v. Firm of Saran Das Maman Chand* (1), *Sarab Dial-Ishar Dass v. Devi Ditta Mal Gordhan Das* (2) *Kadari Pershad Chhedi Lal v. Har Bhagwan* (3) *Munshi Ram v. Bhagwan Das* (4) and

Devisahai Ramji Das v. Tirath Ram (5) that where a commission agent buys goods for a principal and they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by Art. 83 of Sch. I to the Limitation Act. Limitation in such a case operates from the date of payment made on behalf of the principal and not from the date of the sale. In the present case, therefore, limitation commenced on the 9th December, 1920. Under Art. 83 the period of limitation is three years from the date when the plaintiff was actually damnified. The suit having been brought in 1925 is thus apparently long barred by limitation as the plaintiff was damnified in connection with the transaction in question in 1920 when the plaintiff firm paid for the oil on behalf of the defendant firm.

It was argued, however, on behalf of the respondent firm that as according to the plaint the relief claimed was not for indemnity of loss but for the balance in a running account it was not permissible to go behind the plaint and discover what was the real matter in suit between the parties. This proposition as stated is much too wide and it cannot be admitted that a plaintiff by clever wording of his plaint can avoid the proper limitation for his suit. It was more or less admitted that if there had been only a single transaction of buying and selling by the plaintiff firm on behalf of the defendant firm Art. 83 would have applied, but that as there were several transactions all embodied in one account which for this reason showed sometimes a credit in favour of one party and sometimes a credit in favour of the other, the account must be taken to have been a mutual, open and current one with reciprocal demands between the parties. I cannot accept this argument that the mere accident that there were several transactions makes the account different in any way. The account remains that of a commission agent and his principal each transaction giving rise either to loss or profit in favour of one party or the other.

I was referred to *Namberumal Chetty v. Kotayya* (6). In that case the plaintiff

(1) 26 Ind. Cas. 415; 23 P. R. 1915; 35 P. W. R. 1915; 100 P. L. R. 1915.

(2) 46 Ind. Cas. 541; 59 P. L. R. 1918; 139 P. W. R. 1918.

(3) 66 Ind. Cas. 900; 3 Lah. L. J. 65.

(4) 92 Ind. Cas. 595; A. I. R. 1926 Lah. 152; 7 Lah. L. J. 596; 27 P. L. R. 32.

(5) 73 Ind. Cas. 143; A. I. R. 1923 Lah. 473.

(6) 21 Ind. Cas. 773; 14 M. L. T. 496.

advanced moneys to the defendant and the latter consigned goods to the former for sale on commission. It was held that there were independent obligations on each side and that the account between the parties was a mutual, open and current one within the meaning of Art. 85. In the present case the defendant firm was buying through the plaintiff firm as their agents and selling through them. The plaintiff firm was not advancing money to the defendant firm, nor was the latter consigning goods to the former for sale on commission. There were thus no independent obligations on each side and the ruling does not apply.

The other two rulings referred to, namely, *Bihari Lal Jai Narain v. Har Narain Das* (7) and *Ratan Chand-Jwala Das v. Asa Singh-Bagha Singh* (8) are distinguishable for the same reason. Nor can it be said that there was an understanding that the plaintiff firm was to keep an open, mutual and current account because by the nature of the dealings the balance of account went from one side to the other. That is the natural result which follows from commission agency transactions of the kind in question in this suit.

For the reasons given above, I am of opinion that the suit is barred by Art. 83 and accepting the appeal, I set aside the order of the learned District Judge and restore that of the trial Judge dismissing the suit with costs throughout.

R. L. *Appeal allowed.*

(7) 92 Ind. Cas. 674; A. I. R. 1926 Lah. 283.

(8) 59 Ind. Cas. 669; 3 U. P. L. R. (Lah.) 3; 23 P. W. R. 1921; 31 P. L. R. 1919.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 10 of 1926.

July 13, 1927.

Present :—Mr. Justice Blackwell and Mr. Justice Jhaveri.

THE SECRETARY OF STATE FOR INDIA—
DEFENDANT—APPELLANT

versus

THE AHMEDABAD GINNING AND
MANUFACTURING Co., LTD.—PLAINTIFFS

—RESPONDENTS.

*Railways Act (IX of 1890), s. 72—Risk Note Form
B—Non-delivery of goods—Suit for damages—Burden*

of proof of negligence—Duty of Railway Company to produce their servants for examination, whether confined to Small Cause suits.

Per Blackwell, J.—Apart from suits in a Small Cause Court whatever may be the moral obligation upon a Railway Company to render facilities in discovering how goods entrusted to them under a special contract, and not as bailees, may have disappeared, there is no legal obligation upon them to call any evidence to show by examination-in-chief how a loss occurred, or to enable a plaintiff by cross-examination to prove this if he can. [p. 43, col. 2.]

Per Jhaveri, J.—In a suit against a Railway Company for non-delivery of goods consigned under Risk Note Form B the Railway Company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of the goods. This rule is not confined to suits in Small Cause Courts but applies to all the Courts in the country. [p. 44, col. 2.]

G. I. P. Ry. v. Himatlal Jagjivandas (1), commented upon.

Second appeal from a decision of the Assistant Judge at Ahmedabad, in Appeal No. 116 of 1924, confirming that of the Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 460 of 1920.

Mr. H. C. Coyajee (with him Messrs. Crawford, Bayley & Co.), for the Appellant.

Messrs. H. V. Divatia and P. A. Dhruva, for the Respondents.

JUDGMENT.

Blackwell, J.—This is an appeal by the 3rd defendant Company from a decision of the Assistant Judge of Ahmedabad dismissing an appeal from the Subordinate Judge at Ahmedabad. The facts in the case may be stated very shortly and are not really in dispute. They are as follows:—On June 30, 1921, the plaintiffs delivered 87 bales of piece goods at Ahmedabad to the 1st defendants, the B. B. & C. I. Railway Company, for carriage to Sealdah. The goods were consigned under what is known as Risk Note B to which I will presently refer. They were loaded in a waggon No. 32,700 belonging to the 3rd defendants, the East Indian Railway Company, who are the present appellants. The goods were carried from Ahmedabad to Agra by the 1st defendant Company, and thence over the 3rd defendant Company's line, *via*, Asansol to Sealdah. They arrived at Sealdah on August 9, 1921, and upon examination it was found that there were 85 bales intact, that one bale was entirely missing, and that there was the outer covering of another with one bundle in it.

Under these circumstances, the plaintiffs sued the 1st defendant Company, the

2nd defendant Company who were subsequently struck off, and the 3rd defendant Company for damages for the loss of two bales, alleging in their plaint that they had not been delivered by reason of carelessness, indifference, and want of proper care on the part of the defendant Companies. The only written statement to which it is now necessary to refer is that of the 3rd defendant Company in which, in substance, they deny negligence, rely upon the terms of the special contract contained in the Risk Note, and put the plaintiffs to the proof of any exceptional circumstances which would entitle them to recover having regard to the terms of that Risk Note.

Several issues were raised in the case, but Mr. Coyajee, who appeared for the appellants informed the Court that the only issues material for the purposes of the present appeal were issues Nos. 2, 5 and 7. Those issues are in the following terms:—(2) "Are the defendant Companies absolved from all liability whatsoever for the suit consignment because it was booked under Risk Note Form B?" The answer to that issue given by the learned Subordinate Judge was "No." The 5th issue was: "Is it proved by the defendant Companies that they took as much care of the suit consignment as persons of ordinary prudence would do?" The answer to that issue was "No." And the 7th issue was: "Was the loss due to the wilful neglect of the Railway servants? The answer to that issue was "Yes."

The material terms of the Risk Note are in substance that the consignors agree and undertake to hold the defendants harmless and free from all responsibility for any loss from any cause whatever "except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by, or to the wilful neglect of, its servants, transport agents, or carriers employed by them."

The law governing a case of this character is now to be found in a decision of *G. I. P. Ry. v. Himatlal Jagjivandas* (1). In that case the learned Chief Justice Sir Norman Macleod referred to a decision of the House of Lords in *Smith Ltd. v. Great Western Ry. Co.* (2). In that case the defendants at the

trial called no evidence, but contended that the plaintiffs had failed to establish any case of wilful misconduct against them, and it was held that the refusal of the defendants to account for the loss of the goods was not evidence which justified the Court in inferring that the loss arose from the wilful misconduct of the defendants' servants. In the case of *G. I. P. Ry. v. Himatlal Jagjivandas* (1) the learned Chief Justice said at page 353*—"It appears, therefore, that although it may be said that in equity the Railway Company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent under the law upon them to do, and they are not obliged to go out of their way to assist a plaintiff in proving wilful neglect." In my opinion, it is plain from this decision that, apart from suits in a Small Cause Court to which I will presently refer, whatever may be the moral obligation upon a Railway Company to render facilities in discovering how goods entrusted to them under a special contract, and not as bailees, may have disappeared, there is no legal obligation upon them to call any evidence to show by examination-in-chief how a loss occurred, or to enable a plaintiff by cross-examination to prove this if he can. It may, of course, be possible for a plaintiff by administering interrogatories to compel admissions from the Railway Company as to how the goods have been lost. It is also, of course, incumbent upon the Railway Company to disclose in its affidavit of document all material documents in its possession, and if any of those documents enable a plaintiff to show how the goods have disappeared, he may in that way be able to discharge the burden which is in the first instance upon him. But except in a Small Cause Court I am satisfied that there is in such cases as the present, no legal obligation upon a defendant to call evidence unless he chooses to do so. The position is different in a Small Cause Court having regard to what the learned Chief Justice said in the case to which I have referred [*G. I. P. Ry. v. Himatlal Jagjivandas* (1)], namely, that "as there are no rules of procedure enabling a party to administer interrogatories in a Small Cause Court suit we still think that in this country a Railway Company should produce before the Court for examination those of their

(1) 73 Ind. Cas. 696; 25 Bom. L. R. 350; A. I. R. 1923 Bom. 389.

(2) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

*Page of 25 Bom. L. R.—[Ed.]

servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods." In view of what the learned Chief Justice had said earlier in the case, namely, that it is not incumbent under the law upon a Railway Company to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, and that they are not obliged to go out of their way to assist the plaintiff in proving wilful neglect, it seems to me plain that his remarks as to a Railway Company producing for examination before the Court such of their servants as are acquainted with the facts apply only to a suit in a Small Cause Court. Accordingly, in my judgment, the head-note in the case, para. 2 following upon the word "Held," does not correctly represent the actual decision.

This being in my view the law applicable to a case of this kind, what are the proved facts in this case? The plaintiffs called only one witness, their manager. He said this: "The fact that we got two bales short is the neglect of the Railway. I cannot show any other neglect of the Railway Administration. I have no evidence for negligence, carelessness, indifference except the fact of short delivery by two bales." That was the only evidence adduced by the plaintiffs. Under the terms of the Risk Note, to enable them to succeed, it was incumbent upon them to adduce some evidence to show that the loss was due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants. It is plain that on the evidence adduced by the plaintiffs themselves, they had not discharged the burden, and in my opinion, if the defendants had submitted at the close of the plaintiffs' case that the plaintiffs had failed to make out any case against them, they would have been entitled to succeed. But in this case the 3rd defendants took upon themselves to call evidence.....

In the result, for the reason I have given, I am of opinion that the plaintiffs by cross-examination of a witness tendered by the defendants discharged the *prima facie* burden which was upon them, and afforded evidence from which the inference drawn by the learned Assistant Judge was amply justified. That evidence was not rebutted by the 3rd defendant Company.

In the circumstances, I am of opinion that the appeal must be dismissed with costs.

Jhaveri, J.—I agree in the order of dismissal of this second appeal with costs. The facts and the law of the case have been exhaustively dealt with by my learned senior brother.

Where I differ from him is in the interpretation of the decision in *G. I. P. Ry. v. Himatlal Jagjivandas* (i). No doubt, the House of Lords' case is to the effect as has been set out by my learned brother. The judgment of the learned Chief Justice Sir Norman Macleod, however, so far as our Courts are concerned, seems to me to have slightly modified the view taken in England, and for this observation, I rely on this passage of the judgment of the learned Chief Justice at page 354* :—"But as there are no rules of procedure enabling a party to administer interrogatories in a Small Cause Court suit we still think that in this country a Railway Company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods." This passage does not indicate that the duty lay upon the Railway Company of producing the evidence of their servants, etc., only in case of suits being fought out in the Court of Small Causes. In my opinion the observation is general. It applies to all the Courts in this country.¶

But an express decision on the point or a finding on that particular question is not necessary in this case, because the defendants have chosen to lead evidence, whether under the authority of this case or otherwise, and if once they chose to lead such evidence, they should have completed the chain; that they have not done. Therefore, as far as this case is concerned, I am in complete agreement with the exhaustive judgment of my learned senior brother, and I would also dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

*Page of 25 Bom. L. R.—[Ed.]

LAHORE HIGH COURT.
MISCELLANEOUS SECOND CIVIL APPEAL
 No. 2474 of 1926.

March 14, 1927.

Present:—Mr. Justice Jai Lal.
ABDULLAH—JUDGMENT-DEBTOR—
APPELLANT.
versus

ANJUMAN DEHI OF MAUZA BARIAR
THROUGH BUR SINGH—DECREE HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (1) (c)—
'Agriculturist', meaning of—Agriculturists of Punjab
by virtue of special notification, whether within the
term.

The term 'agriculturist' as used in s. 60, Civil Procedure Code, means a person whose main source of income is actual cultivation or tillage of land and the protection afforded by s. 60 (1) (c) does not necessarily extend to persons who are merely agriculturists by virtue of notifications issued by the Local Government under some special Act, e. g., the Punjab Alienation of Land Act, [p. 46, col. 1.]

Bawa Gurbakhsh Singh v. Ghulam Qadir (1) and
Rubine v. Balwantrai Ramnarayan Trivide (2), fol-
lowed.

Bhuta v. Bisheshar Singh (3), distinguished.

Miscellaneous second appeal from an order of the District Judge, Hoshiarpur, dated the 15th May, 1926, affirming that of the Subordinate Judge, Third Class, Batala, District Gurdaspur, dated the 2nd February, 1926.

Mr. S. C. Chatterji, for the Appellant.

Mr. H. J. Rustomji, for the Respondent.

JUDGMENT.—In execution of a money-decree passed against Abdullah, appellant, the Anjuman Dehi of Mauza Bariar in the Tahsil of Batala, attached a house belonging to the judgment-debtor. An objection was raised by the latter that the house could not be attached under s. 60 (1) (c) of the Civil Procedure Code, as he is an agriculturist and occupies it. This objection was rejected by the Subordinate Judge and on appeal has been dismissed by the District Judge. Consequently this second appeal has been filed by the judgment-debtor.

It is contended on behalf of the appellant that the view of the learned District Judge that s. 60 of the Civil Procedure Code is intended to afford protection to actual cultivators of land is wrong and that the expression "agriculturist" in s. 60 of the Civil Procedure Code is synonymous with the term as it is used in certain legislative provisions which apply to this Province, as for instance, the Alienation of Land Act, in other words, it is contended, that it means any person who belongs to an agricultural

tribe, that it is immaterial whether he own any land or not and further that in any case it means a person whose main income is derived from agriculture whether the land is cultivated by himself or by his tenants. This contention is clearly opposed to previous authority.

In *Bawa Gurbakhsh Singh v. Gulam Qadir* (1) a learned Judge of the Chief Court of the Punjab held that the word "agriculturist" as used in s. 266 (c) [which is the same as s. 60 (1) (c) of the present Code] denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land and that "the object of the Legislature is to provide on economic grounds against cultivators of land being hindered or obstructed from earning their livelihood or practising their calling, and against land being thrown out of cultivation by such attachments at the instance of mere holders of money-decrees. If the District Judge's reasoning is correct, the mere possession of land by the debtor is quite sufficient to protect him from having his dwelling houses sold in execution of the decree. He may be a trader or banker or a person practising one of the learned professions, but if he has some land from which he gets rents, in cash or in kind, his dwelling house, though it may be a palatial one, must be exempt from attachment. This cannot be the meaning of the clause. It seems to be mainly intended for the benefit of the poorer class of husbandmen who carry on or make their living by actual cultivation". It was found in that case that though the judgment-debtor was a large land owner he did not cultivate the land himself nor did he own any agricultural cattle. His income was derived from rents paid by tenants to whom his land was let. The learned Judge held that such a person was not entitled to the protection afforded by s. 266 (c) or 60 (1) (c) of the Civil Procedure Code.

A Division Bench of the Bombay High Court held in *Rubine v. Balwantrai Ramnarayan Trivide* (2) that in order to enable a judgment-debtor to get the benefit of s. 60 (1) (c) of the Civil Procedure Code it must be proved that the judgment-debtor earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. It was found that "at the most the judgment debtor seems to have leased 150 acres of land some

(1) 47 P. R. 1897.

(2) 195 Ind. Cas. 795; A. I. R. 1923 Bom. 12.

of which he let out again to tenants and some he tilled by the aid of servants". One of his witnesses stated that he saw the defendant supervise the cultivation of his land. The above facts, it was held, were not sufficient to entitle the judgment-debtor to a finding that he was personally engaged in agricultural labour and was, therefore, an agriculturist as defined in s. 60 (1) (c) of the Civil Procedure Code.

In *Bhuta v. Bisheshar Singh* (3) the Allahabad High Court held that a person does not cease to be an agriculturist even if he has lost his agricultural land if it is established that he was cultivating the soil for remuneration. The judgment-debtor in that case admittedly belonged to an agricultural caste and it was found that she had no other source of livelihood except cultivation of land whether her own or of others. It was also found that she had still got some *shikmi* land. One of the learned Judges who decided that case was of opinion that on the facts proved the judgment-debtor was an agriculturist. The other learned Judge who was a party to the judgment concurred but with considerable hesitation. He based his decision more on the admission made by the decree-holder in some previous proceedings in which he had alleged that the judgment-debtor had been given some land to live on, that her father had built some houses for her thereon and also that she owned two pairs of bullocks for cultivation. It was on this admission that the learned Judge preferred to hold that the judgment-debtor was an agriculturist.

I do not, therefore, think that this last case materially helps the appellant. On the other hand, some observations made by the learned Judges appear to support the contention of the decree holders. In any case the two other authorities that have already been referred to clearly show that the term "agriculturist" as used in s. 60 means a person whose main source of income is actual cultivation or tillage of land and that the protection afforded by s. 60 (1) (c) does not necessarily extend to the persons who are merely agriculturists by virtue of notifications issued by the Local Government under the special Acts applicable to this Province. In the case before me it has been established that the judgment-debtor does not cultivate any land

himself as he is physically unfit to do so. He owns some land which is let out to tenants on the *batai* system. He does not own any cattle. The house in question is used for stabling his mare and storage of fodder for the mare. Under the circumstances I hold that the judgment-debtor has been rightly held not to be an agriculturist within the meaning of s. 60 (1) (c) of the Civil Procedure Code and that in any case the house is not occupied by him as such.

The consequence is that this appeal is dismissed with costs.

R. L.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT.

No. 1363 OF 1926.

July 22, 1927.

Present :—Mr. Justice Madgavkar.

VADILAL PURSHOTTAM—PLAINTIFF

versus

KANAIALAL INDERLAL—DEFENDANT.

Hindu Law—Joint family—Debt contracted by father for joint family purpose—Execution of mortgage as sole owner—Sale of father's interest in execution—Son's interest, whether passes.

A Hindu having a son and a minor grandson borrowed money for purposes of the joint family business and executed a mortgage of property belonging to the family representing that he was the exclusive owner of the property. The mortgagee instituted a suit against him on the mortgage without impleading either his son or grandson as a party and sold the right, title and interest whatsoever of the judgment-debtor and purchased it himself. In a suit by the mortgagee purchaser for possession the minor grandson contended that his rights were not affected by the sale :

Held, that the right, title and interest of the minor grandson also passed to the purchaser, in spite of his absence in the mortgage, suit and execution proceedings. [p. 48, col. 2.]

Daulat Ram v. Mehr Chand (3), followed.

FACTS.—Nandlal, a Hindu, had a son. Inderlal and a minor grandson Kanaialal. Nandlal and Inderlal were trading together. Nandlal executed a deed of mortgage to the plaintiff to discharge certain debts contracted by him for carrying on the trading business. In the mortgage-deed Nandlal did not disclose the fact that the property mortgaged was joint family property but executed the same as exclusive owner. The plaintiff sued Nandlal on the mort-

(3) 87 Ind. Cas. 561; L. R. 6 A. 217 Civ.; A. I. R. 1925 All. 432.

gage, obtained a decree and purchased "the right, title and interest, claim and demand, whatsoever of the said Nandlal." The plaintiff filed a suit for possession against the minor grandson as the latter claimed to be in possession of the property. The grandson contended that his interests were not affected by the sale as he was not represented either in the mortgage, suit or the execution proceedings, and that the plaintiff had purchased only the interest of Nandlal.

Mr. Mulla, (with him Messrs. Kanga, Advocate General, B. J. Desai and Setalvad), for the Plaintiff.

Mr. Lalji (with him Mr. Daphtary), for the Defendant.

JUDGMENT.—The question in this suit relates to the right, title and interest, if any, of defendant No. 1 Kanaialal, minor, and his mother and guardian defendant No. 2, Laxmibai, in respect of certain property mortgaged by defendant No. 1's grandfather Nandlal to the plaintiff, on which the latter obtained a decree, and which was sold and purchased in execution by the plaintiff-mortgagee-decree-holder.

[His Lordship stated the facts and proceeded as follows:] It is admitted by both sides that the real question in this suit is whether, the right, title and interest of defendant No. 1 has or has not passed to the plaintiff by his purchase. It is argued for the plaintiff, firstly, that the mortgage in his favour was executed for an antecedent debt due to Maganlal and to Uderam and that Nandlal was, therefore, competent to mortgage defendant No. 1's interest along with his own to the plaintiff, and, secondly, that he had actually done so and the interest of defendant No. 1 has passed to the plaintiffs in consequence of their legal proceedings above. It is further argued that even if the antecedent debt was not a joint family trading debt, under the Hindu Law as laid down by their Lordships of the Privy Council, as in *Brij Narain Rai v. Mangla Prasad Rai* (1), defendant No. 1 has no interest left and that his grandfather could and did alienate in favour of the plaintiffs. For the defendants it is argued that there is no evidence to show

that the debts were incurred for a joint family business, much less, an ancestral joint family trading business, and that the question is not, whether Nandlal had or had not the power to alienate the interest of defendant No. 1, but, whether he actually did so, and that, in any case, defendant No. 1 not having been a party to the mortgage, or the suit, or the proceedings in execution, his interest has not passed. These proceedings, moreover, had been against Nandlal individually and not as manager of the joint family, and reliance is placed on the cases quoted at page 848 of Mulla's Civil Procedure Code (8th Ed.). The plaintiff relies on the view of the law laid down in *Suraj Bansi Koer v. Sheo Persad Singh* (2) and *Doulat Ram v. Mehr Chand* (3). As regards defendant No. 2, it is contended, that she is not a necessary party because although in her first letter of August 14, 1925, she claimed that she had been in possession, there are subsequent letters of September 16, 1925, in which it is asserted that defendant No. 1 alone was in possession.

Dealing with the question as regards defendant No. 1, in the first instance, it is necessary to state clearly the facts as they appear to me to which the law has to be applied. In the case of a document such as the mortgage now in question, there are three possible cases which may arise. Firstly, those where the interest of a co-parcener is expressly included or excluded. Secondly, those where it is neither explicitly included or excluded. Thirdly, those where there is no mention of the property being joint family property, or of the existence of any co-parcener at all other than the executing party.

The first class presents no difficulty. As an instance of the second I might refer to *Dayanand Pandurang Nerkar v. Daji Narayan Nerkar* (4). The present case, in my opinion, falls in the third category. The defendants rely on certain words in the conveyance, viz., "the right, title and interest, claim and demand, whatsoever of the said Nandlal." The document, however,

(2) 6 I. A. 88 at p. 106; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. O. J. 1; 3 Suth. P. O. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(3) 14 I. A. 187; 15 C. 70; 11 Ind. Jur. 438; 5 Sar. P. O. J. 84; 1 P. R. 1888; 7 Ind. Dec. (N. S.) 632 (P. C.).

(4) 98 Ind. Cas. 754 28 Bom. L. R. 1082; A. I. R. 1926 Bom. 848; 60 B. 793.

(1) 77 Ind. Cas. 689; 51 I. A. 129; 26 Bom. L. R. 300; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1921) M. W. N. 63; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 62; A. I. R. 1921 P. C. 50; 33 M. L. T. 457; 45 A. 95; 11 C. L. J. 107; 1 C. W. N. 48; 41 C. L. J. 232 (P. C.).

read not by single phrases, but taken as a whole, is in the usual form of a mortgage passed by an exclusive owner. Nowhere is there mention of the fact that the property is joint family property, or any reference to a co-parcener, even to the son Inderlal.

As regards the consideration and the dealings, I am of opinion that Nandlal and his son Inderlal were carrying on a joint family business. The inclusion in it of Nandlal's natural brother Ramcoover is further proof, if needed, and even points towards an ancestral joint family business, though as to its ancestral nature there is no such clear evidence as to justify a finding in favour of the plaintiff. However, this joint family business, though not proved to be ancestral, was carried on by Nandlal with his natural brother Ramcoover given in adoption and his son Inderlal, and became indebted to Maganlal and Uderam. And in order to pay them off Nandlal executed the mortgage in suit, and executed it representing himself as the sole owner and concealing from the plaintiff the existence of the share of minor defendant No. 1, whose age at the date of the suit is given as thirteen, and, therefore, at the date of the mortgage would be about six. As Inderlal is not a party to this suit it is not necessary to express any opinion in regard to his interest but only as to how far on these facts the interest of defendant No. 1 still remains, or whether it has been comprised in the sale to the plaintiff. It is not denied that the amount advanced by the plaintiff went to re-pay Uderam and Maganlal.

That it would have been open to Nandlal to say that it was the joint family property and to mortgage not merely his own interest but also that of defendant No. 1 in order to pay off the antecedent debt, cannot be and is not questioned in view of the law as laid down in *Brij Narain Rai v. Mangla Prasad Rai* (1), correcting the view of antecedent debts previously enunciated in *Sahu Ram Chandra v. Bhup Singh* (5). The question in this suit is, whether, because Nandlal instead of so doing purported to represent himself as sole owner and to mortgage his entire interest, concealing the existence of defendant No. 1 and defendant No. 1's inter-

est, whether this conduct of Nandlal saves the interest of defendant No. 1 in the present suit? In considering this question, considerations of logic are out of place and indeed misleading; for on a question of this kind in Hindu Law, as their Lordships of the Privy Council have observed in *Brij Narain Rai v. Mangla Prasad Rai* (1), referred to above, the law on the subject is somewhat illogical.

From the standpoint of equity, it might be said for the plaintiff that he could hardly ascertain the existence of a grandson of six and that he would not have advanced on or purchased a one-third interest. For the defendant No. 1 it could be argued that the misrepresentation of a grandfather and of a manager should not result in a loss to a minor co-parcener of his own interest.

As regards the actual intention of Nandlal, it follows from what I have said; not only that he had no intention of leaving out unburdened the interest of defendant No. 1, but that he went even further and purported to be the sole owner himself. As far as the intention goes, therefore, it was not his intention to mortgage his own interest alone and to leave the interest of defendant No. 1 unburdened. I am unable to accept the contention for the defendant No. 1 that his absence from the mortgage, the suit, and execution proceeding, does not render his share liable. Mere absence in such cases does not suffice. In the case of *Daulat Ram v. Mehr Chand* (3) the two managers had concealed the existence of the other co-parceners and passed a mortgage purporting to be themselves the sole owners to the exclusion of everybody else. The plaintiffs offered to prove, but the defendants refused to join issue upon the facts alleged by the plaintiffs showing that the mortgage validly bound the ancestral estate and business. The defendants relied upon their absence in the legal proceedings. It was held by their Lordships that this contention failed, and that the sale passed the whole estate to which it related. I am, therefore, of opinion that the mere absence of defendant No. 1 is not sufficient to enable him to claim his share.

The only other question of law which remains for consideration, therefore, is, whether because in this case it is proved that the mortgage was to pay off antecedent debts in the joint family business due from Nandlal and Inderlal, but the business is

(5) 39 Ind. Cas. 230; 41 I. A. 120; 19 Bom. L. R. 498; 21 O. W. N. 693; 1 P. L. W. 557, 15 A. L. J. 437; 26 O. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 30 A. 437 (P. C.).

not proved to be ancestral, whether, this single circumstance suffices to free defendant No. 1's share. According to the law as laid down in *Brij Narain Rai v. Mangla Prasad Rai* (1) I am of opinion that it does not so suffice. The mortgage was such that it could validly bind the entire interest including the interest of defendant No. 1. The manager ignoring the existence of defendant No. 1 purported to be the sole owner and to mortgage his entire interest. Therefore, as in the case of *Daulat Ram v. Mehar Chand* (3), the sale in execution of the mortgage passed the entire estate including the share of defendant No. 1. This disposes of the case in so far as it relates to defendant No. 1.

As regards defendant No. 2, for all practical purposes, the issue is not of very great significance. Both the defendants are represented throughout by the same attorneys and by one Counsel, defendant No. 2 having only put in a separate written statement. On the whole, seeing that it was defendant No. 2 who at first claimed possession and that defendant No. 1 being a minor it was she who afterwards was asserting the rights opposed to those of the plaintiff, I am of opinion that it was open to the plaintiff to implead her *pro majore cautela*.

Decree for the plaintiff in terms of prayers (a), (b) and (c) of the plaint.

As regards compensation, the parties agree that defendant No. 1 should pay at the rate of Rs. 200 per month from September 24, 1925, until possession. The defendant to pay this amount to the plaintiff accordingly.

Defendant No. 2 does not claim any separate interest of her own. The suit as against her fails.

Defendant No. 1 to pay plaintiff's costs of the suit. Defendant No. 2 to pay her own.

On the slender materials before me, I am of opinion that the amount of compensation agreed upon is fair, in view of the delay and the costs of further proceedings in this Court or a reference to the Commissioner. I, therefore, sanction the compromise as to compensation so far as regards the minor defendant No. 1 under O. XXX, Civil Procedure Code.

A. N. A.

Suit decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1526 OF 1924.

May 10, 1927.

Present:—Mr. Justice Iqbal Ahmad.

BACHAN SINGH—PLAINTIFF—APPELLANT
versus

BHIKA SINGH—DEFENDANT—RESPONDENT.

Minor—Guardian ad litem—Decree against minor, when liable to be set aside—Mere failure of guardian to diligently prosecute suit, effect of—Civil Procedure Code (Act V of 1908), s. 60 (c)—House of agriculturist—Exemption from attachment—Burden of proof—‘Agriculturist,’ definition of—Zemindars, whether agriculturists—Presumption.

A decree obtained against a minor represented by a duly constituted guardian is binding on the minor unless there is something to show that there was any fraud on behalf of the guardian. The mere failure of a guardian to diligently prosecute the case on behalf of the minor cannot have the effect of vitiating such a decree. [p. 50, col. 2; p. 51, col. 1.]

Chandar Sekhar Tewari v. Balakdhari Dubey (1), *Beni Prasad v. Lajja Ram* (2) and *Lala Ram v. Thakur Prasad* (3), followed.

A person whose main source of income is *zemindari* land and who does not himself carry on cultivation is not an ‘agriculturist’ within the meaning of s. 60 (c) of the Code of Civil Procedure. [p. 51, col. 2.]

The party who alleges himself to be an agriculturist must prove that he earns his livelihood wholly or principally by agriculture, or that he ordinarily engages personally in agricultural labour. [*ibid.*]

An agriculturist whose house is protected from attachment and sale by s. 60 (c) of the Code must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation to a certain extent may be carried on by most *zemindars* but their houses cannot on that account be designated as agriculturists’ houses. [*ibid.*]

Lachhman Dass v. Partapi (4) and *Ashmatulla Sircar v. Pan Mahmud Chowdhury* (5), followed.

Even if a person is both an agriculturist and a *zemindar*, the burden of proving that a house in dispute is strictly of the nature contemplated by s. 60 (c) of the Code is on the person who alleges it. [p. 52, col. 1.]

There is no presumption that a *zemindar* is an agriculturist. The presumption is just the other way and a *zemindar* must be taken to be a *zemindar* unless his main source of income is proved to be from cultivation. [*ibid.*]

Second appeal from a decree of the Additional Subordinate Judge, Farrukhabad, dated the 30th of August, 1924.

Mr. Benod Behari Lal, for the Appellant.
Dr. M. Walli-ullah, for the Respondent.

JUDGMENT. While I am anxious not to in any way abridge the effect of s. 100 of the Civil Procedure Code and not to depart from the well-established rule that the findings of fact recorded by a Court of first appeal are binding in

second appeal, I cannot, in view of the equally well established rule that inference from proved facts is always a question of law, affirm the finding or the decision of the lower Appellate Court in this case. After an examination of the record I have come to the conclusion that the findings recorded by the learned Judge of the lower Appellate Court are not borne out by the facts found by him, and that the conclusion at which the trial Court arrived was correct.

One Ganga Din obtained a simple money-decree against Chandan Singh father of the defendant-respondent on the 28th of February 1910. Before the decree could be executed Chandan Singh died, and the defendant-respondent, who was then a minor and is still a minor, was brought upon the record as a judgment-debtor in place of his father. The father's sister of the defendant was appointed defendant's guardian *ad litem*. On the house in dispute being attached by Ganga Din in execution of his decree, an objection was preferred in the execution department by the defendant's guardian *ad litem* questioning the right of the decree-holder to sell the house in dispute on exactly the same grounds on which the present suit was resisted by the defendant-respondent. It appears that the objections that were taken were not pressed and were eventually disallowed and the house in dispute was sold in execution of Ganga Din's decree and purchased by the plaintiff-appellant on the 7th of November, 1913. The plaintiff-appellant made no attempt to take possession of the house for a period of about 11 years and instituted the present suit for possession of the house on the 11th of January, 1924.

One of the pleas urged in defence was that Chandan Singh, the defendant-respondent's father was a drunkard, a spendthrift and a man of loose character and the debt in respect of which the decree was obtained by Ganga Din was tainted with immorality. This common form of defence which is usually taken by a Hindu son in order to deprive a creditor of the debts advanced by him to a Hindu father, totally broke down in the trial Court, and no attempt was made to challenge the finding of the trial Court on the point in the lower Appellate Court.

The suit was resisted on two other grounds, *viz.*—

(1) "all the proceedings have been taken in collusion with Puttu Singh", the certifi-

cated guardian of the contesting defendant and brother-in-law (sister's husband) of the plaintiff and the defendant is not bound by the same and the plaintiff is not entitled to a decree for possession of the house; and

(2) that the house in dispute belonged to, and was in occupation of, the defendant as an agriculturist and as such, was not liable to sale in execution of the decree held by Ganga Din, in view of the provisions of s. 60 (c) of the Code of Civil Procedure.

Both these contentions were overruled by the trial Court and the plaintiff's suit was decreed. On appeal by the defendant the lower Appellate Court has differed from the trial Court on both the points and has held that "the house in suit is an agriculturist's house as contemplated in s. 60, Civil Procedure Code, and it could not be sold in execution of the simple money-decree against the minor's father and that its sale was brought about fraudulently".

As already remarked above I am unable to accept these findings of the lower Appellate Court as binding on me in second appeal. The learned Subordinate Judge who decided the appeal was of opinion that, notwithstanding the fact that the defendant's guardian *ad litem* in the execution proceedings had objected to the attachment and sale of the house on the ground that the house was an agriculturist's house and that objection was not given effect to by the Execution Court because of the failure of the defendant's guardian *ad litem* to diligently prosecute the case, the defendant, because of his minority, was entitled to question the validity of the execution sale on the ground that the sale of the house was in contravention of the provisions of s. 60 (c), Civil Procedure Code. I am unable to agree with the lower Appellate Court. It is not suggested that the guardian *ad litem* (father's sister) of the defendant who acted as defendant's guardian *ad litem* in the execution case, was in collusion with Ganga Din or the present plaintiff, or was in any way prevented by any person from duly protecting the interests of the defendant. It cannot be denied that the defendant was represented by a duly constituted guardian in the execution proceedings, and the mere failure of the guardian to diligently prosecute the case on behalf of the defendant cannot have the effect of vitiating the order of the Execution Court. The only duty cast upon a litigant by law is that he must see that a minor, who is a party to

a suit or proceeding in a Court of Law, is represented by a duly constituted guardian, but there is no obligation on him to see that the guardian *ad litem* vigilantly prosecutes the case on behalf of the minor. Undoubtedly a guardian *ad litem* is bound to protect the interests of a minor by raising and substantiating appropriate pleas on his behalf, but this duty is not shared by the minor's adversaries in the suit. A decree obtained against a minor who was represented by a duly constituted guardian is binding on the minor unless there is something to show that there was any fraud on behalf of the guardian. This was the view taken by this Court in the cases of *Chander Sekhar Tewari v. Balakdhari Dubey* (1) and *Beni Prasad v. Lajja Ram* (2). In my opinion the mere fact of the defendant's minority is not a sufficient ground for differentiating the present case with the case reported as *Lala Ram v. Thakur Prasad* (3). I, therefore, hold that the plea that the house in dispute was an agriculturist's house could not be raised in the present suit and was barred by the principle of constructive *res judicata*.

Moreover, it appears to me that the finding of the lower Appellate Court that the house in dispute is an agriculturist's house is an impossible finding. The lower Appellate Court has assigned two reasons for recording a finding on the point in the defendant's favour. It has observed "firstly, from the respondent's own statement made before me recorded on paper No. 58-A it is clear that the defendant-appellant is an agriculturist. He has no other source of income. A pure and simple *zemindar* is to be taken as an agriculturist in the absence of any legal definition to the contrary. Secondly, from the same statement of the respondent (appellant) it is also evident that the house in suit is the only dwelling house that he has now got and in it his father, Chander Singh, lived. The other one that he had, fell into ruins. A reference to paper No. 58-A upon the record shows that the summary of the statement of the plaintiff given by the learned Subordinate Judge is entirely at variance with the statement made by the plaintiff. The plaintiff stated that "the *sir* and *khudkasht* of Bhika Singh (defendant) is let out on

rent. No other business except *zemindari* is carried on by the minor. The *zemindari* of the minor is looked after by Hardeo Singh who is my brother-in-law and who is the guardian of the minor". The only conclusion that can be drawn from this statement of the plaintiff is that the defendant is not an agriculturist. It is clear that the plaintiff nowhere committed himself to the statement that the defendant's source or chief source of livelihood was by cultivating land. On the contrary it appears that cultivation was not carried on by the minor and his source of income was from the *zemindari* land. This being so it cannot be held that the house in dispute is an agriculturist's house. It has been pointed out in the case of *Lachhman Dass v. Partapi* (4), that "an agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even if he may have some sort of interest in a field or two". An agriculturist whose house is protected from attachment and sale by s. 60 (c) of the Civil Procedure Code must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose *principal source* of livelihood is by cultivation. Cultivation to a certain extent is carried on by most, if not all the *zemindars*, in this Province but their houses cannot be designated as agriculturists' houses. The view that I take finds support from the decision in the case of *Ashmatulla Sircar v. Pan Mahmud Chowdhary* (5).

It is also well-established that "the party who alleges himself to be an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour;" *Rubine v. Balwantrai Ramnarayan Trividi* (6). The assumption made by the lower Appellate Court in the present case that the defendant-respondent's only source of income is from cultivation is without foundation as the defendant-respondent owns *zemindari* property, and it cannot be said that the house did not belong to and was in his occupation as a *zemindar*.

In arriving at the finding that the house in dispute is an agriculturist's house the lower Appellate Court has not referred to the oral evidence adduced by the defendant,

(1) 15 Ind. Cas. 811; 10 A. L. J. 149.

(2) 35 Ind. Cas. 63; 14 A. L. J. 433; 38 A. 452.

(3) 47 Ind. Cas. 947; 16 A. L. J. 691; 40 A. 950.

(4) 85 Ind. Cas. 700; A. I. R. 1925 Oudh 365; 10 O. & A. L. R. 1275.

(5) 35 Ind. Cas. 343; 20 C. W. N. 874.

(6) 105 Ind. Cas. 793; A. I. R. 1923 Bom. 12.

But I, for the sake of satisfying myself as to the accuracy or otherwise of the finding of the lower Appellate Court on the point, have looked into the evidence produced by the defendant respondent. The evidence consists of the statement of two witnesses named Khamu Singh and Hori Singh and both these witnesses were examined mainly with a view to support the plea of the defendant-respondent as to the immorality of his father. Hori Singh stated that Chandan Singh used to look after the work of his *zemindari* and that there is still *zemindari* and *sir*. Khannu Singh's statement was that Chandan Singh had *kasht*, *sir* and occupancy holdings. It does not appear from the statements of these two witnesses that the main source of livelihood of Chandan Singh and the defendant-respondent was from cultivation. Even if it be held that Chandan Singh was both an agriculturist and a *zemindar* the burden of proving that the house in dispute was strictly of the nature contemplated by s. 60 (c) of the Civil Procedure Code was on the defendant-respondent: *vide* the case of *Jamma Prasad Raut v. Raghunath Prasad* (7).

It is not denied that the plaintiff-appellant was not a party to the suit brought by Ganga Din and purchased the house in dispute in execution of the decree held by Ganga Din. He was justified in believing that the house was saleable in execution of the decree; *vide* the case of *Pandurang Balaji v. Krishnaji Govind Parab* (8).

For the reasons given above I am unable to accept the finding of the lower Appellate Court that the house in suit was an agriculturist's house within the meaning of s. 60 (c) of the Civil Procedure Code. I am equally unable to affirm the proposition of law propounded by the lower Appellate Court that "a pure and simple *zemindar* is to be taken as an agriculturist in the absence of any legal definition to the contrary." In my opinion the presumption is the other way. A *zemindar* must be taken to be a *zemindar* unless his main source of income is proved to be from cultivation.

In support of the finding that "the sale of the house in dispute was brought about fraudulently," the lower Appellate Court has assigned the following reasons:—

(1) "The plaintiff respondent is the

(7) 19 Ind. Cas. 125; 35 A. 307; 11 A. L. J. 437.

(8) 28 B. 125; 5 Bom. L. R. 799.

brother-in-law (wife's brother) of the appellant's certificated guardian, Hardeo Singh, who did not agree to look after the appellant's interest in the case."

(2) "The purchase of the house by the appellant (respondent) looks to be suspicious" inasmuch as the plaintiff had purchased certain *zemindari* belonging to the defendant "and afterwards quietly transferred it to his sister, wife of the appellant's (defendant's) guardian (Hardeo Singh alias Putto Singh) who is himself residing in the house to the exclusion of the defendant."

(3) That the suit was brought more than 10 years after the purchase and, therefore, "may be reasonably presumed to have been inspired by the same self-seeking certificated guardian" of the defendant and it would not be surprising if the plaintiff after his success in the litigation transfers the house also to his sister.

(4) "The circumstances denote that the guardian is pulling the strings from behind with a view to depriving the minor of his ancestral dwelling-house in which he has comfortably nestled himself." It appears impossible to me to infer fraud from the facts found or the reasons assigned by the lower Appellate Court."

No particulars of the alleged fraud were given in the written statement, and none were disclosed in the evidence produced by the defendant-respondent, and nobody in this Court has been able to let me know the particulars or the precise nature of the fraud found by the lower Appellate Court.

It is clear from a reference of the statement of Hardeo Singh, dated the 20th of February, 1924, that he was not a certificated guardian of the defendant at the time that Ganga Din executed his decree and the plaintiff purchased the house in dispute. It is true that in the suit, giving rise to the present appeal, Hardeo Singh, notwithstanding the fact that he was a certificated guardian of the defendant, refused to act as his guardian *ad litem*. But this refusal of Hardeo Singh can in no way lead to the inference that the sale that took place in 1913, when Hardeo Singh had nothing to do with the defendant was brought about fraudulently. It appears to me that Hardeo Singh was well advised, having regard to his relationship with the plaintiff-respondent, in not acting as guardian *ad litem* of the defendant in the present suit. In any

case his refusal to so act in the present case or his desire that the plaintiff should succeed in the present litigation cannot lead to the inference that the sale of 1913 was a fraudulent sale.

I am unable to appreciate the ground on which the learned Subordinate Judge has held the purchase of the house made by the plaintiff to be suspicious, and there is no warrant for the assumption that after succeeding in the present litigation the plaintiff will transfer the house to his sister, the wife of Hardeo Singh. Even if it be assumed that Hardeo Singh is now anxious to get possession of this house and that it was he who asked the plaintiff to purchase the house in 1913, the purchase made by the plaintiff at a time when Hardeo Singh was not a certificated guardian of the defendant, cannot be held to be vitiated by fraud. It is needless to point out that fraud must be specifically pleaded and each particular thereof must be strictly proved. I have examined the evidence in the case and I find that there is not an iota of evidence to suggest that the sale of 1913 was brought about by fraud and in my judgment the finding of the lower Appellate Court on the point is based on pure conjectures, and is bad in law.

For the reasons given above I allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs in all Courts.

A. N. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 68 OF 1927.

September 26, 1927.

Present.—Mr. Kinkhede, A. J. C.

SITARAMSA—PLAINTIFF—APPLICANT
versusAMIRBAX AND OTHERS—DEFENDANTS—
NON-APPLICANTS.

Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 64, 85—Acknowledgment and account stated, distinction between—Account, mutual, open and current—Tests—Account stated—Limitation.

Where an account stated comprises items on both sides and a balance is deducted thereon, and the adjustment points to the common intention of the

parties, to set off their cross-demands against each other and to strike a balance, by consolidation of all items, whether barred or not barred by time, and to start with a fixed consolidated amount as representing a liability of the debtor for the future, that balance is recoverable within three years from the statement of account, although some of the earlier items in the account may have then been already time-barred. [p. 54, col. 1.]

In order that an account may be mutual, open and current, the nature of the dealings must be such that the balance must shift on one side or the other. [ibid.]

Application against a decree of the Small Cause Court Judge, Khandwa, dated the 23rd December, 1926, in Civil Suit No. 1292 of 1926

Mr. G. R. Deo, for the Applicant.

Mr. S. B. Gokhale, for the Non-Applicants.

ORDER.—As the result of certain past dealings, between the parties, which were adjusted by them, a balance was struck, which showed that, on 6th June, 1923, the defendants were liable to plaintiff, in the sum of Rs. 514-7-6. Defendant No. 2, purporting to act for himself and for his father, defendant No. 1, signed a *ruju hisab*, and orally agreed to re-pay, with interest, the sum found due, at the rate of Re. 1 per cent. per mensem, within one month of the execution of the *hisab*. Plaintiff filed the present suit for the recovery of Rs. 724-15-3 inclusive of interest up to the date of the suit, viz, 16th June, 1926.

Defendant No. 1 denied his liability on the ground of non-execution and limitation. Defendant No. 2 admitted the signing of the *ruju*, but denied that the *ruju* was an account stated, and urged that only items aggregating Rs. 66-3-9, were within time, and plaintiff was, therefore, not entitled to anything more than that amount on the strength of the *ruju*. It is significant to note that defendant No. 2 did not deny the plaintiff's allegations in para. 1 of the plaint about the oral agreement to re-pay within one month. Plaintiff's claim was decreed for such items as were in time at the date of the execution of the *ruju* with interest thereon, and the rest of the claim was dismissed as barred by time. The claim was wholly dismissed as against defendant No. 1 for want of execution by him and only partly decreed against defendant No. 2. In arriving at this conclusion the Court below treated the *ruju hisab* as a mere acknowledgment, and not as account stated or as a mutual, open and

Current account. The plaintiff has come up in revision against the decision.

As to the defendant No. 1's liability for the claim no serious attempt was made to show how he was bound by the admission of liability made by defendant No. 2 in regard to the balance found due on adjustment of the *khata* which stood in the name of both on 6th June, 1923. The dismissal of the claim as against defendant No. 1 must, therefore, stand.

The next question is whether the *ruju hisab* was a mere acknowledgment, or an account stated, or a mutual, open and current account. If it was a mere acknowledgment and the items disallowed were advanced on dates long prior to three years of the date of acknowledgment, the dismissal of the claim must hold good. So far as the contention that the account was a mutual, open and current account, suffice it to say that the nature of the dealings is not such that the balance must shift on one side or the other. Article 85 of the Limitation Act does not, therefore, apply.

As to whether the case comes under Art. 64 of the Limitation Act, I may observe that, where an account stated comprises items on both sides and a balance is deducted thereon, that balance is recoverable within three years from the statement of account, although some of the earlier items in the account may have then been already time-barred. If the entries on page 2 of the *hisab bahi* were scrutinised, it will be found that, on the day of the settlement, the account was made of items beginning from *Fagun Badi 30 Sambat 1975*, and ending with *11 Jeth Badi 8, Sambat 1980*. The account, on the face of it, thus shows that several items of more than three years standing were taken into consideration in the balance due, without objection on the part of the executant. Interest was also calculated and added on that basis; and, although, under date *Magh Sudi 5 Sambat 1977*, a sum of Rs. 115 was debited to the defendant's *khata* as the price of a pair of bullocks, that item was wiped out by a corresponding credit entry of Rs. 115 as the price of the pair of bullocks as they were returned, under dated 6th June, 1923. This credit was again squared by a debit under the *maveshi khata* i. e., for purchase of cattle. Then again, a debit item of Rs. 69-2-0, on account of *havala* of one Budha for a sum of Rs. 50 advanced to him, and interest thereon, from

mitti Shravan Sudi 4 Sambat 1977 to *Duja Jeth Badi 30 Sambat 1980*, also appears debited in the defendant's *khata*, and, on the strength of that debit, a credit appears to have been given to Budha towards his liability. All this adjustment points to the common intention of the parties, to set off their cross-demands against each other, and to strike a balance, in plaintiff's favour, of whatever may be found due to him, by consolidation of all items, whether barred or not barred by time, and to start with a fixed consolidated amount as representing the defendant's liability, for the future.

It appears that following upon this common understanding, and with a view to give full effect to the same, the plaintiff credited the sum of Rs. 514-7-6 so found due, and thus squared up the previous account. This, to my mind, is tantamount to a new contract, and, is a substantive cause of action in itself; so that a suit can be maintained on it. Especially as I find that the plaintiff debited the defendants with the amount of Rs. 514-7-6 under *Jeth Badi 8 Sambat 1990*, I have no hesitation in holding that the question of some items being then time-barred is irrelevant to the case as laid. It is, therefore, very likely that the plaintiff's allegation that the executant of the *hisab* made a verbal promise to re-pay the consolidated debt within one month was true and, therefore, defendant No. 2 did not dare to deny it.

I, therefore, modify the decision of the lower Court and decree the entire claim against defendant No. 2 with costs in both the Courts. As defendants Nos. 1 and 2 appeared through the same Pleader, defendant No. 1 will not get any separate costs in this Court. Pleader's fee Rs. 15.

G. R. D.

Decree modified.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 602 of 1921.

July 13, 1927.

Present :—Mr. Rupchand Bilaram, A. J. C.
FIRM OF NIHCHALSING MAHTABSing

—PLAINTIFFS

versus

FIRM OF VISHENJI GOVERDHANDAS—
DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16
—Decree, assignment of, when comes into effect—

Contract Act (IX of 1872), ss. 254 (2), 263—Insolvency of partner—Firm not ipso facto dissolved—Insolvent partner's right to assign decree held by firm.

In India the insolvency or even the adjudication of a partner as an insolvent does not by itself dissolve the partnership but only affords grounds for the Court to decree dissolution [p. 56, col. 1.]

Harnandas v. Mayadas Lakhmichand (1), relied upon.

It is open to a partner of an undissolved firm who has been adjudicated an insolvent to assign a decree held by the firm. [*ibid.*]

An assignment of a decree made by an instrument in writing takes effect from the date of such instrument and not from the date when it is recognized by the Court on application made to it under O. XXI, r. 16, Civil Procedure Code. [p. 56, col. 2.]

Sadagopachariar v. Ragunadachariar (2), relied upon.

Application under O. XXI, r. 58, Civil Procedure Code, by Vazirchand, assignee, for raising of attachment of decree in Suit No. 700 of 1924.

Mr. *Pahlajsing B. Advani*, for the Applicant.

Mr. *Tahilram Maniram*, for the Opponent.

ORDER.—This is an application under O. XXI, r. 58, Civil Procedure Code. It is connected with Execution Application No. 795 of 1925 filed in Suit No. 700 of 1924. I propose to deal with both the applications together.

In the present case the firm of Nihchalsing Mahtabsing are the judgment creditors and the firm of Vishinji Goverdhan are the judgment-debtors. The managing partner of the debtor firm is one Vishinji Devji who was adjudicated as an insolvent in Insolvency Application No. 59 of 1922 and his estate has vested in the Official Receiver. By a deed of assignment dated June 24, 1925, the judgment-creditors have assigned their decree to the firm of Lakhmichand Ohimanlal by their managing partner Lakhmichand Ghanamal for a sum of Rs. 400 with an express covenant that the assignees will have no claim against the judgment-creditors in the event of their failing to realize anything under the decree which is for about Rs. 6,500.

The name of the assignee was brought on the record by an order passed by Tyabji, A. J. C., on August 10, 1925, and at their instance of August 17, 1925, the amount due to the firm of Vishinji Goverdhan under the decree passed in their favour in Suit No. 700 of 1924 was ordered to be attached.

Suit No. 700 of 1924 was instituted by the firm of Vishinji Goverdhan by their

managing partner Vishinji Devji as plaintiff No. 1 after his insolvency and by the Official Receiver in whom his estate had vested, as plaintiff No. 2. The defendant in that suit was Lakhmichand Ghanamal the managing partner of the assignees in this suit.

On October 30, 1924, a consent decree was passed in favour of the plaintiffs in Suit No. 700 of 1924 for about Rs. 4,500.

It is said that the only other partner in the firm of Vishinji Goverdhan was one Parshotam who advanced no capital to the firm and who left Karachi for Calcutta about one year before the insolvency of the capitalist partner presumably for the purpose of avoiding the creditors of the firm, and has not returned here since. The Official Receiver treated the assets and liabilities of the firm of Vishinji Goverdhan as those of Vishinji Devji and dealt with them as such and *inter alia* assigned the decretal claim in Suit No. 700 of 1924 to one Vazirchand who then applied for being brought on the record of the suit as assignee of the decree.

On objection being raised by Lakhmichand that the assignment of the Official Receiver alone was defective, the assignee obtained a fresh deed of assignment dated 11th July, 1925, from the Official Receiver and from the firm of Vishinji Goverdhan represented by their managing partner Vishinji Devji and on the strength of that deed has now applied in these proceedings for raising the attachment issued against the decree in Suit No. 700 of 1924 and has also applied in Suit No. 700 of 1924 for his name being brought on the record as assignee and for execution issuing against Lakhmichand Ghanamal under the said decree.

The application of Vazirchand for raising attachment is based on a two fold ground, firstly that the assignment of the decree in Suit No. 700 of 1924 in favour of Vazirchand being long prior to the order of attachment issued by the Executing Court, there was nothing to attach the right, if any, of the firm of Vishinji Goverdhan having vested in Vazirchand before the date of the said order. Secondly that the firm of Nihchalsing Mahtabsing having elected to proceed against the estate of Vishinji Devji in the hands of the Official Receiver and having proved their claim against his estate, and having thereby induced the Official Receiver to

deal with the estate of the firm of Vishinji Goverdhan as that of Vishinji Devji it is not open to them to fall back on the property of the firm of Vishinji Goverdhan and their assignment if any is of no effect.

The execution of the deed of assignment in favour of Vazirchand dated July 11, 1925, marked Ex. 10-A has been duly proved.

It is urged on behalf of Lakhmichand who occupies dual capacity that it is of no effect as Vishinji Devji could not represent the firm of Vishinji Goverdhan after his insolvency and that, therefore, the money due to that firm should in the first instance be utilized for payment of the debts of the firm of Vishinji Goverdhan.

There is no force in this argument.

As held by me in *Harnamdas v. Mayadas Lakhmichand* (1) in India the insolvency or even the adjudication of a partner as an insolvent does not by itself dissolve the partnership but only affords the ground for the Court to decree dissolution. There is no allegation much less proof that any suit was filed by the insolvent or the Official Receiver or the working partner for dissolution of partnership or that such dissolution has been decreed.

It is no doubt true that by the disappearance of the working partner and the insolvency of the capitalist partner no fresh business was done, but it does not follow therefrom that the right of the capitalist partner to deal with the partnership property was thereby put an end to. It was, therefore, competent for Vishinji to act on behalf of the firm of Vishinji Goverdhan and to execute a deed of assignment on behalf of their firm validly transferring their interest in the decree in favour of the assignee. It would further appear that the object with which the assignment was made was to realize the assets of the firm for the purpose of discharging its liabilities.

The act of Vishinji in assigning the debt was, therefore, necessary for winding up the business. Even if it be assumed that the partnership between him and Parshotam had been dissolved the assignment was indubitably within his powers as defined by s. 263 of the Indian Contract Act.

It is further urged that the assignment of a decree takes effect only from the date of its recognition by the Court and as the assignment in favour of Vazirchand was not recognised before the attachment of the decree, it cannot now be recognised so as to affect the rights of the attaching creditors.

This plea is based on a misconception of law. There is nothing in the Code of Civil Procedure or any other law in force in India to warrant the suggestion that the transfer of a decree made by an instrument in writing should not take effect from the date of such instrument.

All that O. XXI, r. 16, Civil Procedure Code, provides is that a decree shall not be executed on the application of the assignee of the decree until the Court has given notice to the assignor and the judgment-debtor of such application and their objections, if any, heard to its execution. In *Sadagopachariar v. Ragunadachariar* (2) a similar plea was raised under the Civil Procedure Code of 1882 and was held to be bad. Their Lordships observed at page 63* as follows:—

"Under s. 487, Civil Procedure Code (Act XIV of 1882) it was open to him, i. e., the assignee of the decree to present a claim to the attaching Court and if he had done so and had established his transfer, it would have been the duty of the attaching Court to withdraw the attachment in the case supposed, because by the assignment in writing the property in the decrees passed to the plaintiff so that the decrees were no longer liable to be attached as the property of the first defendant."

These observations equally apply to the present case. The assignee has applied for raising the attachment, and as the property in the decree passed to him on the date of the assignment there was nothing to attach, and he is entitled to have the attachment raised.

Under the circumstances it is not necessary for me to go into the further question of estoppel.

I allow the application for raising attachment with costs.

In the connected execution application which was stayed pending the disposal of the application I order that Vazirchand's name be brought on the record as assignee.

(2) 3 Ind. Cas. 938; 33 M. 62 at p. 63; 6 M. L. T. 273.

(1) 87 Ind. Cas. 905 at p. 906; A. I. R. 1925 Sind 310.

of that decree and further order that execution to issue as prayed by him.

P. B. A.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 98 OF 1927.

September 26, 1927.

Present:—Mr. Kinkhede, A. J. C.
RAMCHANDRARAO AND OTHERS—
DEFENDANTS—APPLICANTS

versus

MAYARAM—PLAINTIFF—NON-APPLICANT.

1 Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 8—Interlocutory order—Revision—Powers of interference—Limitation Act (IX of 1908), s. 12 (2) (3)—Copies of judgment and decree applied for, on different dates—Aggregate period, whether can be excluded—Copy of decree applied for before expiry of period as extended by s. 12 (2)—Period requisite for obtaining copy, whether can be excluded—Copy of judgment, filing of, in appeal, whether optional.

A High Court may interfere in revision against an interlocutory order where matters of principle or jurisdiction are involved. [p. 57, col. 2.]

A party is entitled to deduct under s. 12 of the Limitation Act the aggregate period taken by him in obtaining copies of the judgment and the decree, even though he applied for them on different dates, provided the applications were made before the expiry of the period of limitation prescribed for filing an appeal. [p. 58, col. 1.]

Bhagmal v. Firm of Jannadas Potdar (1) and *Sheoram v. Chintoo* (2), followed.

He is entitled to exclude under s. 12 (2) of the Act, the period required for obtaining a copy of the decree, where he has applied for the same before the expiry of the extended time allowed by s. 12 (3). [p. 58, col. 2.]

A suit was dismissed on the 24th August, 1926. The plaintiff applied for a copy of the judgment on the 8th September, 1926, and obtained the copy on the 30th September, 1926. He applied for a copy of the decree on the 7th October, 1926, and obtained the same on the 12th October, 1926, and an appeal which had to be filed within 30 days was filed on that day.

Held, that the appeal was not barred. [*ibid.*]

It is not optional for an appellant to file a copy of judgment with the memorandum of the appeal, even though it may be open to the Appellate Court to dispense with it. [*ibid.*]

Civil revision of an order of the District Judge, Bhandara, dated the 11th January, 1927, in Civil Appeal No. 82 of 1926.

Mr. G. L. Subhedar, for the Applicants.

Messrs. V. Bose and P. N. Rudra, for the Non-Applicant.

ORDER.—This revision raises an interesting question of law. The non-applicant, Mayaram, filed Suit No. 62 of 1925, in the

Court of the Subordinate Judge, Balaghat, against the applicants. That suit was dismissed on 24th August, 1926. Plaintiff applied for a copy of the judgment on 8th September, 1926, and obtained the same on 30th September, 1926. Thereafter, a copy of the decree was applied for on 7th October, 1926, and obtained on 12th October, 1926, and the appeal was filed, on that day, in the Court of the District Judge, Bhandara. The applicants took a preliminary objection that the appeal was barred by time, but the same was overruled, and the case was set down for hearing on the merits. It is against this interlocutory order overruling the objection as to limitation that this revision has been preferred.

The non-applicant raises objection to the maintainability of the present revision, on the ground that it is not the practice of this Court to entertain any revision against an interlocutory order. Suffice it to say, that although, this Court does not, ordinarily, interfere still, where, matters of principle or jurisdiction are involved, this Court does not, necessarily, decline to entertain it. I, therefore, think that the present revision can lie.

Now, as to the merits of this petition for revision, I say that the decision sought to be revised, is in accordance with the Statute Law, and, must be upheld. I will show how it is so.

The prescribed term of 30 days for filing an appeal against the decree expired on 23rd September, 1926; but, before such expiry, the non-applicant applied for copy of the judgment on 8th September, 1926, i. e., on the 15th day of the delivery of judgment, when he had still to his credit 15 days out of the prescribed period of limitation (Art. 152, Limitation Act). When, however, he obtained the copy of the judgment, on 30th September, 1926, the 15 days to his credit had expired, and, out of the period of 23 days which he was entitled to exclude as time requisite for obtaining the copy of the judgment, under cl. 3 of s. 12 of the Limitation Act he had still to his credit, a period of 16 days. Before the expiry of this period, i. e. when, only 6 days out of it had expired, he, on 7th October, 1926, applied for a copy of the decree, and, obtained it, on 12th October, 1926, i. e., when he had still 4 days to his credit, out of the aforesaid period. The appeal was filed on the very day. It will thus be seen that the appeal was instituted, on the 49th day from

the date of judgment, or, excluding the 23 days time required for obtaining the copy of the judgment only, on the 26th day of the period of limitation prescribed by law. If the period of six days which was required for obtaining the copy of the decree, were excluded as he is entitled to exclude it, under cl. 2 of s. 12, his appeal would be still within time by 6 more days. In spite of this state of things, the applicants contended that the appeal was barred by limitation, by reason of the fact that, instead of applying for copy of the decree and of the judgment, simultaneously, or, at different times, within the period of 30 days prescribed by law for appealing, the non-applicant applied first for copy of judgment before the expiry, and then, for copy of the decree, after the expiry of the said period. It is argued that the non-applicant was not entitled to exclude the time taken up in obtaining a copy of the judgment as he had not first applied for obtaining a copy of the decree. I think this contention is unsound in view of the clear provisions of s. 12 of the Limitation Act, which entitle him to deduct both the periods of time.

As pointed out by Drake-Brockman, J.C., in *Bagmal v. Firm of Jamnadas Poidar* (1), it is a well-recognized practice for an unsuccessful litigant to obtain copy of judgment first so that he may consider whether he will appeal or accept failure. It is undoubtedly open to a litigant to postpone applying for copy of judgment and decree till the very last day of the scheduled period. Similarly Mittra, A. J. C., in *Sheoram v. Chintoo* (2), held that the law does not prescribe any particular time for the making of the applications for copies or require that copies of both decree and judgment must be applied for simultaneously. Accordingly in both those cases the aggregate period taken in obtaining copies of judgment and decree was excluded, even though applications for those copies were made on different dates, they were made before the expiry of the period of limitation prescribed for filing the appeal.

In the present case only one application, viz., that for obtaining copy of the judgment was filed within the period of limitation. So, even on the authority of the aforesaid decisions and the provisions of s. 12, (3), Limitation Act, the non-applicant's appeal could be treated as within

time, without the necessity of excluding the period required for obtaining the copy of the decree. If the point were necessary for me to decide, I would hold that the non-applicant was entitled to exclude, under s. 12 (2) of the Act, even the period required for obtaining copy of the decree, provided he has applied for the copy of the decree, before the expiry of the extension of time allowed by s. 12 (3) as time required for obtaining copy of the judgment.

It is, however, argued before me that it is the decree which gives a right of appeal and it is, therefore, necessary to obtain a copy thereof in order to keep that right alive, and that since it is optional with the Court to dispense with the filing of a copy of judgment, the intending appellant should not be held entitled to exclude the time spent by him in obtaining a copy of an optional document, viz., judgment. No doubt under O. XXI, r. 1 of the Civil Procedure Code, every memorandum of appeal must be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded, I need only say that it is not left to the litigant's choice to file or not to file a copy of judgment; inasmuch as it is not optional with him to obtain its copy or not, and Judge alone can dispense with it, the judgment cannot be said to be an optional document. It is as essential as the decree. It is, therefore, wholly immaterial in what order the copies are applied for and obtained. All that is required is that the period prescribed by the specific Article of the Limitation Schedule with the extension claimable under the provisions of s. 12 of the Limitation Act, should not have expired, before the copies were obtained and lodged with the memo. of appeal. In short, the right of appeal must be kept alive, under s. 12 of the Act, until the date the appeal is filed.

In this view of the case the revision is dismissed with costs. Pleader's fee Rs. 25.

G. R. D.

Revision dismissed.

(1) 42 Ind. Cas. 965.

(2) 49 Ind. Cas. 961.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 839 OF 1922.

January 6, 1927.

Present:—Mr. Justice Fforde and
Mr. Justice Campbell.ISHAR DAS-DHARAM CHAND—
DEFENDANTS—APPELLANTS*versus*

DHANPAT RAI-DAULAT RAM—

PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 73, 83, 107—Contract for sale of unascertained goods—Subsequent appropriation by seller—Appropriation not assented to by buyer—Property, whether passes—Re-sale by seller before property has passed to buyer, legality of—Proper remedy of seller—Suit for damages.

Property in goods contracted to be sold will not pass to the buyer under s. 83 of the Contract Act by a subsequent appropriation by the seller unless such appropriation is assented to by the buyer. [p. 60, col. 2.]

A seller has no right to re-sell and claim from the buyer the difference between the contract price and the price fetched on re-sale under s. 107 of the Contract Act where the property in the goods has not passed to the buyer. The only remedy of the seller in such a case is to sue for compensation for breach of contract and the measure of that compensation would have to be based on the difference between the market price at the time of breach and the price agreed upon. [p. 61, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 28th February, 1922.

Messrs. *Moti Sagar* and *Mehr Chand Mahajan*, for the Appellants.

Messrs. *M. L. Puri* and *Sheo Narain Kapur*, for the Respondents.

JUDGMENT.

Fforde, J.—By a contract in writing, dated the 14th April, 1920, the plaintiff firm agreed to sell and the defendant firm agreed to buy four cases of dyed brocade of the office of D. Raushan Lal at the rate of 22½ pence per yard. Each piece was to contain from 50 to 55 yards and each case was to contain 40 pieces. The sellers were to receive Rs. 200 per case as profit from the buyers. If there were more or less pieces in a case the profit was to be adjusted accordingly. The shipments are described as of May-June. The plaintiffs duly notified the expected arrival of the goods by letter dated the 22nd July, 1920. In this letter the plaintiffs stated that interest would commence to run from the arrival of the steamer in Karachi. This notice was headed: "Dyed brocade quality 0076 sold to you 4 cases May-June, 1920 at Rs. 250 per case profit each containing 50 pieces;" and the numbers of the cases were then given as

204—206 and 208. This is the first piece of correspondence which took place in connection with this transaction. The defendants' reply is dated the 27th July, 1920, in which they say that before dealing with the letter of the plaintiffs of the 22nd, they would like to know what was the date of the Bill of Lading. They also asked for the original design and shades of the goods, and they further raised the point that the profit on each case was to have been Rs. 200, and not Rs. 250. In reply to the letter the plaintiffs wrote on the 29th July, 1920, explaining the method in which the profit was calculated, stating that the relative sample had been sent them by registered post, and ending up by pointing out that the Bill of Lading was not material as there was nothing stated in respect thereof in the particular contract between the parties. The defendants then by letter of the 30th of July pointed out that instead of supplying one design the plaintiffs had supplied five designs which the defendants refused to accept. They also repeated that it was important that they should have the Bill of Lading as otherwise they could not be certain that the goods were not of a late shipment.

There was no further correspondence until the 3rd of September, 1920, when the plaintiffs wrote to say that they had enquired from their shippers and had ascertained that the goods in question were shipped at the right time. In answer to this the defendants referred the plaintiffs to their letter of the 30th of July, to which they said they had nothing further to add. They concluded by saying that they would not pursue the correspondence on the matter any further as the plaintiffs themselves had cancelled the contract in the defendants' office. To this letter the plaintiffs replied on the following day, denying that the contract had ever been cancelled and claiming Rs. 1,000, this sum being made up of profit on the four cases and interest from the date of the arrival of the steamer at Karachi. On the same date the defendants replied acknowledging receipt of the plaintiffs' letter, referring the plaintiffs to their own letter of the previous date, and stating that they had nothing more to add, and that any further correspondence on the subject would not be replied to. In spite of this intimation from the defendants the plaintiffs again wrote on the 30th of September informing the defendants that Railway receipts

for the goods had arrived at the Bank, demanding the contract price and requesting the defendants to take immediate delivery within 24 hours.

To this last letter there was no reply, and the parties are agreed that, so far as the defendants were concerned, they had repudiated the contract before the time fixed for performance. The plaintiffs' Counsel states, as indeed the correspondence shows, that the plaintiffs had not accepted the repudiation of the contract but were keeping it alive and insisted upon performance in due course. According to the plaintiffs' Counsel the date for acceptance was not later than the 1st of October, 1920. That being so, the plaintiffs upon the defendants' refusal to accept delivery should have brought their suit for damages for breach of contract based upon the difference between the market price obtaining at the date of the breach and the contract price. Instead of taking this course the plaintiffs did nothing further after the letter of the 30th September until the 29th of December, when they sent a notice to the defendants informing them that if they did not take delivery of the goods within one week the four cases would be sold by auction on the expiry of that period, and the defendants would be held liable for all expenses incurred. In reply to this notice the defendants wrote on the 30th of December pointing out that two out of the four cases were received late, the contract concerning them was cancelled, and that, as regards the remaining goods, neither the design nor the colour nor the floral design was in accordance with the sample; they stated that the goods could not be thrust upon them, and concluded by saying that if any steps were taken against them they would hold the plaintiffs liable for costs and damages. This letter is merely a repetition of the defendants' previous refusal to perform their part of the contract. Eventually on the 17th of January the four cases in question were handed to the auctioneer to be sold by public auction and were sold on the 25th of January, realising the sum of Rs. 6,192-13. On the 8th of February, 1921, the plaintiffs brought the present suit for recovery of Rs. 6,896 10-0 damages based on the difference between the price realised for the goods at the auction sale and the contract price with interest added thereto. The trial Court gave the plaintiffs a decree for practically the amount claimed.

The defendants' main case is that the plaintiffs have not shown that they suffered any damage by reason of the defendants' breach of their contract. Mr. Moti Sagar has argued that as there was no consent by the defendants to the appropriation by the plaintiffs of the four cases in question to the contract, the property in the goods did not pass and, accordingly, that the measure of damage provided by s. 107 of the Indian Contract Act is not the proper measure in this case. It has been argued by Mr. Puri for the plaintiffs that the contract in question must be read with the contract entered into between the plaintiffs and their importers Messrs. D. Raushan Lal, and that in that contract there being a clause of re-sale upon default of the purchasers to accept delivery, that clause must be read into the present contract, and in the alternative he argues that even if this contract between the plaintiffs and their importers cannot be read into the contract between the present parties the property in the goods in question passed to the defendants under s. 83 of the Indian Contract Act, inasmuch as, according to him, there was an appropriation of these goods to the contract by the plaintiffs and assent to the appropriation by the defendants. Mr. Puri, however, has not been able to point to any act by the defendants amounting to an assent to the appropriation by the plaintiffs. He relied upon the correspondence, which in my opinion does not evidence any such assent. I am, moreover, satisfied that the contract between the plaintiffs and their importers has not been incorporated into the contract of the 14th of April, 1920. This could only be done either by express terms embodied in the agreement of the 14th April, or by necessary implication from the conduct of the parties and their statements on the subject or by the established usage of the trade. In my opinion neither by the terms of the document of the 14th April, nor by necessary implication, nor by the custom of merchants can the terms of the contract between the plaintiffs and their sellers be read into the agreement of the 14th April.

Accordingly the plaintiffs had no right to re sell by agreement, and the property in the goods not having passed to the buyer, there was no right of re-sale under s. 107 of the Indian Contract Act. That being so their only cause of action would be for compensation for breach of contract, and

the measure of that damage would have to be based upon the difference between the market rates of the goods in question at the time of the breach and the price agreed upon by the parties. The plaintiffs have not produced any evidence as to the price prevailing in the market at the time of the breach, which the plaintiffs allege occurred between the 30th of September and 1st of October. In this view of the case I do not think it is necessary to discuss the further question which would arise had the plaintiffs a right to measure their damage on the basis provided by s. 107 of the Indian Contract Act. I may mention, however that although the time for performance of the contract was the 30th of September, 1920, the sale did not take place until the 25th of January, 1921. Had there been in the plaintiffs a right of re-sale arising from contract or under the Statute, the further question would have had to have been decided as to whether or not that right was exercised within a reasonable time from the date at which the defendants ought to have accepted delivery of the goods. This matter, however, in view of the conclusion I have come to it, is not necessary to pursue.

For the reasons I have given I am of opinion that the plaintiffs have failed to establish that they have sustained any damage of the defendants' breach of their contract and the appeal must accordingly be accepted, the decree of the trial Court set aside and judgment entered for the defendants dismissing the suit with costs.

Campbell, J.—I agree.

A. N. A. *Appeal accepted.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 106 OF 1926.

August 29, 1927.

Present:—Sir William Phillips, Kt., Off. Chief Justice, and Mr. Justice Ananthakrishna Iyer.

THE OFFICIAL ASSIGNEE OF MADRAS
—APPELLANT
versus

S. M. Sheik MOIDEEN ROWTHER

—RESPONDENT.

Presidency Towns Insolvency Act (III of 1900), ss. 55, 56—Alienation attacked under s. 55—Burden of proof of invalidity—'Good faith', meaning of—Absence of good faith, proof of.
The onus of proving that a transfer effected by

an insolvent is void against the Official Assignee under s. 56 of the Presidency Towns Insolvency Act is on the Official Assignee; but the onus of proving good faith and valuable consideration in a case coming under s. 55 of the Act is on the garnishee. [p. 62, col. 2.]

Official Assignee of Madras v. Sambanda Mudaliar (1), Nripendra Nath Shahoo v. Ashutosh Ghosh (2) and Official Assignee of Bengal v. Yokohama Specie Bank, Ltd. (4), followed.

Absence of good faith under s. 55 of the Act could be proved not only by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent but also by other circumstances. [p. 64, col. 2.]

If a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith. [p. 65, col. 2.]

Appeal from the judgment of Mr. Justice Beasley, dated the 14th September, 1926, passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court, in I. P. No. 110 of 1924, in Application No. 423 of 1924.

Mr. R. Ramachandra Chetty, for the Appellant.

Mr. V. Varadaraja Mudaliar, for the Respondents.

JUDGMENT.—S.M.K. Mohamad Rowther was adjudicated insolvent on 31st March, 1924, on a petition filed on 17th March, 1924, by a creditor Chengalveraya Chettiar. The Official Assignee of Madras applied to have a sale-deed, dated the 27th October, 1923, and a deed of transfer of mortgage, dated 11th November, 1923, executed by the insolvent in favour of the garnishee (S. M. Sheik Mohideen Rowther) declared void under s. 55, or in the alternative under s. 56, of the Presidency Towns Insolvency Act. The learned Judge having dismissed the application, the Official Assignee has preferred this appeal.

The insolvent was carrying on business as a commission agent at Madras. He had a branch shop in Tinnevely. In 1923 the insolvent was largely indebted. He was indebted to the garnishee to the extent of about Rs. 20,000 in May, 1923, and he had executed in favour of Chengalvaray Chettiar a promissory note on 1st October, 1923, for Rs. 30,000 the amount having been advanced to the insolvent between 25th June, and 30th September, 1923. The garnishee is the paternal uncle of the insolvent and the sale-deed, Ex. IV, executed by the insolvent in favour of the garnishee comprised all the immoveable properties of the insolvent. It was also alleged that the properties comprised in the sale-deed were

worth very much more than Rs. 10,000 the consideration mentioned in the sale-deed. Under Ex. V, dated 11th November, 1923, the insolvent transferred for Rs. 775 to the garnishee the mortgage rights of the insolvent in certain immoveable properties in Tinnevely, the principal amount of the mortgage being Rs. 500. It was also alleged that Ex. IV was not executed on the date it bears (27th October, 1923) but that it was executed only about the 20th December, 1923, the date of registration; finally it was alleged that the garnishee was aware of the insolvent's indebtedness to Chengalvaraya Chettiar and others and that Ex. IV was taken with full knowledge of the fact that it comprised all the properties of the insolvent and that the same was a fraudulent transaction and void as against the Official Assignee. The learned Judge in dismissing the application concluded his judgment as follows:—"The Official Assignee has not in my view discharged the burden on him of showing that the sale was not *bona fide*; it clearly was, in my view, for valuable consideration and the only way in which the *bona fide* of the transaction might have been impeached was by showing that for some reason or other the execution of the sale-deed was not on the date it bears. That as I have said the Official Assignee has failed to prove. The Official Assignee having failed to show that the sale was not for valuable consideration and that it was not *bona fide*, this application must be dismissed with costs."

On behalf of the appellant the following main contentions were raised by his learned Counsel:—

1. That the deed of sale was not executed at Pettai a suburb of Tinnevely on 27th October, 1923, the date mentioned in the document but that it was antedated and executed only about the time of its registration at Tinnevely on 20th December, 1923.

2. The consideration mentioned in the document Rs. 10,000 is grossly inadequate; the properties being really worth about Rs. 20,000.

3. The amount due to the garnishee at the time was only about Rs. 7,000 and the recital in the document that more than Rs. 10,000 was due to the garnishee from the insolvent at the time is false and fraudulent.

4. That the document, Ex. IV, could

not be said to have been executed in good faith and consequently the transaction is void as against the Official Assignee, under s. 55 of the Presidency Towns Insolvency Act.

5. That the case is also one of fraudulent preference coming within s. 55 of the Act and consequently the transfer is void as against the Official Assignee.

Before discussing the questions raised by the appellant it would be convenient to state that the *onus* of proving that a particular transfer effected by the insolvent is void against the Official Assignee under s. 56 of the Act is on the Official Assignee, whereas the *onus* of proving good faith and valuable consideration in a case coming under s. 55 would be on the garnishee. This was admitted before us by the learned Counsel on either side appearing in the case, and we think the decision of this Court reported as *Official Assignee of Madras v. Sambanda Mudaliar* (1), and the Calcutta High Court reported as *Nripendra Nath Shahoo v. Ashutosh Ghosh* (2) and *Nilmoni Chowdhuri v. Basanta Kumar Banerjee* (3) and *Official Assignee of Bengal v. Yokohama Specie Bank, Ltd.*, (4) fully support the position.

Before discussing the evidence in the case we should mention that the insolvent died in January, 1924, without filing any schedule of assets and liabilities. His account-books have not been produced. Kadir Mohideen Rowther the fourth witness examined on behalf of the Official Assignee was formerly a *gumashta* of the insolvent. He has deposed that the garnishee is the heir of the insolvent and that all the accounts of the insolvent had been handed over to the garnishee. The garnishee was examined by a commissioner in Tinnevely, as also his witnesses including an attester to Ex. IV, and the garnishee's accountants Sebastian Pillai and Velayudan Pillai. Under ordinary circumstances the garnishee as well as his accountants, though residents of Tinnevely, would have to be examined in Court in Madras which would have been more satisfactory than their examination by a Commissioner at Tinnevely. It would appear that applications were made to the

(1) 60 Ind. Cas. 205; 43 M. 739; 39 M. L. J. 315; 28 M. L. T. 258.

(2) 29 Ind. Cas. 126; 19 C. W. N. 157; 21 C. L. J. 167.

(3) 29 Ind. Cas. 814; 19 C. W. N. 865.

(4) 87 Ind. Cas. 302; 20 C. W. N. 374; A. I. R. 1925 Cal. 610.

High Court first to have some witnesses (other than the garnishee and his accountants) examined on commission and subsequently for similar examination of the accountants and the garnishee also. None of the witnesses examined by the Commissioner at Tinnevely were cross-examined on behalf of the Official Assignee—the Official Assignee not having succeeded in his attempts to have the proceedings before the Commissioner adjourned. On the 24th of December, 1925, the Commissioner sent a registered notice to the Official Assignee appointing 2nd January, 1926, for examination of the witnesses. The Christmas holidays intervened and though the Official Assignee wired to the Commissioner on 28th December, 1925, to postpone the enquiry, the Commissioner replied by wire on 30th December, 1925, that as the time for return of the commission was 4th January he adjourned the inquiry to 4th January, 1926, and the District Munsif ordered extension only for the examination of the garnishee till 9th January, 1926. Thus only the garnishee was cross-examined on behalf of the Official Assignee before the Commissioner. In the circumstances one is not surprised to find gaps in the evidence and there are circumstances appearing in the case on which more light could probably have been thrown had the garnishee and his accountants been examined before the learned Judge in Madras. These circumstances have to be kept in view in discussing the evidence adduced in the case.

The first question is whether the sale-deed, Ex. IV, was executed on the date it bears—that is on 27th October, 1923.

[After discussing the evidence their Lordships came to the conclusion that Ex. IV was not executed on the 27th October, 1923, but was antedated and proceeded as follows:—]

As regards the 2nd and 3rd points, namely, the value of the properties covered by Ex. IV, and re-payment of Rs. 15,000 to the garnishee by the insolvent, we are not satisfied that the appellant has proved his contentions on these heads though having regard to the fact that on 15th June, 1921, the garnishee was prepared to take properties covered by the First and Second Schedules only of Ex. IV, as security for Rs. 10,000, and seeing that the value of the properties covered by Third Schedule of Ex. IV is about Rs. 2,400, it is possible that the properties included in Ex. IV were worth more than

Rs. 10,000 in 1923. But the evidence on record is not definite enough for us to say that the price of Rs. 10,000 mentioned in Ex. IV is grossly inadequate. It does not seem that this portion of the case as regards valuation of the property was properly pressed before the learned Judge. Otherwise it is difficult to understand the following observation of the learned Judge: "The evidence on behalf of the garnishee is evidence taken on commission and it goes to show that the property was worth at least equal to the consideration set out in the sale-deed and this evidence has not been contradicted in any way". Exhibit VI is not referred to by the learned Judge in his judgment. As regards the re-payment of Rs. 15,000 it is spoken to only by Kadir Mohideen Rowther, *gumashta* of the insolvent; and though having regard to the evidence given by that witness materially in favour of the garnishee in one important respect (we refer to the statement by the witness that Exs. IV and V, were executed on the 11th of November, 1923, which would be more than three months prior to the creditor's petition), it could not be said that the witness was inimical to the garnishee, yet on the whole we are not prepared to differ from the learned Judge on this point. We accordingly find against the appellant on points Nos. 2 and 3 mentioned above.

In the face of the statement made by Kadir Mohideen Rowther that the documents were executed on the 11th of November, 1923, we hold that the Official Assignee is not entitled to relief under s. 56 of the Act, but we hold that he is entitled to the relief that he seeks under s. 55.

The garnishee and the insolvent were near relations, the garnishee being the paternal uncle of the insolvent. The insolvent had a branch shop at Tinnevely where the garnishee was carrying on his own business. Though the garnishee had transactions with the insolvent on a large scale some years previously, the subsequent dealings were only on a comparatively small scale. The garnishee was anxious in 1921 to take security, but did not take steps to complete the security bond Ex. VI, being assured by the insolvent that the amount would be re-paid from the collections of a *chit* fund. The garnishee admitted that in 1923 on account of certain rumours the garnishee came to know that the insolvent's representations were not true. The

garnishee also (Para. 6 of the garnishee's counter-affidavit) admitted that all the properties were included in the sale-deed Ex. IV. Though the garnishee stated in his deposition that he did not ask the insolvent whether he had any liabilities we have no doubt that the garnishee had full knowledge of the insolvent's liabilities at the time. We have found that the document, Ex. IV, was antedated. The garnishee took an assignment not only of all the immoveable properties of the insolvent, including dwelling houses, but he took also an assignment of the mortgage rights possessed by the insolvent in respect of a mortgage for the principal sum of Rs. 500 and interest, (Ex. V). If the garnishee's case about the draft sale-deed is accepted then it is clear that after executing a promissory note to Chengalvaraya Chettiar on 1st October, 1923, for Rs. 30,000 the insolvent agreed to sell all his properties to the garnishee for Rs. 10,000 on the very next day, namely, the 2nd of October. The garnishee's clerk was sent to Madras to gather information about the state of the insolvent's business and it is impossible to believe that the garnishee did not know that the insolvent was heavily indebted in Madras. There is evidence that the insolvent owed moneys to two other creditors in addition to Rs. 30,000 that he owed to Chengalvaraya Chettiar. No doubt, no schedule of assets and liabilities has been filed, the insolvent being dead. In the circumstances of the case we are inclined to think that the garnishee has got possession of the account books of the insolvent and has withheld the production of the same; the said account-books, if produced, would have been of very great use in the decision of this case. When confronted with the question as to whether he would have taken the sale-deed Ex. IV, if he had known that the insolvent was indebted to Chengalvaraya Chettiar in the sum of Rs. 30,000 the garnishee stated that even if he had known that the insolvent had other debts, he would have purchased the property as his debts should be realised. We hold that the garnishee knew when he took Ex. IV, that the insolvent was indebted to Chengalvaraya Chettiar to the extent of Rs. 30,000 and also to some others and that he (insolvent) had no other properties. Knowing all this the garnishee took an assignment of all the insolvent's properties and

antedated the sale-deed knowing full well that what was being done was in fraud of the insolvency law. He cannot be said to have acted in good faith in the circumstances of the case.

The learned Counsel for the respondent argued that the present case does not come under s. 55 of the Presidency Towns Insolvency Act. Under that section any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the Official Assignee. It will be noticed that it is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that the exception is made. In the present case the respondent has proved valuable consideration, but he has to prove good faith also. The respondent's Counsel argues that the expression 'good faith' in the section means only that the transaction should not be a sham one in which there is a resulting trust in favour of the insolvent, and he contends that as neither of those two objections could be urged in the present case, the transaction is binding on the Official Assignee. We are unable to accept that contention. Absence of good faith could be proved by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors to whom he owes much more than the debt due to the transferee and the transferee also being fully aware of all the above circumstances and in concert with the insolvent, brings into existence such a transfer deed, and antedates the same, and take such sale-deed for debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, then we have no doubt that the transaction could not be said to have been entered into in good faith, and the same should be held to be void against the Official Assignee under s. 55 of the Act. The cases referred to by the respondent *Hakim Lal v. Moosahar Sahu* (5) and *Musahar Sahu v. Hakim*

Lal (6) are cases that were decided under s. 53 of the Transfer of Property Act and not under the Insolvency Act. In fact at page 1015 of 34 Calcutta [*Hakim Lal v. Mooshahar Sahu* (15)] it is observed as follows:—"It is well-settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors, even to the extent of transferring all his property to one creditor to the exclusion of the others." Note the words 'In the absence of a Bankruptcy Act.' The Privy Council also in *Musahar Sahu v. Hakim Lal* (6) makes a similar observation. At page 524* it is said: "As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others, unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts." In fact we have cases arising under the Insolvency Act where it has been held that under similar circumstances the transfer would be void as against the Official Assignee. In *Official Assignee of Bengal v. Yokohama Specie Bank, Ltd.*, (4) Sanderson, C. J. and Buckland, J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any contemporaneous advance was void against the Official Assignee when the transferor was adjudicated insolvent within two years after the date of the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment, the Court held that the transfer was not in *good faith* within the meaning of s. 55 of the Act. Justice Buckland was of opinion that in considering the effect of transactions of such a nature, the facts must be considered in the light of the Law of Bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors, and that a transaction which may in other circumstances be free from all taint would become an offence when it is established that it contravenes the Law of Bankruptcy. Justice Buckland, J., further remarked that "though the Bank (transferees) may have

(6) 32 Ind. Cas. 343; 43 C. 521; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.).

* Page of 43 C.—[Ed.]

acted honestly in the popular sense they cannot be deemed to have acted in good faith within the Law of Insolvency, however honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvents as security for their own debt." We may also refer in this connection to a passage in the Privy Council decision reported as *Khoo Kwat Siew v. Wooi Taik Hwat* (7) where Lord Hobhouse observed as follows:—"The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance something is left to carry on the business." In *In re Jukes, Ex parte Official Receiver* (8) Wright, J., remarks as follows:—"I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a past debt. . . . I cannot help thinking that if a creditor . . . takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith." See also *Official Assignee of Bombay v. Obla Kuna Muna Sundarachari* (9).

The onus of proving good faith, it has been held, is on the transferee. *Official Assignee of Madras v. Sambanda Mudaliar* (1), *Official Assignee of Bengal v. Yokohama Specie Bank, Ltd.*, (4). It will depend on the circumstance of each case whether good faith has been proved or not. Having regard to the facts found by us in this case, we are of opinion that the transactions impugned in this case were not executed in good faith and we accordingly allow the appeal and declare that the deed of sale dated the 27th October, 1923, Ex. IV, and the deed of transfer, dated 11th November, 1923, (Ex. V) are void against the Official Assignee. The garnishee would be entitled to prove, as a simple creditor, in respect

(7) 19 C. 223 at p. 231; 19 I. A. 15; 15 Ind. Jur. 750; 6 Sar. P. C. J. 98; 9 Ind. Dec. (N. s.) 594 (P. C.).

(8) (1902) 2 K. B. 58 at p. 60; 71 L. J. K. B. 710; 50 W. R. 560; 86 L. T. 456; 9 Manson 249.

(9) 102 Ind. Cas. 702; 53 M. L. J. 209; 25 L. W. 813; A. I. R. 1927 Mad. 634; 38 M. L. T. 401; (1927) M. W. N. 685; 50 M. 776.

of the amount that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the Original Side scale of the Official Assignee both in the appeal and before the learned Judge including the costs of the commission.

V. N. V.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 330 OF 1927.

March 28, 1927.

Present:—Mr. Justice Panton and
Mr. Justice Mitter.

DHARANI MOHAN RAY—PETITIONER

versus

KSHITIPATI RAY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 40
—Judgment-debtor under arrest—Grounds for release
—'Furnishing security', meaning of.

A judgment-debtor who is arrested and brought before the Court cannot be released under O. XXI, r. 40, Civil Procedure Code, unless the Court is satisfied on proper evidence that he is unable from poverty or other sufficient cause to pay the decree debt.

A Court cannot, therefore, release a judgment-debtor under arrest on the mere statement of his Vakil at the bar that he is possessed of much landed property.

'Furnishing security' in O. XXI, r. 40 (3) of the Civil Procedure Code means furnishing proper security and not any illusory security.

Rule against an order of the Subordinate Judge, Hooghly, dated the 7th March, 1927.

Mr. N. Barwell (with him Babu Manmatha Nath Ray, Junior, on behalf of Babu Hiralal Chakrabarti), for the Petitioner.

Dr. Radhabinode Pal (with him Babus Narayan Chandra Kar and Nirmal Kumar Sen), for the Opposite Party.

JUDGMENT.—Having heard the learned Counsel who appeared in support of the Rule and the learned Vakil for the judgment-debtor, we are satisfied that the order made by the Subordinate Judge on the 7th March, 1927, was not in accordance with law. In the first place, there was no evidence before him on which it was possible for him to arrive at the decision that the judgment-debtor was a person, who for any "other sufficient cause" within the meaning O. XXI, r. 40 was unable to pay the amount of the decree. The mere statement made at the Bar to the effect that he was owner of landed

property is insufficient for the purpose. In the next place, it was clearly wrong for the learned Subordinate Judge to release the judgment-debtor on his personal security, which was absolutely ineffective. Order XXI, r. 40, sub-r. (3) provides that the Court may release the judgment-debtor on his furnishing security, which means furnishing proper security and not the illusory security with which the learned Subordinate Judge has been satisfied.

We, therefore, set aside this order and direct the judgment-debtor to surrender at once before the Subordinate Judge, Third Court, Hooghly, who will then consider, on proper materials being placed before him, whether he should be committed to Jail or released, and if released, upon what security; the learned Subordinate Judge must comply with the provisions of O. XXI, in the matter of security. We also draw the attention of the Subordinate Judge to the mandatory provisions of s. 55 of the Code of Civil Procedure.

We may say here that the learned Vakil for the judgment-debtor states that his client is willing to furnish security.

The opposite party will pay the costs in this Rule to the petitioner.

A. N. A.

Rule made absolute.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL

No. 37 OF 1927.

PETITION No. 119 of 1926.

August 15, 1927.

Present:—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Blackwell.

GANGARAM TILLOCKCHAND—

APPELLANT

versus

THE CHIEF CONTROLLING REVENUE
AUTHORITY—RESPONDENT.

Court Fees Act (VII of 1870), s. 5—Decision of Judge of High Court on reference, whether appealable—Final, meaning of—Government of India Act, 1915; (5 & 6 Geo. V, c. 61), s. 108 (1).

The decision of the Chief Justice or a Judge of the High Court appointed by him to whom a question relating to Court-fee is referred under s. 5 of the Court Fees Act is not open to appeal or revision. [p. 70, col. 2.]

Balkaran Rai v. Gobind Nath Tewari (2), *In the goods of Bhubaneswar Trigunait* (3), *Ramsekhar Prasad Singh v. Sheonandan Dubey* (5) and *Krishna Mohan Sinha v. Raghunandan Pandey* (6), relied on.

Thaddeus Nahapiet v. Secretary of State for India (1) and *Taraprasanna Chongdar v. Nrisinha Murari Pal* (4), distinguished.

The right of appeal does not exist in the nature of things but must be given by express enactment. [p. 71, col. 1.]

A Judge deciding a reference under s. 5 of the Court Fees Act sits as a person designated and not as a 'Court.' [p. 71, col. 2.]

Appeal from the following decision of Crump, J. under s. 5 of the Court Fees Act

Crump, J.—(April 12, 1927)—As far as r. 561-A of the High Court Rules is concerned, it is obvious that the rule is not intended to decide what amount is payable on the grant of Probate, but is only a rule intended to secure that, as far as may be, whatever may be payable shall be paid at the time when the application first comes to be made. The payment so made is only provisional, and it is conceded that, if the grant of Probate for one cause or other does not come to be made, the petitioner would be entitled to a refund of the amount so deposited. That being so, I cannot see that r. 561-A of the High Court Rules has any bearing on the point before me. That point must, in my judgment, be decided upon the correct interpretation of s. 19-I of the Court Fees Act. That section for the present purposes runs as follows:—

"(1) No order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the Third Schedule, and the Court is satisfied that the fee mentioned in No. 11 of the First Schedule has been paid on such valuation."

It seems to be that the question arises for consideration when the grant comes to be made and not until that date. What I have to decide here and now, no grant having yet been made in the present case, is, whether the fee mentioned in No. 11 of the First Schedule has or has not been paid, and seeing what the law is here at the present time as to the fee payable, it appears to me that the answer must clearly be in the negative. I concede that fiscal Statutes should be construed so far as is allowable in favour of the subject. But, holding as I do that the fee is payable upon the grant of Probate and not upon the application for Probate

it seems to me clear that the law in force at the date of the grant is the law which must be applied in deciding this matter. I have been referred to a decision of the Calcutta High Court, *Thaddeus Nahapiet v. Secretary of State for India* (1). In that decision it was apparently held, in similar circumstances, that the petitioner was competent to comply with s. 19-I at the time when he actually made the payment, and as that payment was before the legislation came into force, whereby the rate of fee was raised, he had complied with the requirements of the Statute and was entitled to the grant of Probate without further payment. With all possible deference to the learned Judges who decided that case, it appears to me that it is not a correct view of the matter. I do not see how the petitioner can be said to be competent to comply with the requirements of the section until the time when the obligation imposed by that section comes into effect, that is, when the grant of Probate comes to be made. This being my view of the matter, I must hold that the Testamentary Registrar was correct in this case, and that no grant of Probate can be made until the additional Court-fee has been paid.

Messrs. *Mulla and Nadkarni*, for the Appellant.

Mr. *Kanga*, Advocate-General, for the Respondent.

JUDGMENT.

Marten, C. J.—This appeal relates to the amount of duty payable under the Court Fees Act, 1870, Art. 11 of Schedule I, as amended by Bombay Act III of 1926, which came into force on April 1, 1926. Stated shortly, the Court-fee in question may be described as Probate duty.

The point at issue between the parties is whether the amount of the duty ought to be calculated at the rate in force under the law as it stood at the date of the petition for Probate, or whether it should be calculated at the higher rate of duty which came into operation before any grant of Probate was made.

The petitioner is the executor of the Will of the deceased Shamdas Hirañand who died on December 3, 1923, and he has paid the sum of Rs. 28,439 for duty at or prior to his petition being presented and filed on

(1) 81 Ind. Cas. 751; 39 C. L. J. 209; A. I. R. 1924 Cal. 987.

February, 24, 1926. If, however, the Amending Act of 1926 applies, then additional duty to the extent of about Rs. 18,861 is payable. A difference having arisen between the Testamentary Registrar and the attorneys for the petitioner as to the payment of this extra amount, the question was eventually referred under s. 5 of the Court Fees Act to Mr. Justice Crump by the directions of myself as Chief Justice. Mr. Justice Crump decided that the amount of duty ought to be calculated in accordance with the Amending Act, and that, therefore, the petitioner ought to pay the additional sum of Rs. 18,861. From this decision, the petitioner now appeals.

There is a preliminary question as to whether an appeal lies. That is because s. 5 refers to the final decision of the Judge so nominated by the Chief Justice. We have, therefore, to decide whether the dispute in question was one coming within the operation of s. 5, and if so whether the decision of Mr. Justice Crump was final under that section within the ordinary meaning of that word, or whether in some way or another, an appeal or revision would lie from his decision.

Now, in the first place, one must get rid of notions of Probate duty derived from English Law and practice. They have little or nothing to do with the question which we have here before us. In England, for instance, the old Probate duty (now included in estate duty) is calculated at the date of the death, and the Courts have jurisdiction to deal with taxation purporting to be levied on His Majesty's subjects. But, in India, under s. 106 (2) of the Government of India Act, 1915, which really embodies the previous law to the same effect:—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

Consequently, in revenue matters the jurisdiction of the Court is confined within the four corners of some legislation on the subject, and we have no inherent jurisdiction to deal generally with the matter.

A further observation to avoid confusion is, that in India Probate duty is not a duty leviable on the death of all persons alike as is the case in England. It is a duty

which, speaking generally, is leviable only in the case of those who seek Probate or Administration. As regards Europeans and, I think, Parsis, the duty may in any event be leviable. But as regards Hindus and Muhammadans, they to a large degree escape the operation of the duty, unless for certain purposes it is incumbent on them to obtain Probate or Letters of Administration from the Court.

Another difference is that unlike the practice in England and unlike the practice on the Original Side, the law under the Court Fees Act as regards the *Mofussil* Courts is that an *ad valorem* fee is payable on the institution of the litigation. On the Original Side, there are also certain fees leviable in an ordinary suit, but they are not at all in the same category as those levied at the start of ordinary suits in the *mofussil*. The result then of the Court Fees Act appears to be that the legislation has treated, what I will shortly call, the Probate duty as if it was a duty payable in respect of a law suit. Bearing then these distinctions in mind, I will now turn to the Act itself.

Section 3 provides:—

"The fees payable for the time being to the clerks and officers...of the High Courts established by Letters Patent,...

or chargeable in each of such Courts under No. 11 of the First...Schedule...shall be collected in manner hereinafter appearing."

Now, the duty we have to deal with here is No. 11 in the First Schedule. I disregard for the moment the Amending Act of 1926. And it is common ground that it is the duty of the Testamentary Registrar on the Original Side,—we are here dealing with a Bombay case,—to collect this duty.

Next, turning to s. 5:—

"When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court

as the Chief Justice shall appoint either generally or specially in this behalf."

The section following has a somewhat similar provision as regards the Small Causes Courts, which says:—

"When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court."

Now, in the present case, the matter was referred to the Taxing Officer. He treated it as a matter of general importance and consequently referred it to me, and I, under the section, as I have already stated, appointed Mr. Justice Crump to decide it.

Stopping for a moment at the words "final decision" in s. 5, we are of opinion that these words mean what they say. It is the ordinary way of expressing that no further appeal or revision is to lie, and we see no reason why a different meaning should be given to those words here.

In this connection we respectfully agree with the decision of the Full Bench of the Allahabad High Court in *Balkaran Rai v. Gobind Nath Tewari* (2), where Sir John Edge states (page 158*):

"I have consequently come to the conclusion that not only did the Legislature intend that the decision under s. 5 of the Court Fees Act of the Taxing Officer of the High Court, or of the Chief Justice, or the Judge appointed under s. 5, should for all purposes be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such a decision might be questioned. Whether or not such decisions ought to be open to appeal, review or revision is another question as to which I do not feel bound to express an opinion."

So, too, in *In the goods of Bhubaneswar Tragunait* (3), a decision of the Court of Appeal in Calcutta, Mr. Justice Rankin says (page 877†):—

"I think this involves that the Taxing Officer's decision is a final decision under s. 5

and that in this case the learned Judge had no authority to review it under s. 19-I."

And again he says (page 878*):—

"In my opinion the decision of the Taxing Officer under r. 4 of Ch. XXXV is final by virtue of s. 5 of the Act."

The reference to r. 4 of Ch. XXXV is to the Rules of the Calcutta High Court. In that particular case, on an application for Letters of Administration made by the surviving members of a Mitakshara Hindu joint family regarding properties held by the deceased as the late *karta*, the Taxing Officer certified that the *ad valorem* fee prescribed by Sch. I, cl. (2), of the Court Fees Act was not payable. The Chamber Judge overruled that decision. The Appeal Court held that the decision of the Taxing Officer was final and that the Chamber Judge had no authority to review it.

And, indeed, in the present case, we do not understand it to be contended that if the original Act of 1870 had not been amended, and the attorneys had only tendered, say, half the appropriate duty, and that consequently a difference had arisen between them and the Testamentary Registrar on the point, then the decision of the Taxing Officer or the Judge under s. 5 would be otherwise than final. So, too, as we understood from the argument of the appellant, it was conceded that if the present Amending Act of 1926 had been in operation at the death of the testator, then, too, the larger duty would have been payable, and the decision at any rate under s. 5 would be final.

The argument presented to us, as I understand it, was that the present dispute was not really one as to the amount of the duty, but as to what legislation was in force at the material date, and that the main point between the parties was whether the material date would be the date of the presentation of the petition or the date of the actual grant. One may, indeed, put forward a third date, namely, whether it should be the date of the death as in England. But, however that may be, it seems to us that this in any event involves a difference as to the amount of the duty payable. Those words in s. 5 are quite general, and, speaking for myself, I see no reason why they should be cut down and why their ordinary meaning should be confined to differences as to the amount of valuation only.

(2) 12 A. 129; A. W. N. (1890) 33; 6 Ind. Dec. (N. S.) 31.

(3) 95 Ind. Cas. 529; 52 C. 871; 23 C. W. N. 879; A. I. R. 1925 Cal. 1201.

*Page of 12 A.—[Ed.]

†Page of 52 C.—[Ed.]

*Page of 52 C.—[Ed.]

Consequently, there seems to me a broad distinction between s. 5 and s. 12, to which we were also referred, because s. 12 speaks of "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter." Questions relating to valuation seem to me to stand on a different footing. Further, in s. 12 (2), there is an express power given to the Court, if it thinks the original decision wrong, to require an additional fee to be paid. In this respect, the legislation somewhat resembles ss. 36 and 61 of the Indian Stamp Act. This distinction is pointed out in the Full Bench case [*Balkaran Rai v. Gobind Nath Tiwari* (2)] to which I have already alluded, where Sir John Edge says (page 102*):—

"I have no doubt that the term 'final' in s. 5 of the Court Fees Act has precisely the same meaning as the term 'final' in s. 12 of that Act. But the subject to which that term is applied in s. 5 is different from that to which it is applied in s. 12. In s. 5 it is applied to a decision as 'to the necessity of paying a fee or the amount thereof', whereas in s. 12 it is applied to a decision as 'to every question relating to valuation for the purpose of determining the amount of any fee chargeable under the Chapter (Chap. III) on a plaint or memorandum of appeal.' When we come to look into the authorities it will be necessary to keep this distinction in mind."

In these circumstances, we are not here called on to consider the decision of Mr. Justice Mookerjee and Mr. Justice Chotzner in *Tara Prasanna Chongdar v. Nrisinha Murari Pal* (4) where they held that—

"Where the decision involves root questions of principle as to the nature of a suit it is open to appeal notwithstanding the provisions of s. 12 of the Court Fees Act."

They said (page 223†):—

"We may add finally that this appeal is competent notwithstanding the provision of s. 12 of the Court Fees Act. This is not a case of appraisement or of fixation of value with a view to determine the amount of fee chargeable; the dispute involves root questions of principle as to the nature of the suit and the retrospective operation of Statutes."

That, again, was not a question of Probate duty, but, as to the fees payable in respect of an ordinary suit.

Another decision of the same Bench in *Thaddeus Nahapiet v. Secretary of State for India* (1) was pressed upon us. But there the Bengal Court Fees Act of 1922 which raised the rate of duty expressly provided that:—

"17. Nothing in this Act shall apply to any Probate, Letters of Administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued."

In the corresponding Bombay Amending Act III of 1926 we have no such provision. And, indeed, it does not appear from the statement of that case as to whether there had been any decision by the Taxing Officer or by the Judge under s. 5 of the Act. The decision, as I understand it, was merely given on the merits of the case as to whether the higher duty should be paid. The latter was precluded by the express provision of the Bengal Act.

We were also referred to *Ramsekhar Prasad Singh v. Sheonandan Dubey* (5) and *Krishna Mohan Sinha v. Raghunandan Pandey* (6). The latter is a Full Bench case and the former decides that "under s. 5 of the Court Fees Act, 1870, the decision of the Taxing Officer is final, and even if he has done anything which the law does not allow him to do the High Court has no jurisdiction to interfere with his decision as to the amount of the fee." The latter case [*Kishna Mohan Sinha v. Raghunandan Pandey* (6)] is much to the same effect on this point.

The result is that the authorities, to which we have been referred, substantially support the view which, apart from the authorities, we should be prepared to take of this section. To summarize, then, we think that the dispute in this case was a dispute as to the amount of the fee, and that consequently the case fell within s. 5, and that the decision of the Judge specially appointed in that behalf, namely, Mr. Justice Crump, was final, and that no appeal or revision lies

(4) 81 Ind. Cas. 763; 51 C. 216; 39 C. L. J. 212; 28 C. W. N. 683; A. I. R. 1924 Cal. 731.

*Page of 12 A.—[*Ed.*]

†Page of 51 C.—[*Ed.*]

(5) 73 Ind. Cas. 43; 2 Pat. 198; 4 P. L. T. 71; 1 Pat. L. R. 25; A. I. R. 1923 Pat. 137; (1922) Pat. 337.

(6) 87 Ind. Cas. 137; 4 Pat. 336; (1925) Pat. 65; 6 P. L. T. 262; A. I. R. 1925 Pat. 392 (F. B.).

therefrom. Consequently, on that ground alone, it follows that this appeal does not lie.

There is one further observation which may be made, and that is, that if the argument of the appellant was sound, then it would follow that what has been done under s. 5, namely, the reference first to the Taxing Officer and then to the Special Judge, was erroneous, and that neither of them had any jurisdiction to determine this particular matter. Incidentally, I may say that no objection to the jurisdiction under s. 5 was ever taken by the appellant either before the Taxing Officer or before Mr. Justice Crump. It was not until the last decision was given against him that this point was raised. If, then, according to the appellant, the procedure under s. 5, was erroneous, it is difficult to see what right of appeal there can be to this Court. As pointed out by their Lordships of the Privy Council in *Rangoon Botatourg Co., Ltd. v. Collector, Rangoon* (7) (page 27*):—

"An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment."

Their Lordships were here citing what Lord Bramwell observed in the case of the *Sandback Charity Trustees v. North Staffordshire Ry. Co.* (8).

Nor, if we turn to s. 15 of the Letters Patent, would any appeal necessarily lie because the appeal there given is from orders passed in exercise of the original jurisdiction pursuant to s. 13 of the recited Act. And when one turns to the corresponding section in the Government of India Act, 1915, s. 108 (1) refers to the exercise of the original and appellate jurisdictions vested in the Court. But it may be argued that under s. 5 of the Court Fees Act the Court is not really exercising its original or appellate jurisdiction, and that the Judge there appointed by the Chief Justice is more in the nature of *persona designata* as in the case of the Chief Judge of the Small Causes Court in certain

matters arising under Municipal elections. In these circumstances, and apart from the use of the words "final decision" in s. 5, we should find great difficulty in any event in dealing with the appeal which is presented to us at this stage. In saying this, I do not overlook the provisions of s. 19-I of the Court Fees Act. But I wish to make it quite clear that Mr. Justice Crump was not sitting as the Testamentary Judge or in exercise of the ordinary testamentary jurisdiction of the High Court. He was sitting on this occasion solely as a Judge specially designated to decide this case under s. 5 of the Court Fees Act. Consequently, there has been no decision of "the Court," so far as I am aware, under s. 19-I. In these circumstances, I need not pursue this particular point.

The result is that this appeal will be dismissed with costs.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 286 OF 1924.

February 9, 1927.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Roy.

RASH BEHARI MANDAL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

HEMANTA KUMAR GHOSE AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), s. 11
—Sale of patni—Occupancy raiyat, whether liable to be ejected by purchaser—'Khudkasht raiyat', definition of—Tenant of jungle land living in contiguous village, whether khudkasht raiyat.

Persons in occupation who have acquired occupancy rights under the tenancy law are not liable to be ejected by a purchaser in a sale under the Bengal Patni Taluks Regulation, VIII of 1819, even though they are not *khudkasht raiyats*. [p. 73, col. 1.]

Rama Charan Ghosain v. Ram Kanai Dubey (4), followed.

Jageshwar Mazumdar v. Abed Mahomed Sirkar (1), explained and distinguished.

Tenure-holders cannot under the provisions of law acquire a right of occupancy as *raiya*ts with regard to lands which they had themselves cultivated within their own tenure. [p. 74 col. 1.]

A *khudkasht raiyat* is a resident and hereditary cultivator in contradistinction to a *paikasht raiyat* or a migratory tenant. [p. 74, col. 2.]

Tenants of waste and uninhabitable jungle lands which do not form part of any village cannot be

(7) 16 Ind. Cas. 188; 40 C. 21 at p. 27; 39 I. A. 197; 14 Bom. L. R. 833; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150 (P. C.).

(8) (1871) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391; 26 W. R. 229.

*Page of 40 C.—[Ed.]

held to be not *khudkasht raiyats* merely because they reside only in contiguous villages of the *patni*. [p. 75, col. 1.]

Nubokishore Biswas v. Jadub Chunder Sircar (8), relied on.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 27th September, 1924.

Mr. S. C. Bose, Babus Saroj Kumar Chatterjee and Jatis Chandra Guha, for the Appellants.

Dr. Sarat Chandra Basak, Babus Bepin Chandra Bose and Urukram Das Chakravarti, for the Respondents.

Babus Prafulla Chandra Chakravarti and Surjya Kumar Aich, for the Deputy Registrar.

JUDGMENT.

B. B. Ghose, J.—This appeal arises out of an action in ejectment, and is on behalf of some of the defendants in the Suit No. 55 tried by the Subordinate Judge of Khulna. The facts are these:—There is a Sayedpur Trust Estate, which has got the *zemindari* interest. A *patni* was created consisting of certain *mouzahs* within that estate in 1821 in favour of two persons named Gopi Roy and Kali Roy. Within the *patni* there was a large tract of jungle and apparently it was not included within any of the *mouzahs*. In 1843 some of the persons, who held the property in *dar-patni* interest, executed a lease of about 600 *bighas* of jungle land under certain terms in favour of two persons, named Ramjiban Jotedar and Ram Sunder Mandal. Sometime after that the *patni* interest appears to have come into the possession of certain Boses. On the 9th of October, 1879, these Boses granted a lease of 600 *bighas* of *patni* and jungle lands excluding 400 *bighas* of *dhap* lands in favour of four persons, who may be called Jotedars and Mandals. There was also a stipulation that the 400 *bighas* excluded, which was described as *dhap* lands, might be taken possession of by the lessees after reclaiming those lands at a certain rate of rent. The provision with regard to rent was in the usual manner of progressive rent from time to time, and stipulating that the rent would be at a certain rate from the year 1304, that is 1897. This *patni* was put up to sale under Regulation VIII of 1819 on the 15th of May, 1914, and was purchased by the plaintiffs. After their purchase they served notice on all persons, who were the descendants of the original

lessees under the lease of 1879, and all those who had derived title under these lessees or their representatives. A large number of persons was impleaded as defendants. Most of them came to an agreement with the plaintiffs and compromised the suit. The appellants before us fought out the suit in the Court below, and a decree for ejectment has been made as against them.

The case of the plaintiffs was that under the provisions of s. 11 of Regulation VIII of 1819, they were entitled to eject the defendants, and to recover *khas* possession of the lands in question. Various pleas were taken in defence, but the main defence was that the lessees under the lease of 1879 were *khudkasht raiyats* and, therefore, protected under the third clause of s. 11 of the Regulation. Secondly, even if it be considered that they were not *khudkasht raiyats*, they acquired right of occupancy as *raiya*s by holding the lands for more than 12 years, and consequently they are protected from ejectment under the provisions of the Bengal Tenancy Act, notwithstanding the provisions of s. 11 of Regulation VIII of 1819. Another plea was sought to be raised that the plaintiffs had acquired no right by virtue of the Regulation sale, as certain steps were not taken under the Regulation. Besides those pleas, other pleas were taken and a large number of issues was raised in the Court below. It is unnecessary to mention these as they are absolutely immaterial for the purposes of the appeal. The Subordinate Judge held that the defendants were not *khudkasht raiyats*. Secondly, he held that not being *khudkasht raiyats*, they are liable to ejectment, as cl. 3 of s. 11 of the Regulation does not protect them. He further held that the defendants were tenure holders, and their interest was an incumbrance coming under the first clause of s. 11 of the Regulation, and, therefore, they have no right to remain on the land after the *patni* sale. He also held that the defendants could not challenge the validity of the *patni* sale collaterally by way of defence in the present suit. On these findings he made his decree in ejectment. Twelve of the defendants have appealed to this Court. One of them, defendant No. 18, is one of the representatives of the original lessees under the lease of 1879. Others

claimed under various sub-leases from the lessees or from the sub-lessees under those lessees. It is unnecessary for our purpose to state the origin of the title of those subordinate holders.

Three main questions have been argued on behalf of the appellants before us. It is stated, firstly, that the predecessors of defendant No. 18 were *khudkasht raiyats* and the lease being a *bona fide* lease in their favour the plaintiffs are not entitled to eject him, and consequently the plaintiffs are not entitled to eject the tenants holding under rights subordinate to the lessees under the lease of 1879. The second point was that the defendants have, by their cultivation of the lands, themselves acquired occupancy rights under Act X of 1859 as well as under the Bengal Tenancy Act and are, therefore, not liable to be ejected. The third point taken was that the Collector had no jurisdiction to sell the *patni* under Regulation VIII of 1819 on account of certain circumstances, one of which was that he was the Manager of the Sayedpur Trust Estate.

The third point may be taken up first and disposed of, on the ground that this plea was not taken in the lower Court, nor does it appear in the issues raised in that Court. The question not having been discussed in the lower Court, we are not inclined to allow that question to be raised for the first time in this Court. The other facts upon which they rely as to the invalidity of the sale are not such as would make the sale void, and, therefore, in my judgment there is no substance in that point raised.

As regards the second point, the Subordinate Judge seems to have been of opinion that even if the defendants had acquired the right of occupancy under the Bengal Tenancy Act they were liable to be ejected under the provisions of s. 11 of Regulation VIII of 1819. His view apparently was that under the third clause of that section, only *khudkasht raiyats* or resident and hereditary cultivators are protected, and whoever does not come within the description of that class of *raiya*ts, is liable to be ejected at the instance of a purchaser at a *patni* sale. He apparently relies in support of that contention on the case of *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (1). In my judgment that view of the Subordinate Judge is er-

roneous. Apart from authority, if the third clause of s. 11 is examined, it will be apparent that it only provides certain restrictions on the right of an auction-purchaser to eject certain persons, which right has been given by the previous clauses of that section. Under the first clause certain incumbrances, which had accrued upon the *taluk*, were liable to be cancelled. The second clause deals with leases creative of a middle interest between the resident-cultivator and the late proprietor, and the third clause mentions an exception to the right of the purchaser. If the right of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejectment by some other law, there is no reason to suppose that s. 11 of the Regulation gives authority to the auction-purchaser to eject that occupier of the land by virtue of his purchase. The case of *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (1) can only be reasonably construed as an authority for the proposition that a lease is an incumbrance. If it be construed as an authority for laying down the proposition that even an occupancy *raiya*t is liable to be ejected by an auction-purchaser because he does not come within cl. 3 of s. 11 of the Regulation, with all respect I must say that I am unable to accept that proposition. That case has been interpreted and doubted in various other cases. See *Prodyote Kumar Tagore v. Rakhal Chandra Sarkar* (2), *Tamiz-ud din Khan v. Khoda Nawaz Khan* (3) and also the case of *Bama Charan Gosain v. Ram Kanai Dubey* (4). In the last case, the learned Judges observed that the case of *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (1) did not lay down that an occupancy right is an incumbrance, and, as a matter of fact, it could not have been so laid down as an incumbrance as contemplated in the first clause of s. 11 of the Regulation. There is ample authority for the proposition that the proviso in the third clause does not mean that persons in occupation not coming within the definition of *khudkasht raiya*ts, are liable to be ejected, even if they have acquired occupancy rights under the tenancy law. I have not been able to find any authority with regard to

(2) 5 Ind. Cas. 243; 37 C. 322; 11 C. L. J. 209; 14 G. W. N. 487.

(3) 5 Ind. Cas. 116; 14 C. W. N. 229; 11 C. L. J. 16.

(4) 28 Ind. Cas. 374; 19 C. W. N. 858.

(1) 3 C. W. N. 13.

patni sales, but the cases with reference to s. 16 of Act VIII of 1865, where the proviso is in the same terms as the proviso in the third clause of s. 11 of Regulation VIII of 1819, support the proposition. Those cases are *Pureeag Singh v. Purtaap Narain Singh* (5), *Nil Madhub Kurmakar v. Shiboo Paul* (6), *Emam Ali Mestory v. Ator Ali Khan* (7) and *Bama Charan Gosain v. Ram Kana Dubey* (4).

The second proposition, therefore, on behalf of the appellants ought to be accepted. But the question is whether the defendants had acquired a right of occupancy by remaining in possession of the disputed land for the requisite period under the Bengal Tenancy Act. It is not necessary for me to examine the evidence or the terms of the lease in detail having regard to the view I have taken with regard to the first question. The learned Advocate for the respondents has argued with considerable stress, that the lease of 1879 was the grant of a tenure and if the lessees were tenure-holders they could not under the provisions of the law, acquire a right of occupancy as *raiyats* with regard to lands which they had themselves cultivated within their own tenure. That proposition seems to me to be unassailable. It is unnecessary for me to discuss the question whether the lease should be construed as the grant of a tenure or whether it should be considered as a mere *raiyati* lease, as is contended for equally strenuously on behalf of the appellants by their learned Advocate. It is sufficient for my purpose to state that these lessees were illiterate people and actual cultivators themselves. They belong to the caste of Pode, one of that class of people who are considered to be untouchables. It can hardly be supposed that they were to act the part of landlords or tenure-holders. The only point that can be urged against their being *raiyats* is that the area of the demised premises exceeds by far 100 *bighas* of land.

I next come to the first point urged, and it is this, that the defendants are *khudkasht raiyats*. The Subordinate Judge has found that the appellants have no dwelling house within the village in which the lands in question are situate. His finding is that some of them have got more *chalias* where they stayed during the time of cultivation.

(5) 11 W. R. 253; 5 B. L. R. App. 20.

(6) 13 W. R. 410; 5 B. L. R. App. 18,

(7) 22 W. R. 133.

He further relies upon the *vakalatnamas* filed by some of these defendants in which their residences have been described as in another village. He, therefore, does not believe the evidence given by the defendants' witnesses, that they are resident hereditary cultivators. I may mention that the descriptions in the *vakalatnamas* do not amount to anything. These people are illiterate. Their *vakalatnamas* must have been written by the clerks of their Pleaders, and the clerks of their Pleaders must have written their residence from the copy of the summons that was served upon the defendants, and their residence in the copy of the summons must have been taken from the plaint in which the plaintiffs chose to describe the defendants as being residents of a different village. That being so, the only evidence that remains is the evidence of those defendants as to their place of residence. But that also is not decisive of the question, because at the time when the lease was granted it was not known within which village the jungle land was situate. In the description of the property in the lease of 1879, it was described as in *Mouzah Sahapur Bil*, where the details of the *kisti-bundi* as regards the payment of rent was given. In the schedule of boundaries it is described as in the Bil south-west of Ramkrishnapur Ghona, within Taraf Sahapur. In para. 4 of the plaint the plaintiffs described it as situated on the south of the *Thak Map* that was prepared with respect to Ramkrishnapur and Ghona *Mouzahs* jointly. From this it appears that the property was not actually situated within the village of Ramkrishnapur or Ghona. The lessees in 1879 were all residents of Ruprampur and Madhavakti, which villages, it appears, are within the *patni mahal* which has been purchased by the plaintiffs at the auction-sale. What is the meaning of *khudkasht raiyats*? It is resident, hereditary cultivator in contradistinction to *paikasht raiyat*, that is a migratory tenant. If the tenants were resident within the *patni mahal* but outside the jungle tract, which did not form part of any village, and where no man could live,—and it is in evidence that the land in question was at that time infested with tigers and other wild animals—would it be reasonable to say that these tenants were not *khudkasht* tenants although they were residents of contiguous villages within the *patni*? I think not. There is ample evidence on the

record to show that these *jotedars* and Mandals were *rai-yats* of the villages in which they lived, and as I have already stated, they belong to a class whose only mode of life is by cultivation. That these men may be considered to be *khudkasht rai-yats* is supported by the observations of Mr. Justice Markby in the case of *Nubokishore Biswas v. Jadub Chunder Sircar* (8). I may state in passing that the Subordinate Judge is clearly wrong in observing that that case was not followed in the later cases mentioned by him. Now, if the tenants to whom the lease was given in 1879 were *khudkasht rai-yats*, then their case falls within the third clause of s. 11 of the Patni Regulation; and that clause lays down that the purchaser is not entitled to eject the *khudkasht rai-yats*, nor to cancel *bona fide* engagements made with such tenants by the late incumbent, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor. Now the only ground on which the plaintiffs might bring this action, as it seems to me, is that this was not a *bona fide* engagement. That has not been stated in the plaint, and having regard to the nature of the land, which was absolutely jungle and the purpose for which the lease was granted, that is, for the purpose of reclaiming by these people, who were residents of villages close by, it can hardly be said that it was not a *bona fide* lease given to the lessees by the then *patnidars*. No attempt has been made to show that the rent then fixed was not the proper rent demandable. The representatives of the lessees under the lease of 1879 cannot, therefore, be ejected by the plaintiffs, and consequently the persons claiming under them or their representatives are also not liable to be ejected. In this view as I have already stated, it is unnecessary for me to determine whether the lease created a tenure or a *rai-yati* interest. Whether it is an incumbrance falling within the first clause of the section or not, need not also be determined having regard to my finding that the lessees were *khudkasht rai-yats* and the lease was a *bona fide* lease for the purpose of reclaiming jungle lands.

The result, therefore, is that this appeal must be allowed, and the suit for ejectment

against these defendants-appellants must be dismissed with costs.

The costs in this Court will be given to the appellants other than appellants Nos. 8, 9 and 12.

The applications are not pressed and are dismissed without costs.

Roy, J.—I agree.

A. N. A.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 61 OF 1926.

August 18, 1927.

Present :—Sir Amberson Marten, Kt, Chief Justice, and Mr. Justice Crump.

KAIKHUSHRU KHARSEDJI

TANTRA—APPELLANT

versus

NAVAJBAL—RESPONDENT.

Administration suit—Appeal from order on Commissioner's report—Motion for interim distribution—Proper Court.

A motion for *interim* management or distribution of the estate in an administration suit should be made to the Court of first instance and not to the Appellate Court, where the Appeal Court is not seized of the whole suit but is seized only of certain exceptions to the Commissioner's report in the case. [p. 76, col. 1.]

Appeal against the decision of Mr. Justice Rangnekar.

FACTS.—Pending an appeal from an order passed by the trial Court on certain exceptions taken by a party to the Commissioner's report in an administration suit, one of the parties took out summons asking for Rs. 1,000 or Rs. 1,500 to be given to him on account of his share. The trial Court dismissed it holding that the matter was one for the Appellate Court and not for it to decide. The applicant appealed.

Mr. *Munshi*, for the Appellant.

Mr. *Mulla*, for the Respondent.

JUDGMENT.—A question of practice arises on this motion as to whether the present application should be made before the Chamber Judge or before the Appellate Court. An application has already been made to the Chamber Judge, which he has refused. The applicant now comes direct to the Court of Appeal by way of motion.

* * * * *

Now it is important to observe that the Appeal Court is not seized of the whole administration suit. It is only seized in appeal of certain exceptions to the Commis-

sioner's report, and those only. Therefore for the time being it has nothing whatever to do with any order that may be made for the *interim* management or the distribution of the estate. With great respect to the learned Chamber Judge we think he must have overlooked this circumstance, and I regret that we have not got the advantage of knowing the reasons for his judgment.

In our opinion this present question does not arise in this appeal. We are not seized of it, and it is most inconvenient to have ordinary Chamber matters brought not before the Chamber Judge in whose province they properly fall, but before a Bench of two Judges in open Court. This Court has already in *Ladkavahoo v. Charundas Chaturbhuj* (1) drawn attention to the fact that in an ordinary administration suit, even if at some phase of the case the matter has been before the Appeal Court, all future applications with regard to the administration of the estate should in general come before the Judge of first instance in the ordinary way. It is true that in the present case there is a pending appeal, but as I have already pointed out, the only appeal before us is as regards the exceptions. As regards what the Chamber Judge has to decide, he is in just as good a position as we are to consider whether on the figures before the Court the proposed advance will be a safe one to make. We cannot, of course, say what the result of the appeal itself will eventually be any more than he can. It is really a question of figures as to whether the present order asked for can be appropriately made.

When the above was pointed out to Counsel there was substantially no contention that what I have above indicated was other than the proper course. Indeed a technical objection was taken by the Counsel for the respondents that the present application to us did not lie at all.

Under these circumstances we will direct the present notice of motion to be treated as a summons before the Chamber Judge and laid before him for disposal as Chamber Judge. He will accordingly deal with the costs of this motion, as well as of the costs of the original Chamber summons which he reserved.

A. N. A.

Order accordingly.

(1) 104 Ind. Cas. 692; 29 Bom. L. R. 1082; A. I. R. 1927 Bom. 519.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 709 OF 1926.

March 24, 1927.

Present:—Mr. Justice Davados.

Syed ABDUL HUCK AND OTHERS—PLAINTIFFS Nos. 3 TO 5—APPELLANTS

versus

SEETHAMSETTI JAYARAO NAIDU AND ANOTHER—DEFENDANTS Nos. 7 AND 1—RESPONDENTS.

Muhammadan Law—Property purchased in name of minor son from father's funds, whether common property belonging to all heirs.

Children in a Muhammadan family are not co-owners in the sense that what is purchased by or in the name of one person enures for the benefit of another. [p. 77, col. 1.]

The fact that certain property was purchased in the name of a minor son of a Muhammadan with money taken from the father's estate after his death would not make the property so purchased the common property of the family. [*ibid.*]

It is not proper to apply the principles governing the Hindu joint family system to a Muhammadan family. [*ibid.*]

Second appeal against the decree of the District Court, Ganjam, in A. S. No. 323 of 1920, preferred against that of the Court of the Subordinate Judge, Berhampore, in O. S. No. 69 of 1915.

Mr. B. Jagannatha Doss, for the Appellants.

Mr. P. Venkataramana Rao, for the Respondents.

JUDGMENT.—The first point urged in this second appeal is that the lower Courts were wrong in re-trying the whole case as the judgment of the High Court cannot be said to have upset the concurrent findings of two Courts. This contention is untenable in view of the clear wording of the judgment of the High Court "as the discussion on the question of adverse possession has proceeded on a wrong view of the law, we think the safe course is to reverse the judgments of the Courts below and remand the suit to the Court of first instance for disposal in the light of our observations."

It is clear from this point that the learned Judges who decided the second appeal set aside the judgments of both the lower Courts and directed the case to be re-tried.

The next point urged is that the purchase in the name of one brother was for the benefit of the whole family and the property purchased should not be considered as the sole property of the person in whose name the sale was taken. As the learned

Judge observes, it is not proper to apply the principles governing the Hindu joint family system to a Muhammadan family. The plaintiff and the 1st defendant are brother and sister. Their father died in 1878. Then there were other children of the father living. The children were minors and their paternal uncle managed the property on their behalf. He purchased some property in the name of the 1st defendant. Items Nos. 4, 8 and 9 were purchased so far back as 1881, 1880 and 1879, respectively. The contention of Mr. Jagannatha Das is that inasmuch as the property was purchased in the name of a minor, it must be taken to have been purchased for the benefit of the whole family. Children in a Muhammadan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another. There is some evidence that some cash was left by the father and a portion of it was utilised for the purchase in the 1st defendant's name. So far as the amount taken from the general estate was concerned the 1st defendant had to give credit for that amount. If the 1st defendant had taken money and wasted it, or if he had purchased any trinket or trifle, it cannot be said that he purchased it for the benefit of the family. When accounts are taken the family would be entitled to debit against him the amounts he had taken. The fact that the property was purchased by him with money taken from the father's estate would not make the property the common property of the family. The judgment of the District Judge is correct, and the second appeal fails and is dismissed with costs.

There is no question of law in the memorandum of objections. The learned Judge's finding is supported by the evidence on record. The memorandum of objections is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 81 of 1927.

July 28, 1927.

Present:—Mr. Justice Pratt.

MAGANLAL PARBHURAM—PLAINTIFF

—APPELLANT

versus

M. A. AZIZ HAJEE KARIM AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution—Money paid by defendant to avoid attachment before judgment—Attachment by other creditors, effect of—Plaintiff's right to entire amount.

Where money is paid to the credit of a suit or earmarked for a suit, the money belongs to the plaintiff in the event of his success and cannot pass to the general creditors of the person who pays it in or to any persons who claim under him. [p. 78, col. 2; p. 79, col. 1.]

A instituted a suit against B and applied for attachment before judgment of an amount due to B. The order of attachment was issued in a wrong form containing neither an order to furnish security nor a direction to pay the money into Court. B, however, paid the money into Court and did not contest the suit. Various creditors of B attached this money in Court before A obtained his decree, and the amount was rateably distributed:

Held, that the money having been paid towards satisfaction of A's claim in order to avoid an attachment before judgment, A was entitled to have it paid out to him on an application without taking out execution of his decree and the other attaching creditors were not entitled to rateable distribution. [p. 78, col. 1.]

Sorabji Coovarji v. Kala Raghunath(1) and Seena Vana Ramiah Ayyar v. Gopala Ayyar (2), followed.

Second appeal from the judgment of the District Judge, Mandalay.

Mr. A. C. Mukerjee, for the Appellant.

Mr. S. Mukerjee, for the Respondents.

JUDGMENT.—In Civil Regular Suit No. 313 of 1926 of the Sub-Divisional Court of Mandalay, Maganlal Parbhuram sued Maung San Lon for Rs. 1,593.12 principal and interest on a promissory note.

On the 31st July, 1926, plaintiff applied for attachment before judgment of a sum sufficient to satisfy the decree, from the price of a house due by one Charan Das to the defendant, and for a prohibitory order restraining the defendant from receiving the amount.

An attachment order was issued, in wholly wrong form, to defendant and Charan Das jointly, directing them to hold the sum of Rs. 1,790.12 subject to the further orders of the Court. On the order being served, defendant paid up the sum of Rs. 1,790.12 and the Bailiff returned the warrant with an endorsement that it had been duly executed (*vide Civil*).

Miscellaneous No. 57 of 1926 of the Sub-Divisional Court).

Whilst the money was still in Court various creditors attached it before judgment. Plaintiff obtained an *ex parte* decree on the 12th August and applied for payment of the money paid into Court by defendant. Objections were made and ultimately the money was distributed rateably between various decree-holders. Plaintiff then in Suit No. 452 of 1926 of the same Court sued for a declaration that the sum of Rs. 1,790-12 held in Court to the credit of his Suit No. 313, was not liable to rateable distribution and that plaintiff alone was entitled thereto. His suit was dismissed.

Both the lower Courts have held that the money was attached before judgment and that, before plaintiff had any fair lien. Their findings are undoubtedly correct on the assumption that the money in question was attached before judgment; but it seems clear to me that the money was not attached. As I have already pointed out the order of attachment was in wrong form.

There was no order to furnish security, as there should have been under O. XXXVIII, r. 5, and none was asked; neither was there any direction to pay the money into Court. Instead of holding the money at the disposal of the Court as directed defendant paid the money into Court. He never contested the suit. It is obvious, therefore, that the money was paid towards satisfaction of plaintiff's claim and in order to avoid an attachment before judgment. None of the conditions necessary to constitute an attachment under O. XXXVIII, r. 5, have been complied with.

The money must be considered as a deposit in satisfaction of the plaintiff's claim under O. XXIV, r. 1, and plaintiff was entitled to have it paid out to him in satisfaction of his claim on application without taking out execution of his decree. As soon as it was paid to the Bailiff the money ceased to be an asset in the hands of the defendant.

It must be taken as settled law that under the circumstances plaintiff had a fair lien on the money and it was not liable to rateable distribution. There is a wealth of case-law on the subject both English and Indian. It is only necessary to refer to two Indian cases. In *Sorabji*

Coovarji v. Kala Raghunath (1) the immoveable property of a judgment-debtor was attached at the instance of two judgment-creditors, and his other judgment-creditors merely put in applications for execution without attaching.

On the day fixed for sale of the property the decrees of the two attaching judgment-creditors were satisfied by payment in Court of the decretal amounts, and the effect was the withdrawal of the attachment under O. XXI, r. 55.

On the day following the payment into Court on an *ex parte* application an order was made for rateable distribution of the money paid into Court.

It was held on appeal by a Bench of the Bombay High Court that the moneys, which were paid in to satisfy the attaching creditors' decrees, and to raise the attachment could not be treated as assets held by the Court and were not distributable among other judgment-creditors who had merely applied for execution.

The facts here are not the same as in the case under appeal, but the principle involved is.

The whole subject is discussed at length in *Seena Vana Ramiah Ayyar v. Gopala Ayyar* (2) which might almost be called the *locus classicus* on the point. The facts were that the defendant was arrested before judgment and was ordered to be released from custody on his paying in Court sufficient to meet plaintiff's claim. The money was subsequently attached by a decree-holder and the defendant was adjudicated an insolvent.

It was held by a Bench of the Madras High Court that the money was paid in Court to the general credit of the action and was charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour. It was further held that the attaching creditors and the Official Receiver's claims were subject to this term.

As Coutts Trotter, J., observed in the course of his judgment:

"Where money is paid to the credit of the suit or earmarked for the suit the Courts have always held that, when that is done, the money belongs to the plaintiff in the event of

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

(2) 49 Ind. Cas. 20; 41 M. 1053; 35 M. L. J. 355.

his success, and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him."

The case is clearly distinguishable from one in which defendant gives security for his appearance. Such security would be merely conditional for his appearance in Court and would not be earmarked for the purposes of the suit.

Plaintiff was on this view clearly entitled to the declaration sought and to satisfy his decree from the money paid in towards his claim.

I set aside the findings and decrees of the lower Courts and grant plaintiff a decree as prayed with costs throughout.

A. N. A. Decrees set aside.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 81 OF 1925.

July 19, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Cramp.

VENKATRAMAN MUKUND KAMAT
AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JANARDHAN BABURAO KAMAT
AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Hindu Law—Joint family—Father's powers of alienation—Mere benefit, whether sufficient—Deed tying up management of property after death, validity of—Father's power to appoint testamentary guardian.

A Hindu who had only two minor sons executed a deed in favour of the defendant, his brother's son, by which the defendant was to manage his properties both during his lifetime and after his death during the minority of his sons. The defendant was not willing to accept management with the liability of accounting for profits and another deed was executed which was called a *Ohalgeni* for a term of thirteen years fixed, whereby certain annual payments were to be made, certain fixed sums were to be invested for the minors and the defendant was relieved from liability to account. The minors sued after the death of their father for cancellation of the deed:

Held, (1) that whatever be the real nature of the documents, the father had no power to tie up the joint family property in this manner after his death, and that the documents were not binding on the plaintiffs. [p. 81, col. 2.]

A Hindu father has no power to alienate joint family property for anything that may be of general benefit to the family, apart from necessity. [p. 82, col. 2.]

Quære.—Whether a Hindu father in a joint Mitakshara family has power to appoint a testamentary guardian of property for his minor sons by Will. [p. 84, col. 2.]

Soobah Pirthee Lal Jha v. Soobah Doorgah Lal Jha (11), *Deba Nand v. Anandmani* (10) and *Mahableshwar Krishnappa v. Ramchandra Mangesh* (8), doubted.

First appeal from the decision of the First Class Subordinate Judge at Karwar, in Civil Suit No. 127 of 1923.

Messrs. A. G. Desai and D. R. Monerikar, for the Appellants.

Mr. Nilkant Atmaram, for the Respondent.

JUDGMENT.

Marten, C. J.—This is a suit by minors to set aside two deeds, Exs. 85 and 86, of February 21, and June 25, 1921, executed by their father Mukund in favour of their cousin, Janardhan, defendant No. 1, who is a nephew of Mukund. Shortly stated these deeds are in the nature of management deeds both in the lifetime of Mukund and after his death during the minority of the minors. They also, taken together, confer a personal interest upon Janardhan, inasmuch as although he is to be under liability to account for the corpus, he is not to be liable to account for the income of the property, but is to pay certain expenses and a fixed sum as representing the balance during the minority of the minors. On Mukund's death the minors were young children, and approximately the deeds would operate for a term of some thirteen years. The points of law are whether Mukund had power thus to deal with the family property over this term of years, and in particular to make this provision as regards a fixed lump sum as being payable in lieu of the actual interest. Incidentally a question of law arises as to whether a Hindu father has any power at all to appoint guardians of the property as opposed to the persons, of his minor sons after his death, whether by Will or by deed *inter vivos*.

I do not propose to deal in any detail with these two deeds. It is sufficient for my purpose to state that at the date when they were executed Mukund had no adult son, but only two minor children besides some five ladies who were dependent on him, viz, his two wives, and a widow of a deceased son, and two daughters. Consequently Janardhan, defendant No. 1, was his nearest male relative and the person whom he naturally might look to for assistance. As regards the two wives, the elder, Janaki, defendant No. 2, had no children. The other one, Saraswati, the mother of the minors, was quite a young woman of about twenty-two or thereabouts. The learned trial Judge has formed a somewhat un-

favourable opinion of the latter's business capacity and has drawn our express attention to the fact that her father was a man in embarrassed pecuniary circumstances. It is suggested that it is this father who is largely responsible for the present litigation. It also appears, as is recited in the documents, that Mukund at the time he made them, was in bad health, that he was no longer able to manage the properties himself, and that consequently he brought in his nephew Janardhan to assist him. It may be taken that Mukund was about sixty or sixty-one at the date of these deeds, and that he died in the following year, *viz.*, in May, 1922. We may also note in passing that in between these two deeds he executed a Will on May 10, 1921, but, as the learned Judge points out, that does not affect the question before us.

I mention these facts as they are very naturally relied on as showing that the deeds which Mukund entered into represented a reasonable business arrangement which was one for the benefit of the family and the minors in particular. As regards the first deed, Ex. 85, that was in the nature of a deed of management, and is called a trust deed or power-of-attorney. It says:—"And you are fit to be accepted as my trustee or my constituted attorney. I have, therefore, accepted you are my legal constituted attorney to do the following things, *viz.*, to carry on *vahivat* from this day on my behalf and on behalf of minors, of all my immoveable and moveable properties or estate and the outstandings mentioned below, excepting some properties kept with me which I shall dispose of in my lifetime or only up to my death, and up to the time my said two sons come of age after my death, in case I die hereafter before the said two sons come of age." Then it deals with the performance of certain religious ceremonies and making payments for the education of the sons. There are provisions for keeping accounts which are to be inspected by a *panch* and for cultivating the lands, and for paying certain sums for maintenance to the two wives, *i.e.*, Rs. 24 to the senior wife and Rs. 75 to the junior wife for herself and her children, and certain other expenses, and that the balance should be invested in the manner therein mentioned. If the trust is not accepted, then there is to be no objection to the Court taking over the manage-

ment. The deed then provides: "And having appointed you to do the above things, I have this day given the whole of the estate into your possession." Then it sets out the various particulars including moveables as well as immoveables.

It appears, however, from the next deed, Ex. 86, that Janardhan was not willing to accept the obligations under the earlier document. In particular he objected to the provisions as to accounting for the income and so on. Consequently, the nature of the deed of management was altered in very material particulars by the second deed, Ex. 86, which is headed: "Chalgeni deed in respect of immoveable and moveable properties for a term of thirteen years, value in respect of this is Rs. 1,409-12-7, the assessment in respect of this should be paid by the owner only." Then the document provides that Mukund gives this Chalgeni deed for a term of thirteen years as follows. The provisions which follow amount in effect to this. It is estimated that the profits or the income of the property will amount to roughly Rs. 1,409 a year. It is estimated that the expenses including maintenance etc., for the minors will amount to Rs. 808 a year. That leaves a balance of Rs. 600 odd. The deed accordingly provides that Janardhan is to invest this Rs. 600 in certain ways for the benefit of the minors, and that provided he thus disburses these two main sums, *viz.*, Rs. 808, for the various expenses and Rs. 600 for the investments making together about Rs. 1,409 he can take the whole income of the property, whether more or less, and be under no liability to account for it. That is, of course, during the minority of the minors. The deed says, "as only the income of lands and the interest due from others and rent from the date of the deed are included in this deed there is no need for keeping an account in respect of this, according to the conditions mentioned in the trust deed. Only you should keep an account in a proper manner, in respect of the principal amount if any (to) be received ... If any amount be expended for making special improvement for the cultivation of lands subsequently (in future) the amount should be taken from the amount belonging to the minors and an account should be kept in a proper manner." Subject to that and certain other provisions the deed ends: "As to all the particulars mentioned in the trust deed except only all the con-

ditions mentioned in this deed, the same are kept alive and in this way the trust deed also is kept alive."

I think it quite clear that these two documents must be read together. In fact Janardhan had refused to act under the first document, and he is only acting under the first deed as modified by the second. Further, I think that the whole of the provisions must be taken together, and that it is not open to us to create a new bargain between the parties by eliminating all that is contained in the second deed about Janardhan taking the income for a fixed sum.

Now how are these very special provisions in the second deed to be justified? One must remember that this being joint property the father's interest ceased at the date of his death. What right then had he to tie down the future income of the property in this way and to say that the estate which he had no interest in after his death should only receive a particular fixed income although that income in fact might be very much larger? What right had he to appoint a manager, a so-called trustee, who was to be under no liability to account for the trust property but was to be at liberty to put it into his own pocket? What right had he to fix the maintenance of the widows at certain sums whether they liked it or whether they did not? What right had he to fix the maintenance of the minors at certain sums? What right had he to direct the investment of the balance of Rs. 600 in various ways which are certainly not trust investments, including deposit "in a society," and including, as I read the deed, a power for the sole manager Janardhan to keep the money on deposit with himself on payment of interest at $6\frac{1}{4}$ per cent.? And what security would there be that at the end, say of the thirteen years, Janardhan would be in a financial position to refund these various sums which would be due from him under this deed?

As my brother Crump has put it, we may test this matter in three or four different ways. Was it a power-of-attorney as Mukund calls it? That surely will not suffice. What right had Mukund to give any power-of-attorney existing after his death? Was it a trust deed, the alternative name given to the first deed? The answer to that is, what power had Mukund to create

a trust after his own death, of property which after his own death did not belong to him? Then it is argued, treat it as an alienation; treat it as a transfer. But in the first place was there here really a transfer within the meaning of the Transfer of Property Act? Was there a conveyance to this defendant, Janardhan? Even supposing that in some ways it can be looked upon as an alienation, then what power had the father to enter into this very extraordinary alienation? You cannot call it a sale. You cannot call it a mortgage or a charge or a lease in the ordinary acceptation of those terms, more especially as it is muddled up with moveable properties including pots and pans. Can one say the relationship of landlord and tenant for instance was established here? And if one does regard it as an alienation, how can it be justified. By necessity? Necessity in the ordinary acceptation of the word, certainly there was none here. Granting the conditions which I have already stated, if protection of the minors' property was wanted, there are provisions under the Guardians and Wards Act for the appointment of guardians which should meet what was requisite. But there is no statutory power given to a Hindu father to tie up his property in this sort of way, for what he conceives to be the benefit of his children. And incidentally I may observe that if this deed was a valid deed, then it would seem to stand in the way of any appointment of a guardian under the Guardians and Wards Act. The deed is either a valid appointment of a guardian or it is not. If it is a valid appointment of a guardian, then I take it that under ss. 7 (3) and 39 Janardhan could only be removed on certain specified grounds, such as misconduct and so on.

We were referred to certain authorities. It was argued that a father's powers of alienation are not confined to cases of necessity, but may extend to cases of mere benefit. We are not called on in this case to review the well-established conditions laid down by the authorities as regards the powers of a Hindu father to alienate. We have the well-known case, *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (1), which has often been dealt with

(1) 6 M. I. A. 393; 18 W. R. 81n; *Sevestre* 253n; 2 Suth. P. O. J. 29; 1 Sar. P. O. J. 552; 19 E. R. 147.

and particularly in recent years in *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (2). The commentary in Mayne's Hindu Law, 9th Edition at page 476 is as follows:—

"Ever since this important judgment was pronounced, the terms 'necessity' and 'benefit to the estate' have been used side by side. It is obvious that anything which is a necessity to the estate must be of benefit to it. But the term 'benefit' would seem to import something positive done to enlarge or improve the estate, not a merely negative act such as the discharge of debts or the averting of disaster."

A reference is then made to the judgment of their Lordships of the Privy Council in *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (2) including a citation of the following passage (page 477):—

"No authority has been cited for giving any countenance to the notion that a *she-bait* is entitled to sell *debutter* lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the *debutter* land itself."

In *Vishnu Vishvanath Nimkar v. Ramchandra Sadashiv Nimkar* (3) a decision of Sir Norman Macleod and Mr. Justice Crump, the above case of *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (2) was followed and applied. The head-note runs:—

"The manager of a joint Hindu family can justify the sale of joint family property only for necessity. He cannot justify it merely on the ground that the sale at the time appeared to be advantageous. Such a sale is not binding on the minor co-parceners."

The learned Pleader for the respondent No. 1, being pressed by these authorities, felt a difficulty in maintaining that a sale could be justified merely on the ground of some general benefit apart altogether from necessity. But he contended that this was not the case of a sale, that, but it was not

the case of property passing for good out of the possession of the family; and that it was at the most something in the nature of a lease. In that respect another decision by the Board in *Abhiram Goswami Mohant v. Shyama Charan Nandi* (4) was referred to. There at page 1013* it is stated:—

"The second question is whether, this being so, the *mohant* had power to grant a *mokurari pattah* of the *mouza*. It is well-settled law that the power of the *mohant* to alienate *debutter* property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity: *Prosanno Kumari Debya v. Golabchand Baboo* (5)."

Then after referring to a particular case where the grant was upheld because the money was required for repairs for the temple their Lordships proceed (page 1013*):—

"But the general rule is that laid down in the case of *Maharanees Shibessoree Debia v. Mothooranath Acharjo* (6) that, apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the *mohant*."

I appreciate that what is put there is for all time—something in the nature of a perpetual lease—whereas here it is a question of only some thirteen years. But, in my opinion, the respondents have failed to satisfy me that there is any such general power in a Hindu father as is contended for here, *i.e.*, to alienate lands in any way he likes for anything that may be of general benefit to the family, whether or no there is any "necessity," so far as that expression has hitherto been interpreted.

Even if it comes to the question of benefit, I am not satisfied on the facts of the present case that the respondents have discharged the onus which undoubtedly lies upon them in this respect. Treating

(2) 39 Ind. Cas. 722; 44 I. A. 147; 19 Bom. L. R. 567; 21 O. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 22 M. L. T. 1; (1917) M. W. N. 507; 26 O. L. J. 153; 40 M. 709; 6 L. W. 222 (P. O.).

(3) 73 Ind. Cas. 1017; 25 Bom. L. R. 508; A. I. R. 1923 Bqm. 453.

(4) 4 Ind. Cas. 449; 36 O. 1003; 11 Bom. L. R. 1234; 10 O. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 14 O. W. N. 1; 36 I. A. 148 (P. O.).

(5) 14 B. L. R. 450; 2 I. A. 145; 3 Sar. P. O. J. 449; 23 W. R. 253; 3 Suth. P. O. J. 102 (P. O.).

(6) 13 M. L. A. 270 at p. 275; 13 W. R. P. O. 18; 2 Suth. P. O. J. 300; 2 Sar. P. O. J. 528; 20 E. R. 552.

*Page of 36 O.—[Ed.]

it as an alienation Janardhan was taking the family property for a particular fixed sum over a term of years. *Prima facie* it would lie on him to justify that alienation. But when we turn to the evidence I find it most difficult, speaking for myself, to get any clear idea as to whether the fixed sum arranged by Mukund was really a fair sum to fix. Janardhan himself says he knew nothing whatever about the rents of the property prior to the date of the lease. He did not enquire, he only asked whether the rent fixed was a fair one, and being informed that it was, he signed the deed. He does not even tell us of whom he enquired or who told him it was fair.

It is argued that presumably the father in the interests of his own children would be sure to fix a fair rent, and that we must, therefore, presume that the rents were fair. But I am not prepared to go to that length. It might amount to this, that every time a father sells or leases, it must be assumed *prima facie* that the transaction was a fair one from a pecuniary point of view. In other words the onus in that case will be shifted from the person on whom, in my opinion, it properly falls, viz., the alienee. It must also be noticed here that there are passages in Janardhan's own evidence which seem to point to the fact that he was getting the property at a reduced rent. I may also notice this, that apart from this question of a fixed sum, he was in addition to be paid a remuneration of Rs. 180 per annum. This was the remuneration he got under the earlier deed. He was still to retain it under the second deed although he was presumably getting some benefit by paying a fixed sum for the income of the lands.

It would not be right of me to dispose of this case without referring to the second point of law and to the cases decided upon it, viz., whether in general a Hindu father has power to appoint a testamentary guardian of property by Will. In that respect, no doubt, there is a conflict of authority. And I can quite appreciate that the learned trial Judge felt himself embarrassed by this. I can also understand his view that in these circumstances he thought it his duty to follow the latest decision in this Court in preference to an earlier decision of this Court the other way and in preference to a Full Bench

decision of the Madras High Court. The earlier decision in this Court, *Harilal Bapuji v. Bai Mani* (7), was a decision of Mr. Justice Russell and Mr. Justice Aston. There the father made a Will appointing his son as heir to the whole property which was ancestral. He also appointed trustees to administer the property till his son should attain twenty-one with power to the trustees to take possession. He also gave the trustees power to sell any part of the property and to purchase new property. It was held that the appointment of a trustee was void since at the moment of the testator's death the whole of the property became the property of the son. Further, that no trust was created by the Will because the property in question was not one transferable to the beneficiary.

In *Mahableshwar Krishnappa v. Ram Chandra Mangesh* (8), which was a decision of Sir Basil Scott and Mr. Justice Beaman, the manager of a joint Hindu family executed a *mukhtiar* providing for the management of the family estate including settlement of money-debts and pecuniary claims both during his lifetime and after his death. The *mukhtiar* was empowered to manage the estate as he thought fit. The Court there held that the power to manage implied the power to sell, that it was binding on the minors and that the sale could not be treated as a nullity inasmuch as a dying adult Hindu might appoint a manager and trustee without interfering with the succession to the property. The judgment of the Bench was largely put upon this that it was a matter of great practical convenience that a Hindu father should have such a power. It is said (page 103*):—

"In a family consisting in other respects of minors and women it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management, otherwise a dead-lock and loss would be arrived at through various widows quarrelling among themselves."

In *Chidambara Pillai v. Rangasami Naicker* (9) a Full Bench of that High Court considered the matter, and the finding was that the only adult co-parcener of a Mitakshara family consisting of himself and his

(7) 29 B. 351; 7 Bom. L. R. 255.

(8) 21 Ind. Cas. 350; 38 B. 94; 15 Bom. L. R. 882.

(9) 45 Ind. Cas. 905; 41 M. 561; 34 M. L. J. 381; 23 M. T. 286; (1918) M. W. N. 285; 7 L. W. 454 (F. B.).

*Page of 38 B.—[Ed.]

minor co-parceners is not competent to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. Mr. Justice Ayling, in delivering the first judgment, agrees with the observations of Mr. Justice Sadasiva Ayyar in an earlier case in which that learned Judge said (page 570*):—

"On principle I find it difficult to hold that a man who cannot deal with a particular species of property by Will can make arrangements for the management of that property by Will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death."

There Mr. Justice Coutts Trotter, as he then was, says (page 572*):—

"His argument seemed to me to come merely to this: The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the Legislature to take action. They cannot, in my opinion, suffice to set in motion a Court of Law."

The remaining Judge, Mr. Justice Seshagiri Ayyar, deals in some detail with the previous authorities on the point, and in the result arrives at the same conclusion.

There is one other case in *Deba Nand v. Anandmani* (10), which is a decision of Sir Grimwood Mears and Mr. Justice Sulaiman. The head-note runs:

"A Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death. He is unrestricted in the choice of a guardian, and may exclude even the mother from the guardianship."

But although this case was argued in August, 1920, whereas the Madras Full Bench decision had been argued in 1917 and in 1918 it does not appear that the latter was brought to the attention of their Lordships. Nor is there any reference in the judgment to the two Bombay cases which I have referred to.

Reliance was also placed on the Calcutta

(10) 59 Ind. Cas. 909; 43 A. 213; 18 A. L. J. 1127; 2 U. P. L. R. (A.) 431.

*Pages of 41 M.—[Ed.]

case, *Soobah Prithee Lal Jha v. Soobah Door-gah Lal Jha* (11), but speaking for myself, I hardly view it as a cogent authority in favour of the respondents, for at the most it amounts to this that it is not shown that the appointment of a guardian is prohibited by Hindu Law. I would rather say that if this important power is to exist in a Mitakshara family, then one would want positive evidence of the existence of the power rather than some negative statement that it is not prohibited.

If this had been a simple case of appointing a testamentary guardian of property, then it may well be that having regard to the conflict of authority both in our own Court and between other High Courts, it would be proper to send the case to a Full Bench. But in the view I take there is a very marked difference in this case from any other which has been cited to us. I refer to the provision in the second deed that the alleged guardian is not to be liable to account, and that he is to take the produce of the property for his own benefit paying yearly a fixed sum for it. That to my mind goes far beyond anything that was held justified in *Mahableshwar Krishnappa v. Ramchandra Mangesh* (8) or for the matter of that, in any of the other cases that have been cited to us. Accordingly I think we can dispose of this case on its own facts by saying that in any event the deeds here, when considered together, went far beyond the powers of a Hindu father in a Mitakshara family. Whether in any event a father could appoint a testamentary guardian of property at all, must, as I have already indicated, be regarded as open to grave doubt having regard to the authorities which I have cited.

I will only add a reference to the argument that the documents here were deeds *inter vivos* and not a Will. To my mind that makes little or no difference. If a man purports to dispose of property after his death, in substance it is a Will, whether you call it a deed or whether you call it a Will. If you treat it as a conveyance or alienation *inter vivos*, then he is still purporting to deal with an interest in the property after his death. One has then to see whether he has any power to make a settlement *inter vivos* of that nature. I take it then that practically the same principles would apply, bearing in mind that he is purporting to operate on property—at any

(11) 7 W. R. 73 at p. 74.

rate in part—as from the date of his own death, when *ex hypothesi* he no longer has any interest left in that property. In the present case, therefore, Mukund had no interest in the property after his death which he could vest in the trustees of any settlement, whether that settlement was made by deed or by Will.

There were other allegations in the case, allegations which ought not to have been made, charging Janardhan with fraud and undue influence. Those allegations were held by the trial Judge to be quite unfounded, and I respectfully agree with what the trial Judge said in that respect. But on the main part of the case as to whether these deeds can be upheld, in my judgment they cannot. They are accordingly voidable at the suit of the minors, and, therefore, in my judgment they must be cancelled and set aside as from the death of Mukund. It follows that Janardhan will have to account as from the death of Mukund. The appeal must, therefore, be allowed.

As regards the costs, I would say this. It was put to us that Janardhan had no personal interest in this matter, but was merely contesting this litigation because of his uncle's wishes. But that argument overlooks the fact that Janardhan took a personal pecuniary interest under this document, because he was getting the income at a fixed sum. Further he has chosen to stand by that document and to put in a defence raising every possible objection. Having eventually failed, I think he must be treated as any ordinary litigant who puts forward a document under which he claims a personal interest. It is not, therefore, a case where an absolute owner of property has caused confusion by making an ambiguous Will, under which circumstances it may be only right that as he caused the trouble, therefore, the costs should come out of his estate. On the other hand I recognize that there are these charges of fraud and undue influence on which Janardhan has succeeded. On the whole, therefore, I would hold that the fair order is that he do bear his own costs in both Courts and that the costs of the minors come out of the estate.

I will conclude with saying this. We quite appreciate the warning that the learned trial Judge who has had the advantage of seeing the witnesses, has given us. He has intimated in clear terms that

an undesirable person is at the bottom of this litigation, and that consequently if the deeds are set aside the result may be that the property of the minors will suffer. We think, therefore, this is a case where the question of the appointment of a guardian under the Guardians and Wards Act should be carefully considered by the Court; and further that the case is one where we may suggest for the consideration of the Collector whether he should not apply under the Guardians and Wards Act for a guardian to be appointed. So long as Janardhan has to account in this suit for the property and income he has received, I see difficulties in appointing him guardian of the property of the minors. But apart from that point, speaking for myself, I see nothing in this case which would in any way prevent him from being appointed by the Court to be guardian of the property of the minors, if the Court after considering all the facts came to the conclusion that that was in the interest of the minor. But while he has to account in this suit, as I have already said, there is a technical and practical difficulty in appointing him guardian.

I would accordingly direct that the appeal be allowed and that consequential relief be granted in the manner I have indicated.

Crump, J.—I entirely agree with the judgment pronounced by the learned Chief Justice, and in view of the fact that every point in the case has been fully covered, I do not desire to pronounce a separate judgment beyond expressing my concurrence.

Per Curiam.—Appeal allowed. Deeds to be cancelled and set aside as from the death of Mukund. Account to be taken of all property and the income thereof as from the date of death of Mukund. As regards possession Mr. Nilkant says that his client, respondent No. 1, is willing to give up possession at once, but the question arises as to whom the possession should be given pending any application for the appointment of a guardian of the property under the Guardians and Wards Act. On the whole we think that the best solution is to appoint the Nazir of the First Class Subordinate Judge's Court (at Karwar) to be the Receiver of the property until the termination of the suit or until further order with liberty to apply. The order will provide for possession being eventually given

to the guardian appointed under the Guardians and Wards Act.

We hope that matters will so arrange themselves that a proper guardian will be appointed, and accordingly any difficulty will be got over. If any difficulty remains, the parties will apply to the trial Court.

The respondent No. 1 is to bear his own costs in both Courts and the costs of the minors are to come out of the estate.

Copy of our decree will be sent to the Collector under O. XXXIII, r. 14, in relation to pauper suits, and also with reference to our recommendations in regard to an appointment under the Guardians and Wards Act.

A. N. A.

Appeal allowed.

ODH CHIEF COURT.

SECOND CIVIL APPEAL No. 100 OF 1927.

October 11, 1927.

Present :—Mr. Justice Hasan.

BHAGWAN BAKHSH SINGH AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

BEJAIPAL SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Alluvion and diluvion—Re-appearance of land in situ—Ownership—Adverse possession, effect of.

Land belonging to village S became submerged but re-appeared as an accretion to the lands of village M on the opposite of the river and since its re-appearance remained in the possession of the owners of village M for a period of over 30 years before the river again began to change its course and threw out the land on the side of village S. In a suit for possession by the owners of village S against the owners of village M:

Held, that the plaintiffs had lost their rights and were not entitled to recover possession from the defendants. [p. 87, col. 1.]

Maharaja of Dumraon v. Secretary of State for India (1), distinguished.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 3rd February, 1927, reversing that of the Munsif, Sultanpur, dated the 25th August, 1926.

Mr. H. Husain, for the Appellants.

Messrs. B. N. Srivastava and Bishambharnath, for the Respondents.

JUDGMENT.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Sultanpur, dated the 3rd February, 1927, reversing the decree of the

Munsif of the same place, dated the 25th of August, 1926.

The matter in controversy is the title to a plot of land No. 207 measuring 3 *bighas* 8 *biswas* now held in possession by the defendants who are the owners of village Maing in the District of Sultanpur. The plaintiffs claim title to this land on two alternative grounds. The first is that the land has by gradual change in the course of the river Gomti become an accession to their village Soti and this state of fact creates title in them both according to law and the custom of the village. The second ground of claim is that at the First Regular Settlement of the village Soti the land in suit formed part of village Soti and that on its re-emergence now after it had been under water for long it has retained its identity as land appertaining to the village Soti.

As to the first ground of claim, the trial Court held that having regard to the geographical situation of the land in suit it is an accession exclusively neither to the one village nor to the other but to both. On the second ground of claim the same Court held that it was well founded and decreed the suit.

On appeal by the defendants the learned Subordinate Judge of Sultanpur formed the opinion that the land in suit must be held to have accreted to the defendants' village Maing by gradual change in the course of the river. With this finding I concur. As to the second ground on which the plaintiffs claim title to the land in question the learned Subordinate Judge does not appear to have fully appreciated the bearing of the fact that the land in suit is identifiable with the land of the village Soti belonging to the plaintiffs as it lay with regard to its geographical situation in relation to the river at the time of the First Regular Settlement. He, however, accepts the finding of the Court of first instance as to the identity of the land in suit with the land which appertained to the plaintiffs' village at the First Regular Settlement.

If the facts had stood there, there is no doubt the plaintiffs would be entitled to a decree in spite of the finding against them on the first ground of their claim. This will be so by the rule of law as recently explained by their Lordships of the Judicial Committee in the case of *Maharaja of Dumraon v. Secretary of State for*

India (1) followed by a Bench of this Court in the case of *Sher Bahadur Singh v. Tafazul Husain* (2).

Now the intervening facts, which to my mind have the effect of fully supporting the decree under appeal, are that after the land in suit had remained submerged it re-appeared in the year 1892 if not earlier as an accretion to the lands of a village called Madhopur on the opposite side of the river and since its re-appearance it has been measured as a part of the village of Madhopur during the last Settlement and possessed by the owners of that village. This exercise of proprietary title by the *zemindars* of the village of Madhopur over the land in suit was continued for at least a period of 30 years before the river again began to change its course and threw out the land in suit on the side of the defendants' village. The learned Subordinate Judge has fully considered the effect of these facts and is of opinion that "Soti people had thus lost every semblance of title to it so long ago as the date of the last Settlement." I am unable to interfere with this finding of the learned Subordinate Judge. This being so, the fact that the land in suit belonged 30 years ago to the proprietors of the village Soti is of no consequence on the question of subsisting title of the plaintiffs.

I accordingly dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

(1) 101 Ind. Cas. 1; 54 I. A. 156; (1927) M. W. N. 393; A. I. R. 1927 P. C. 89; 31 O. W. N. 717; 45 C. L. J. 520; 8 P. L. T. 497; 6 Pat. 481; 53 M. L. J. 576 (P. C.).
(2) 104 Ind. Cas. 426; 1 Luck. Cas. 315.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 811 OF 1925.

February 28, 1927.

Present :—Mr. Justice Fawcett and Mr. Justice Patkar.

NARAYAN PUNDLIK VALANJU—

DEFENDANT—APPELLANT

versus

LAKSHMAN DAJI SIRSEKAR—

PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Dancing girls—Sister, whether heir—Crown; whether entitled to succeed in preference to sister—Escheat—Duty of Crown to show absence of relations and heirs-at-law.

Under the Hindu Law, the sister of a prostitute is entitled to inherit the property of the prostitute as an heir. She is at any rate a blood relation and entitled to succeed before the property goes to the Crown. [p. 90, cols. 1 & 2; p. 91, col. 1.]

[Case-law discussed.]

Before the Crown can take proper ty of a deceased person by escheat it must be shown that the deceased left no relations or heirs-at-law. [p. 91, col. 1.]

Second appeal from the decision of the District Judge at Ratnagiri, in Appeal No. 282 of 1923, confirming the decree of the Subordinate Judge at Deogad, in Civil Suit No. 281 of 1922.

Mr. P. W. Kane, for Mr. P. B. Shingne, for the Appellant.

Messrs. A. G. Desai and S. R. Parulekar, for the Respondent.

JUDGMENT.—In this case one Baya Bhavin executed a mortgage dated April 15, 1916, of the property in suit in favour of the defendant Narayan and his deceased brother Lakshman for Rs. 900. On Baya's death in 1921 the plaintiff purchased the equity of redemption from her sister Saguna on May 18, 1922, and brought the present suit for redemption. One of the defences set up by the mortgagee was that as Baya Bhavin acquired the property by prostitution, her sister Saguna was not the heir, and the property must escheat to the Crown, and that the plaintiff as purchaser from Saguna was not entitled to redeem. Both the lower Courts held that Saguna was the heir of Baya and allowed the plaintiff to redeem.

It is argued by the learned Pleader on behalf of the appellant-mortgagee that Saguna is not the heir of Baya, who was a prostitute, on the ground that the sister according to the Vyavahara Mayukha could only inherit as a *gotraja sapinda*, and that Saguna was neither a *gotraja* nor a *sapinda*, that *sapinda* relationship depended on marriage and uterine sister was unknown as an heir in Hindu Law. Baya belonged to the community of Bhavins who, according to Ratnagiri Gazetteer, page 126, practised prostitution and were dedicated to the temples like Murlis in the Deccan. The rights of daughters taking before sons in the case of inheritance to a dancing girl attached to Pagodas were upheld in Madras. See *Tara Munnee Dassea v. Motee Buneanee* (1), *Kamakshi v. Nagarathnam* (2), *Narasanna v. Gangu* (3) and *Arunagiri Mudali v. Ranganayaki Ammal* (4). In the present case Baya belonged to a prostitute class and the question whether prostitution entailed degradation from caste and severed

(1) 7 Sel. Rep. 273; 8 Ind. Dec. (o. s.) 247.

(2) 5 M. H. O. R. 161.

(3) 13 M. 133; 4 Ind. Dec. (N. s.) 804.

(4) 21 M. 40; 7 Ind. Dec. (N. s.) 384.

the tie which connected her to her kindred by blood does not arise. In this connection reference may be made to recent cases of *Meenakshi v. Muniandi Panikkan* (5), *Hari Lal Singh v. Tripura Charan Roy* (6) and *Narain Das v. Tirlok Tiwari* (7).

In the case of *Myna Boyee v. Ootaram* (8) where an Englishman, Mr. Hughes, had two illegitimate children by a Brahmin woman who had deserted her husband, the Privy Council held that the illegitimate children were to be considered as Hindus and their rights were governed by Hindu Law. At page 424* their Lordships observed: "To assume without evidence, on assertion simply, a capacity in the appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship, *inter se*, to property which never was their mother's, would be at variance with legal principles," and feeling difficulty in dealing with the case remitted the question to India for further investigation and consideration. On remand the Madras High Court in *Mayna Bai v. Uttaram* (9) held that the children were to be regarded as Sudras or a class still lower and that in the absence of preferable heirs, they inherited the property of their mother and of one another. At page 203† the learned Judges observed:—

"Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman, who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

(5) 25 Ind. Cas. 957; 38 M. 1144; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353.

(6) 19 Ind. Cas. 129; 40 C. 650; 17 C. L. J. 438; 17 C. W. N. 679.

(7) 29 A. 4; A. W. N. (1906) 243; 3 A. L. J. 537.

(8) 8 M. I. A. 400; 2 W. R. (P. C.) 4; 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 582.

(9) 2 M. H. C. R. 196.

*Page of 8 M. I. A.—[Ed.]

†Page of 2 M. H. C. R.—[Ed.]

In *Sivasangu v. Minal* (10) it was held that the sister succeeded to the estate of married Maraver woman who deserted her husband and lived in adultery. This decision is directly against the contention of the appellant. In *Subramania Iyer v. Rathnavelu Chetty* (11) Kumaraswami Sastriyar, J., held that the whole law of succession to dancing girls and prostitutes in cases not expressly provided for by rules relating to *stridhan* has been built up by Courts on analogies furnished by other parts of the Hindu Law, and at page 73* referred to the decision in *Subbaratna Mudali v. Balakrishnaswami Naidu* (12) where the learned Judges observed (page 209*):—

"The rules as to *stridhan* obviously do not apply to such property and there is no other rule of succession laid down in the Smrithis or by the commentators prescribing the devolution of the property of women of this caste, except it be the general rule 'that to the nearest *sapinda* the inheritance next belongs.'"

The question as to whether the Vaishya, *i. e.*, prostitute class, forms a fifth division of Hindus like the four divisions of Brahmins, Kshatriyas, Vaishyas and Sudras, or whether they are included in the Sudra division has been discussed in *Ram Pargash Singh v. Dhan Bibi* (13) where it was held that the Vaishyas, *i. e.*, prostitute class, are governed in matters of succession by the Mitakshara, and, following the case of *Advaya v. Rudrava* (14), it was held that the Mitakshara did not bar the succession of an unchaste or immoral daughter. In *Viswanatha Mudaly v. Doraiswami Mudaly* (15) it was held that there was heritable blood between the sons of a dancing girl or a prostitute and that the legitimate descendants of two sons of a Hindu dancing woman are under the

(10) 12 M. 277; 4 Ind. Dec. (n. s.) 543.

(11) 42 Ind. Cas. 556; 41 M. 44; 22 M. L. T. 94; 6 L. W. 149; 33 M. L. J. 224; (1917) M. W. N. 688 (F. B.).

(12) 41 Ind. Cas. 408; 33 M. L. J. 207; 22 M. L. T. 91; 6 L. W. 184; (1917) M. W. N. 569.

(13) 78 Ind. Cas. 749; 3 Pat. 152; (1924) Pat. 85; 5 P. L. T. 203; A. I. R. 1924 Pat. 420.

(14) 4 B. 104; 4 Ind. Jur. 630; 2 Ind. Dec. (n. s.) 579.

(15) 91 Ind. Cas. 193; 48 M. 944; (1925) M. W. N. 613; 49 M. L. J. 684; A. I. R. 1926 Mad. 1 & 289; (1926) M. W. N. 182.

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†Page of 33 M. L. J.—[Ed.]

Hindu Law entitled to succeed to each other. The authorities referred to above would support the claim of plaintiff in this case that there is heritable blood between Saguna and Baya and that Saguna as sister is the heir of Baya.

Apart from the reported decisions there are no express texts relating to succession of a prostitute. The only reference to Vaishya or prostitute class in the Mitakshara appears in the commentary on Yajñavalkya's verse 290, Vyavahara Adhyaya, in the Chapter of स्त्रीसम्बन्ध. There, a reference is made to the Skandapurana, and it is stated: "There are certain Apsarasas called Panchachuda; their progeny is known as the Vaishya, and is regarded as a fifth caste." The prostitute class may, therefore, be considered as a lower class than the Sudras. See Mitakshara, Gharpure's translation, pages 409 and 410. The portion of the Skandapurana is translated at page 409 in a foot-note.

The order of succession to the estate of a deceased prostitute is not laid down in the texts. The sister is not expressly mentioned in the compact series of heirs in Sapratibandha Daya, i. e., obstructed heritage of a male, but her place in the order of succession is placed by Nilakantha in the Vyavahara Mayukha between the paternal grandmother and the paternal grandfather. See Vyavahara Mayukha, Ch. IV, s. VIII, pl. 19; Stokes, p. 89; Gharpure's translation, p. 114: "In default of her (i. e., paternal grandmother) comes the sister, for, says Manu 'To her who is the nearest sapinda the inheritance shall belong.' Brihaspati says 'Where there are many (claimants), viz., the Jnatis, the Sakulyas and also the Bandhavas, he who is the nearest among these, shall take the wealth of the childless.' Being born in the brother's gotra she also is in no respect other than a gotraja. Indeed she has no Sagotrata but that has not been mentioned here as an operating cause for the right of inheritance." It is argued on behalf of the appellant that a sister of a prostitute cannot be gotraja sapinda as there can be no gotra in the prostitute class. But there can be gotra only in the three Varnas असनानासि गोत्रजास्त्रियेतत्रैव वारिक्म्. See Mitakshara, Achara Adhyaya, Yajñavalkya, verse 53. The Brahmins have gotra; but in the case of Kshatriyas and Vaishyas

they have not their own gotra, the gotra of their preceptor is to be considered their gotra. Therefore, it follows that in the case of Sudras there is no gotra. But a sister would be the heir of a male Sudra and succeed as gotraja sapinda. In the case of Sudras the gotra may be considered as synonymous with kul, i. e., family. In any view of the case the sister is an heir of the Sapratibandha Daya of a male and would not come in, under the above text of the Vyavahara Mayukha, as heir of a female prostitute. There is also considerable force in the contention that the sister of a prostitute cannot come in as heir under the texts relating to heirs to the stridhan of a woman because in determining the succession of kinsmen in the absence of issue, regard is had to the form of marriage, and in the case of four forms of marriage as the Brahma and others, the succession goes to her husband and in his absence to one nearest to him in his family, and in the other forms of marriage to her father or in his absence to one nearest to her in his family. In the case of a female belonging to a prostitute class there is neither a husband nor a father. Similarly, it is difficult to apply the order of succession relating to the Sulka of a damsel (kanya) to the inheritance of a deceased Vaishya or prostitute. In Tara v. Krishna (16) Sir Narayan Chandavarkar held that a Murli who lived by prostitution was entitled to her father's property only in default of either married or unmarried daughters on the ground that a woman, who in her maiden condition becomes a prostitute, Sadharana Stri, is neither a kanya (unmarried) nor Kulastri nor Bharya (married woman). The succession, therefore, to the estate of a prostitute would be governed by analogies derived from Hindu Law. The rule of Atidasha whereby principles laid down with reference to one case are applied to analogous cases was recognised, by Jaimini in his Mimansa (Bks VII and VIII of Jaimini's Mimansa) See Subramania Iyer v. Rathnavelu Chetty (11). In considering, therefore, the right of a sister to succeed to a female prostitute, the texts relating to her right to succeed to the Sapratibandha Daya of a male may be considered as applicable by analogy, viz., the text of Manu, Ch. IX, verse 187: "To the nearest sapinda

the inheritance shall belong," and also the text of Brihaspati that "the nearest Sakulya shall take the wealth of a childless person." The question, therefore, is whether the sister of a female prostitute is her nearest *sapinda*. *Sapinda* relationship is defined in the Mitakshara on verse 52 of Achara Adhyaya of Yajnavalkya Smriti. Mitakshara says that *sapinda* relationship lies in the connection through the particles of the same body सपिण्डता च एकाशरीरावयवान्वयेन भवति. After describing *sapinda* relationship with the father and the paternal grandfather, the Mitakshara deals similarly with the *sapinda* relationship with the mother because of the connection with the particles of the mother's body, and lays down that wherever the term *sapinda* is found, connection with the particles of the same body directly or indirectly should be understood. See translation—Appendix A of Setlur's Collection of Hindu Law Books of Inheritance. While commenting on Yajnavalkya's verse 117 (3rd quarter) Vyavahara Adhyaya, and dealing with the right of a daughter to succeed to her mother the Mitakshara says that it is proper that the *stridhan* property goes to the daughter because the portions of the body of the female parent abound in the female children, and the father's estate goes to the sons as portions of the body of the father abound in the male children (Mitakshara, Ch. I, s. 3, pl. 9 and 10; Gharpure's translation, page 189; Stokes' Hindu Law, page 383). Again while discussing the right of priority of the mother over the father in the compact series the Mitakshara in commenting on Yajnavalkya's verse 136 gives first the grammatical reason that the word *Mata* comes first in the compound मातापितरौ (mother and father) and proceeds to lay down that the father is the common parent to the other sons also, but the mother is not so, and since her propinquity, i.e., प्रत्यासत्ति, is consequently greatest, it is just that she should take the estate in the first instance according to the text "to him who is the nearest among the *sapindas* the inheritance shall belong." (Mitakshara, Ch. II, s. 3, pl. 2 to 5; Gharpure's translation, pages 249 and 250 and Stokes, pages 441 to 443). If the analogies of Hindu Law are applied to a prostitute mother, the daughters are the *sapindas* of the mother as the particles of the mother's body abound in them, and they are *sapindas* of each other because they

are connected with each other through one body of the mother. Saguna would, therefore, be the *sapinda* heir of Baya on the analogy of Hindu Law.

In this connection reference may also be made to verse 191 of Manu, Ch. IX: "Of two sons begotten of the same woman by two different men contending for the paternal estate let either of them take the property by his own (natural) father and no other." It is contended that this text refers to one legitimate son and the other son born of re-marriage. But in the commentary of Sarvadna-Narayan the other son is described as Golaka or Pūnarbhava and Golaka is not the son born of lawful wedlock. This text is discussed in *Arunagiri Mudali v. Ranganayaki Ammal* (4). Reference may also be made to Nanda Pandita's *Vaijayanti*, commentary on Vishnu Smriti, where the order of precedence among brothers and sisters of the whole blood and of half blood is given as follows: (1) brothers of the whole blood, (2) sisters of the whole blood, (3) sons of the same father, (4) sons of the same mother. The son of the same mother and a different father is considered as an heir. See translation of the passage at foot-note on page 208 of Hindu Law of Partition, Tagore Law Lectures by Jolly, 1855 Edition. The original text is printed in appendix at page 287 of Jolly's Tagore Law Lectures. It is contended by Mr. Kane that the words अन्यपतिमाश्रित्य in the text show that the second son is one born in lawful wedlock, but the text affords some basis for the contention that there is heritable blood between sons of the same mother by different fathers. Reference may be made in this connection to the case of *Ekoba Parashram v. Kashiram Totaram* (17). Relying on the above two texts Devadoss, J., in *Viswanatha Mudaly v. Doraiswami Mudaly* (15), remarks (page 954*):—

"The existence of heritable blood between sons of the same mother by different fathers cannot, therefore, be through the father and is attributable only to their being sons of the same mother. It is not, therefore, necessary that in order to have heritable blood, inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them."

(17) 66 Ind. Cas. 341; 24 Bom. L. R. 229; A. I. R. 1922 Bom. 27; 46 B. 716.

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Wallace, J., at page 960*, after referring to the theory of *sapinda* relationship as propounded by the Mitakshara, held that there was no authority for the proposition that *sapinda* relationship cannot exist without a father. In *Dundappa Basappa v. Bhimawa Baswantiappa* (18), it was held by Macleod, C. J., relying on Ghosh's Hindu Law, page 763, that under the Hindu Law the illegitimate daughter of a Sudra succeeds to her mother in absence of any nearer heir.

Lastly, before the Crown gets the property by escheat it must be shown that Baya died without any relations or any heirs-at-law: see *Gridhari Lal Roy v. Bengal Government* (19). See *Vyavahara Mayukha*, Ch. IV, s. 8, pl. 5 and 27; *Mitakshara*, Ch. II, s. 7, pl. 6; *Stokes' Hindu Law*, pages 85, 450. In *Ganpat Rama Joshi v. Secretary of State for India* (20) it was held, following *Kanakammal v. Ananthamathi Ammal* (21) that blood relations would at any rate succeed to the exclusion of the Crown. The Madras ruling is based on the opinion of Dr. Banerjee and West and Buhler, page 544. Saguna would be at least a blood relation of Baya and is entitled to succeed before the property goes to the Crown by escheat.

We think, therefore, that the appeal fails and should be dismissed with costs.

A. N. A. *Appeal dismissed.*

(18) 59 Ind. Cas. 561; 45 B. 557; 22 Bom. L. R. 1306.

(19) 12 M. I. A. 448 at p. 463; 10 W. R. P. C. 31; 1 B. L. R. P. O. 44; 2 Suth. P. C. J. 159; 2 Sar. P. O. J. 382; 3 Mad. Jur. 386; 20 E. R. 408; 1 Ind. Dec. (N. S.) 28.

(20) 62 Ind. Cas. 109; 45 B. 1106; 23 Bom. L. R. 462.

(21) 25 Ind. Cas. 901; 37 M. 293.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 43 OF 1927.

July 14, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.

S. N. BANERJEE—DEFENDANT—

APPELLANT

versus

HUSEYN SHAHIED SUHRAWARDY

—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—
Ex parte decree on Original Side of High Court—R. 13,

whether applicable—Power of High Court to restore on terms where there is no 'sufficient cause'—Ex parte decree against two defendants—One defendant not properly served—Restoration against all defendants, when proper.

Although it has been the practice on the Original Side of the Calcutta High Court to follow the analogy of O. IX, r. 13 of the Code of Civil Procedure on general principles of justice, and, as a rule, a case decided *ex parte* will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court, yet the exact words of O. IX, r. 13 are not to be applied on the footing that they are directly applicable and are exhaustive, and it is open to the High Court in its discretion to restore a suit upon proper terms even though there is an element of negligence on the party applying for restoration. [p. 93, col. 1.]

In a suit for damages for defamation on the Original Side of the High Court against the Printer and the Editor of a newspaper the summons was served on the Printer but not on the Editor. The Printer requested the Manager to undertake the defence and the latter agreed to do so. On the day of hearing neither of the defendants appeared and an *ex parte* decree was passed. The Editor applied for restoration of the suit and the Printer prayed that the decree may be set aside as against him also. The application of the Printer was dismissed on the ground that there was no 'sufficient cause' for his non-appearance and that the case did not fall within the proviso to O. IX, r. 13, Civil Procedure Code. On appeal:

Held, that the decree must be set aside as a whole even as against the Printer and that the High Court had power to do so. [p. 93, cols. 1 & 2.]

Appeal from an order of Mr. Justice Buckland, dated the 25th February, 1927, passed in the exercise of Ordinary Original Civil Jurisdiction.

Messrs. S. N. Banerjee (Sr.), B. C. Ghose, and D. N. Sen, for the Appellant.

Mr. J. N. Mazumdar, for the Respondent.

JUDGMENT.

Rankin, C. J.—This is an appeal from a judgment of Mr. Justice Buckland whereby he refused to restore a suit which was decreed *ex parte*. It appears that a newspaper of which the first defendant was the Editor and the present appellant—the second defendant—was the Printer published an article on the 27th July, 1926, referring to the plaintiff. The plaintiff says that the article is defamatory and, on the 8th November, 1926, he brought a suit for damages against the Editor and the Printer. On the 6th December summons was served upon the Printer. It appears to have been established that the summons was not served upon the Editor. The Printer says that he handed over the summons to be attended to by the Manager of the newspaper but that, owing to the fact that the summons was not served on the Editor or owing to some in-

dependent negligence, the Manager took no steps, though he had promised to do so, to have the suit defended on the part of the Printer. It is necessary that it should be understood what happened upon this default. Under the rules of the Original Side, a person served with a summons is required to enter an appearance in the office of the Court. That is an act which does not require his personal attendance and it does not involve his appearing before the Court himself with or without his witnesses. If he does not enter appearance within the time limited, the case will go into what is called the undefended list; and, when the case is on the undefended list, it is not possible for the defendant, without obtaining leave, to enter appearance. He has a limited right to cross-examine witnesses adduced on behalf of the plaintiff if he appears at the time when the undefended case is down for hearing: but his position is that of a man who for not entering appearance in time is precluded from defending the suit, whether he appears at the hearing or does not appear at the hearing. A similar form of procedure is applicable to a case where a person has entered appearance but has made default in the filing of his written statement and again in the case of a person who has failed to obtain leave to defend in a suit on a negotiable instrument under O. XXXVII, Civil Procedure Code. In the present case, no appearance was entered. The suit came on the undefended list on the 3rd January, 1927, and the minute shows what took place before the Court on that occasion. Learned Counsel Mr. I. B. Sen when the plaintiff had given his evidence in part appeared and represented to the Court that the writ had not been served on the first defendant—the Editor; and he asked that the case might stand over to enable the first defendant to enter appearance. I should have explained that this case came on the undefended list on the footing that both these defendants had been served and both had made default in entering appearance. It was being heard, therefore, against both as an undefended suit. Mr. Sen stated in reply to the Court that he had not yet been instructed on behalf of the first defendant. Whether this means that Mr. Sen by that time was instructed on behalf of the present appellant is not quite clear. The Court refused Mr. Sen's application for time holding that he had no *locus standi*. That, of course, was quite correct.

A person who is not allowed to enter appearance cannot employ an Attorney or Counsel to appear on his behalf except possibly for a limited purpose specially provided for. Under these circumstances, a decree for Rs. 7,500 for damages was passed against both the defendants. Then the Editor applied to have the decree set aside as against him and he succeeded in his application ostensibly on the ground that the writ of summons was not served on him. The Printer applied on the 18th of January, 1927, to have the decree set aside so far as he was concerned and the learned Judge has refused that application holding that, as he was served on the 6th of December, the negligence of the Manager—his failure to provide for the defence of the suit—was not a "sufficient cause" within the meaning of O. IX, r. 13, Civil Procedure Code. He has held further that this case is not one within the concluding proviso to that rule. On that, the Printer brings this appeal. It would appear from the judgment of Mr. Justice Buckland that the plaintiff said that he did not oppose the application of the Editor to have the suit restored as against him because he wanted him to have an opportunity of putting in a plea of justification. The position, therefore, is that the plaintiff, according to him, is anxious to fight out this question with the Editor but desires that the judgment against the Printer should stand in any event. I have some difficulty in seeing that this course is either reasonable or heroic and, in my opinion, it is necessary for us to consider whether this Court is bound either to affirm that there is "sufficient cause" within the meaning of O. IX, r. 13, Civil Procedure Code; or to refuse to set aside the decree.

In my judgment, O. IX, r. 13, Civil Procedure Code, is directed in terms to a different practice from that which obtains on the Original Side of the High Court and was followed in this case. It refers to the case which is the usual case in a *mofussil* Court where a summons has gone to a defendant informing him that on a given date the case will come on before the Court for hearing or for settlement of issues. The ordinary practice under O. V and the forms in the Schedule to the Code sufficiently elucidate that. In the *mofussil*, therefore, the question arises in the form whether or not the defendant was prevented by "sufficient cause" from

appearing when the suit was called on for hearing. In the High Court, the question is whether or not the defendant has entered an appearance in the office. If he has not entered an appearance within a certain time, then his right to enter appearance comes to an end upon the suit being sent to the undefended list in the absence of leave from a Judge. It does seem to me that there are many cases in the High Court where the mere fact that the plaintiff himself or the defendant himself was unable personally to attend on the day of the hearing would be no excuse at all because there are many cases in which the party is not a necessary witness and in which he was really intending to present his case by the assistance of Attorney and Counsel. I am unable to hold that the exact words of r. 13 of O. IX are to be applied on the footing that they are directly applicable under the rules of the Original Side and that they are exhaustive. It has been the general practice on the Original Side to follow the analogy of r. 13 of O. IX on general principles of justice. As a rule, the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court. But on the Original Side, at all events, the terms of r. 13 do not prevent the Court where there is an element of negligence from restoring the suit upon proper terms. My own view is that the main purpose of r. 13 of O. IX is to give a right to a party who could show sufficient cause to get a restoration on certain terms independently having to make a plea to the mercy of the Court. The words are "the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit;" I am not prepared to hold that the Court is deprived by this rule of its discretion in a case like the present. If the matter is a question of discretion to be exercised on terms, I have a clear opinion that this would be a proper case in which to set aside the decree as against the Printer. It is quite clear that there is an absurdity if this judgment should go against the Printer and the Editor should be held not liable in respect of the same publication. Moreover, in the case of the Printer of a newspaper, it does not seem to be unreasonable that,

in a question of this kind, he should go to the Manager and request the Manager to undertake the whole of the defence. It is true that when he does so, he is in some sense responsible as having entrusted the Manager on his behalf to look after the case. But it may be a great hardship to a Printer in a case of this kind who honestly relies upon the Manager doing his duty as, indeed, he has promised to do, to find a judgment of Rs. 7,000 against him on the ground that this does not amount to "sufficient cause" and that the Court is powerless to rescind the decree. Nothing that I have said is to be regarded in any way as pronouncing an opinion to the effect that in cases coming from the *mofussil*—from Courts to which r. 13 of O. IX, Civil Procedure Code, in its terms applies—the 13th rule is not to be regarded as exhaustive. Nor do I propose to define "sufficient cause." These questions may be left open for the purposes of the present case. Nor am I saying that what the learned Judge has said about s. 151, Civil Procedure Code, is not well-founded. It may be that, as a rule, s. 151 is wrongly invoked in cases which are covered by special legislation. I confine myself to the application of the principle of this rule to the very different practice that prevails on the Original Side of this High Court. I am not satisfied that the traditional view that the Court has a discretion independently of O. IX, r. 13 is wrong, and, in my judgment, this is a case in which the appeal should be allowed. At the same time the reason of default is a reason which must be attributed to the appellant and, in my judgment, he ought to pay the costs both before Mr. Justice Buckland and before this Court.

Mitter, J.—I agree.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 695 OF 1927.

August 15, 1927.

Present:—Mr. Justice Cuming and
Mr. Justice Roy.

ASIM KRISHNA DEB—DEFENDANT No. 1
—PETITIONER

versus

SAILESH CHANDRA GHOSH

AND OTHERS—DEFENDANTS—OPPOSITE
PARTIES.

Civil Procedure Code (Act V of 1908), s. 115-g

Valid partial award—Refusal of Court to pass decree—Revision—Interference—Jurisdiction, meaning of—Revision of interlocutory order.

Certain arbitrators who were authorised to make separate awards from time to time in a partition suit, refused to act after making an award as to some of the matters in dispute and the Court refused to pass a decree on the basis of the award on the ground that the award was partial. One of the parties applied to the High Court for revision of this order:

Held, per Cuming, J. (Roy, J., dissenting).—That the High Court had no jurisdiction to interfere under s. 115, Civil Procedure Code, inasmuch as the lower Court had not in any way refused to exercise its jurisdiction or acted illegally or with material irregularity in the exercise of its jurisdiction, even though it might have committed an error of law or fact; and that the High Court should not interfere in any case as the order was only an interlocutory one. [p. 95, cols. 1 & 2.]

Per Roy, J.—Inasmuch as there had been an effective award, the Subordinate Judge had no jurisdiction to deal with the properties concerned, and the case was a fit one for interference in revision. [p. 96, col. 2.]

A High Court has power to interfere in revision with interlocutory orders where great hardship may otherwise result to the parties. [*ibid.*]

Rule against an order of the Sub-Judge, Third Court, 24-Parganas (Alipur), dated the 25th March, 1927.

Mr. Atul Chandra Gupta and Babu Indu Prokash Chatterjee, for the Petitioner.

Mr. Bankim Chandra Mukherjee, Dr. Bijan Kumar Mukherjee, Mr. N. N. Bhose, Babus Manindra Kumar Bose and Jatindra N. Guha, for the Opposite-Party.

JUDGMENT.

Cuming, J.—The facts of the case out of which this Rule has arisen are these:—

The opposite-party instituted a suit for partition in the Court of the Subordinate Judge at Alipur, sometime in 1921. A preliminary decree was made in August, 1921, a Commissioner was appointed and a final decree was passed on the 20th February, 1923. On an application for a review being made this decree was set aside and a fresh partition was ordered. The parties then agreed to refer all the disputes in the suit to arbitration. Sir Provash Mitter and his brother Sir Benode undertook this duty. It was agreed that the arbitrators might make separate awards from time to time.

• They made an award regarding the Calcutta properties. The parties as usual in these cases began to file various objections to the arbitrators' award. The arbitrators then refused to have anything more to do with them and the remaining properties which also formed part of the subject of

the partition suit have not been dealt with by the arbitrators. The Court held that the award being only a partial award it could pass no decree on it. The Court, therefore, set aside the award and ordered the parties to take the necessary steps. The petitioner then moved this Court and obtained this Rule. His contention is that a decree can be made on a separate award and that hence the Judge in refusing to make a decree on the separate award has refused to exercise a jurisdiction vested in him by law.

So far as the present matter is concerned it is no doubt an interlocutory order in the suit and the view I have always taken is this that such an order cannot form subject of revision under s. 115, Civil Procedure Code. It is not, however, necessary to discuss this question, because whether or not an interlocutory order can form the subject of s. 115, Civil Procedure Code. I am quite satisfied that the present matter whether interlocutory or final order cannot form the subject of an application under s. 115. The argument put forward is this that the Judge wrongly decided that he could not pass a decree on a partial award. Hence he refused to exercise a jurisdiction vested in him by law and so the matter comes within the provision of s. 115. If this argument be accepted as far as I can see every error or law or fact can be converted or perverted into the subject of revision under s. 115.

I will give a few instances.

A Judge wrongly refused to admit a certain document in evidence holding that it was inadmissible in evidence. The document was admissible in evidence so the Court has jurisdiction to admit the document and as the result of wrongly deciding the document inadmissible he refused to exercise a jurisdiction vested in him by law. Or the Judge held wrongly that a suit was barred by the principle of *res judicata* and so would not take any further evidence and he dismissed the suit. Had he decided rightly that the suit was not barred by the principle of *res judicata* he would have taken evidence in it and, therefore, by wrongly deciding that the suit was barred by the principle of *res judicata* he refused to exercise a jurisdiction vested in him by law which was to take evidence and make a decree in favour of the plaintiff.

It is unnecessary to multiply instances. There would be no difficulty if once this

principle were accepted in extending it to errors of fact. A Judge wrongly decides a question of fact and decrees a suit in favour of plaintiff. Had he decided it properly he would have given a decree in favour of defendant. Hence he did not exercise a jurisdiction vested in him by law which was to give a decree in favour of defendant on account of his error of fact. In other words, every error of law or fact would be a refusal to exercise a jurisdiction or an exercise of a jurisdiction not vested in the Court. This seems to me to be merely a perversion of the word jurisdiction. Jurisdiction means the power of deciding. In the present case admittedly the Judge had the power to deal with or decide the case before him which was a suit for partition within his territorial and pecuniary jurisdiction. In exercising the power of decision he held that a decree could not be given on a partial award because he held the parties agreed to refer all matters to arbitration and did not agree to abide by the decision of the arbitrators if they decided only some and not all of the matters in dispute. He might be wrong and possibly he could have granted a decree on a partial award and he might have been mistaken as to what the agreement of the parties was in reference to arbitration. A number of rulings have been cited to show that he can. It is unnecessary for me to determine whether he can or cannot. It might be an error of law that he wrongly held he could not give a decree on a partial award or possibly an error of fact that the parties really agreed to have a decision on some of the matters in dispute and did not require that all the matters should be decided by the arbitrators. But in the exercise of a Court's jurisdiction to decide a question of law or fact wrongly is not to refuse to exercise a jurisdiction or to exercise it with material irregularity. As the Privy Council has pointed out in *Amir Hassan Khan v. Sheo Baksh Singh* (1) where a Court has jurisdiction to decide a case and does decide it whether it decides it rightly or wrongly it is immaterial. If it decided wrongly it did not exercise its jurisdiction illegally or with material irregularity. In that case the present con-

tention was not put forward that such exercise really amounted to a refusal to exercise its jurisdiction. It was only argued in that case that the Judge had acted with material irregularity. The present contention amounts to this that the Court by exercising its jurisdiction or power of decision wrongly refused to exercise its jurisdiction or power of deciding. In other words that to exercise jurisdiction is not to exercise jurisdiction. It is unnecessary to further pursue the argument.

In the present case the Judge had jurisdiction and he exercised it and held that he could not pass a decree on a partial award. He might be wrong but that would not give this Court power to interfere under s. 115.

I may here refer to the case of *Kali Charan Sirdar v. Sarat Chunder Chowdhry* (2) a case which in many respects is very nearly akin to the present case. Further if the Court had the power to interfere under s. 115 this is not a case in which the Court should interfere. The Judge has not finally decided the case. It is still open to the parties to ask for fresh arbitration if they so desire or to leave the case to be decided in the ordinary way. Further I may point out that when the case is finally decided it could still be made a ground of appeal that the Court should have accepted the award. I would, therefore, discharge this Rule. The Rule is discharged with costs. Hearing-fee ten gold mohurs.

Roy, J.—I regret to say that I differ from my learned brother in this matter. As my opinion cannot make any difference in the result of the case I will only indicate my reasons very briefly :

There was a preliminary decree in this partition suit and the parties thereafter agreed to refer the matter to arbitration. The arbitrators were given powers to give their award separately from time to time and it was agreed that Calcutta properties should be divided first by the arbitrators. They divided the Calcutta properties and gave an award in respect of these properties. On account of certain circumstances, the arbitrators refused to proceed any further with the partition. The learned Subordinate Judge has set aside this award in respect of the Calcutta properties and directed a Commissioner to make a fresh

(1) 11 O. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(2) 30 O. 397; 7 O. W. N. 545.

partition. The contention of the petitioner is that the order of the Subordinate Judge is in so far as it deals with the properties not dealt with by the arbitrators is good and the order in respect of the properties dealt with by the arbitrators is bad and should be set aside and that a decree should be made on the basis of the arbitrators' award. A question has arisen whether we can interfere with the learned Subordinate Judge's order in revision. The cases of *Rudra Prasad Pande v. Mathura Prasad Ponde* (3) and *Chimanbhai Kalyanbhai v. Keshavlal Bulkhdas* (4) amongst others were referred to where the learned Judges refused to interfere with the order setting aside the arbitration. These decisions appear to have proceeded from the point of view that the order of the lower Court was only an interlocutory order. It has been pointed out, however, by the learned Advocate for the petitioners that Piggott, J., who was a party in the Full Bench case of *Buddhoo Lal v. Mewa Ram* (5) interfered with an order wrongly superseding an arbitration in *Husain Baksh v. Lachhman Das Mathra Das* (6). On the other hand, the learned Advocate for the opposite party has referred to a decision of Maclean, C. J., in *Kali Charan Sirdar v. Sarat Chunder Chowdhry* (2) where the learned Judge refused to interfere with an order of the Small Cause Court in respect of an arbitration matter. It might be said that the last case was governed by the facts of that case. The Calcutta High Court seems to have taken ordinarily a view different from those of the High Courts of Bombay and Allahabad as to the meaning of the word "case" in s. 115, Civil Procedure Code, and has interfered in revision in many cases. Some of these cases have been collected or mentioned in the case of *Salam Chand Kannayram v. Bhagawan Das Chilhama* (7). The ground taken in these cases seems to have been that where there is likely to be grave injustice or injury this Court should interfere even with interlocutory orders and other orders from which there is no appeal. Several of

these cases are mentioned in *Salam Chand Kannayram v. Bhagawan Das Chilhama* (7). In this particular case it is urged that the error in law of the Subordinate Judge has led him to assume a jurisdiction which he did not possess and the cases of *Lachmi Narayan Marwary v. Balmakund Marwary* (8), *Birj Mohun Thakur v. Rai Uma Nath Chowdhury* (9) and *Umed Mal v. Chand Mal* (10) have been referred to as examples where similar errors have been corrected. It is conceded by the learned Advocate for the opposite party that the arbitrators had power to make partial award but it is contended that the parties did not say that they would be bound by such partial award and the decision of the learned Subordinate Judge is a finding of fact with which we cannot interfere. It seems to me that the case must be decided on the construction of the terms of the reference which was made in the case. If the parties agreed to abide by the decision of the arbitrators in respect of the whole of the dispute and if the arbitrators had power to make partial award from time to time the award which they actually made must be effective and cannot be set aside in that way and a decree should follow on the award already made. It would seem to me that great hardship would result to the parties if they are asked to wait until the whole suit which began in 1921, and which may still be prolonged for a considerable time is finally decided and then to raise any debateable question by way of appeal against the final decision. With all due respect to my learned brother, I would say that this is a case in which we should interfere on the ground that the learned Subordinate Judge had no jurisdiction to deal with the properties in respect of which there had been effective award.

A. N. A.

Rule discharged.

(8) 81 Ind. Cas. 747; 51 I. A. 747; A. I. R. 1924 P. C. 198; 35 M. L. T. 143; 47 M. L. J. 441; 20 L. W. 491; (1924) M. W. N. 707; 10 O. & A. L. R. 1033; 5 P. L. T. 623; 22 A. L. J. 990; 26 Bom. L. R. 1129; 40 C. L. J. 439; L. R. 5 A. (P. C.) 171; 29 C. W. N. 391; 1 O. W. N. 629; 4 Pat. 61 (P. C.).

(9) 19 I. A. 154; 20 C. 8; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).

(10) 99 Ind. Cas. 749; 53 I. A. 271; A. I. R. 1926 P. C. 112; 3 O. W. N. 989; 25 L. W. 90; 25 A. L. J. 61; (1927) M. W. N. 84; 38 M. L. T. 43; 28 P. L. R. 113; 31 C. W. N. 413; 52 M. L. J. 338; 45 C. L. J. 274; 8 P. L. T. 251; 29 Bom. L. R. 755; 51 C. 338 (P. C.).

(3) 89 Ind. Cas. 173; 47 A. 916; 23 A. L. J. 656; A. I. R. 1925 All. 566; L. R. 6 A. 459 Civ.

(4) 73 Ind. Cas. 464; 47 B. 721; 25 Bom. L. R. 443; A. I. R. 1923 Bom. 402.

(5) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 (F. B.).

(6) 64 Ind. Cas. 934; 20 A. L. J. 125; A. I. R. 1922 All. 69.

(7) 98 Ind. Cas. 615; 30 C. W. N. 907; 53 C. 767; A. I. R. 1926 Cal. 1149.

MADRAS HIGH COURT.**FULL BENCH.**

February 21, 1927.

Present :—Sir Victor Murray Coutts
Trotter, Kt., Chief Justice, Mr. Justice
Beasley and Mr. Justice Srinivasa
Ayyangar.

In the matter of Mr. S., SECOND GRADE
PLEADER, SOLINGHUR.

*Legal Practitioners Act, (XVIII of 1879), s. 39—
Pleader guilty of improper conduct but not of dis-
honesty—Penalty.*

Where a Pleader who was in possession of money belonging to his client did not pay the amount to his client notwithstanding many demands, and ultimately when a complaint was launched under the Legal Practitioners Act against the Pleader he paid the money and put forward an explanation for non-payment which was not fully made out, but during the period when the proceedings under the Legal Practitioners Act were pending, he did not take out any *sannad* or practice :

Held, that the practitioner was guilty of improper conduct deserving severe censure though the conduct was not necessarily dishonest. [p. 98, col. 1.]

FACTS.—It was brought to the notice of the High Court by the District Judge of Chittoor, that Mr. S., a Second Grade Pleader of Sholinghur, in his capacity as the Pleader of one Senthamarai Ammal, the plaintiff in S. C. S. No. 592 of 1923, on the file of the Court of the District Munsif of Sholinghur, received from the defendant in the case the sums of Rs. 40 and Rs. 14 on 28th August, 1923, and 27th November, 1923, respectively and in spite of the repeated demands of his client and even after a registered notice addressed to and acknowledged by him on 17th December, 1924, he retained with him the said amounts for nearly three years. The High Court issued notice on 7th January, 1927, calling on the said Mr. S. to show cause why he should not be removed from the roll of Pleaders of Chittoor District or otherwise dealt with as the High Court may think fit.

Mr. K. S. Krishnaswami Ayyangar, for the Pleader.

The Advocate-General, for the Government.

JUDGMENT.—The charge against the Pleader in this case was that, having received two sums of money amounting in all to Rs. 54 from the defendant in a suit in which he was appearing for the plaintiff, he misappropriated it and converted it to his own use. The money was received at the end of 1923. Many demands were made upon him and he did not pay any attention to them. Ultimately, sometime

in 1926 a complaint was launched under the Legal Practitioners Act against the Pleader and he then undoubtedly paid the money and he also put forward an explanation which the District Judge has found to be untrue, namely, that he had been asked by some relations—it is very difficult to make out which—of his clients to keep the money in order that it might be utilised in the purchase of stones for the construction of a temple which, I think, the client's father was supposed to have been building in Sholinghur. No body came forward to speak to the story one way or other. As I say, the learned Judge took the view that it was a mere story invented to stave off the evil day when it came; but it is fair to this man to say that the District Munsif, while not attempting to use it as a justification for what the Pleader did, apparently did think that there might have been some vague talk which reached him about the desirability of this money being applied to this purpose and that, no doubt, is why he found as he did, that the Pleader, whom after all he had seen and examined was not guilty of any fraudulent conduct. Nevertheless, he quite rightly held that, even on that showing he was guilty of improper conduct because he has never at any time pretended that he had instructions to withhold the money for that or any other purpose from his own client who instructed him. It has been brought to our notice by Mr. Krishnaswami Ayyangar who has very judiciously said all that can be said for him, and assented to by the Advocate General that for the whole of the year 1926 while these proceedings were hanging over his head he took out no *sannad* and, therefore, suspended himself as it were from pleading in the Court where his practice lay. The District Munsif says that he had before that been practising in the Court for 15 years and that, so far as he could ascertain, there had been no complaints against him. That appears in the report of the learned District Judge.

"The District Munsif reports that the Pleader has been practising in his Court for a period of 15 years and that there has been nothing against him."

None of these matters afford any real excuse for what he did, but we are going to take a lenient view of his case for two reasons not to any very considerable extent, because the sum of money was trifling but, first, because he has evinced some sense of

propriety by not attempting to take out a sannad and seeking to practise while this matter was hanging over his head and he has thus in a way anticipated any sentence of suspension from practice which this Court might otherwise have passed upon him and in the next place, it may be that he had some muddled idea that these people did not really urgently want their money owing to this vague talk about the temple, and that may be sufficient warrant for the finding of the District Munsif that, however improper his conduct was, as it undoubtedly was, it was not necessarily dishonest. On that we are quite prepared to give him the benefit of the doubt. He knew perfectly he had no right to withhold the money in spite of demands, whatever the talk about temples or stories of temples or anything of the kind. The sentence of the Court is that the Pleader Mr. S. be severely censured for his conduct in this matter but that, having regard to the events that have happened, this Court does not think it necessary to inflict upon him any further sentence than he has inflicted upon himself of suspension from practice.

V. N. V.

*Pleader censured.***LAHORE HIGH COURT.**

CRIMINAL REVISION No. 1083 OF 1927.

September 8, 1927.

*Present:—Mr. Justice Broadway.***NATHA SINGH—ACCUSED—PETITIONER**
*versus***EMPEROR—RESPONDENT.***Penal Code (Act XLV of 1860), s. 193—Perjury—Denial of knowledge of fact—Proof that accused had personal knowledge, necessity of.*

In the course of the examination of a prosecution witness he was asked whether the accused had arrested his sons, and the witness denied knowledge of the fact. In a prosecution of the witness for perjury it was proved that his sons had been arrested and that he had heard of the arrest, though he had no personal knowledge of the same:

Held, that the accused could not be convicted of an offence under s. 193 of the Penal Code, as there was no proof that the accused had personal knowledge of the fact. [p. 99, col. 1.]

Petition for revision of an order of the Sessions Judge, Ferozepur, dated 24th April, 1927.

• *Dr. Nand Lal*, for the Petitioner.• *Mr. Sunder Das*, for the Respondent.

JUDGMENT.—In 1925 a case was instituted by one Bahadur against Prem

Singh Head Constable and three others under s. 161 of the Indian Penal Code. One of the prosecution witnesses in that case was Natha Singh, son of Sahib Singh, an old man between 75 and 80 years of age. In the course of his cross-examination he was asked whether the said Prem Singh Head Constable had his sons arrested in 1924, for taking part in the Akali movement, and that his son had been proceeded against, and only avoided conviction by apologizing. Natha Singh replied that he had no knowledge of this. The case against the Head Constable and his companions failed and subsequently proceedings under s. 193 of the Indian Penal Code were instituted against Natha Singh under the order of the District Magistrate.

Now, it appears that in January, 1924, Gulab Singh, the son of Natha Singh, was, as a matter of fact, arrested by or under the directions of Prem Singh, Head Constable, for taking part in the Akali movement and after proceedings had gone on for two months was released on his tendering an apology. It appears also that at the same time the nephew of Natha Singh was similarly arrested and released. The learned Magistrate who tried Natha Singh held, on the prosecution evidence, that Natha Singh was present in his village, when Gulab Singh, his son, was arrested and that, therefore, his statement made in 1926, was false to his knowledge and that the falsehood had been intentionally spoken. He accordingly convicted Natha Singh under s. 193 of the Indian Penal Code and sentenced him to simple imprisonment for six months and to pay a fine of Rs. 500 or in default to undergo further rigorous imprisonment for six months. Natha Singh appealed to the learned Sessions Judge who maintained the conviction but reduced the sentence to imprisonment to the rising of the Court upholding the fine.

Natha Singh has come up to this Court under s. 439, Criminal Procedure Code, and it has been urged before me by Dr. Nand Lal that on the findings of the learned Sessions Judge the conviction cannot stand. A reference to the judgment of the learned Sessions Judge shows that the defence set up by Natha Singh was that he had two places of residence in two separate villages from 16 to 20 kos apart and that at the time when his son is said

to have been arrested he himself was in another village where he had been staying for three months collecting his share of the produce from his tenants. He also said that although there has been no formal separation and partition of land between him and his son they, as a matter of fact, lived apart and were not on visiting terms. While for the prosecution witnesses were produced to prove that Natha Singh was in the village where his son was arrested, defence witnesses were produced who have sworn that Natha Singh was in his other village and had been there for about three months. The learned Magistrate accepted the evidence given by the prosecution witnesses, but the learned Sessions Judge has apparently been unable to agree for he says as follows:—"I agree with the Magistrate that it is extremely unlikely that appellant (Natha Singh) by the time he gave evidence on the 12th February, 1926, had not learnt of his son's affair. He describes himself on that date as a *lambardar*. It is possible that what he meant to convey was that he had no direct knowledge of his son's arrest and prosecution. His presence at the time is not conclusively proved." He then goes on to say:—"There is, however, a '*suppressio veri*,' three questions appear to have been addressed to him on the point and the opportunity of saying that he had heard of his son's arrest, and prosecution was not apparently denied him."

Now, what Natha Singh was asked was whether he knew that his sons had been arrested. The learned Sessions Judge has found that it has not been proved conclusively that he was present in the village at the time of the arrest. Natha Singh, therefore, obviously could not have had any personal knowledge of the arrest and the most he could have said was that he had heard of it. Again, in order to make the statement relevant to the case in which it was made the important point was whether the arrest had been made by the Head Constable Prem Singh, a fact that seems to have been made somehow lost sight of by the learned Sessions Judge.

It not having been proved that Natha Singh had any personal knowledge of the arrest of his son by Prem Singh in 1924, the mere fact that he probably heard of it between 1924 and 1926, is not, in my opinion sufficient to warrant his conviction on the charge laid against him. I,

therefore, accept this petition and setting aside the conviction and sentence direct that the fine, if paid, be refunded.

A. N. A.

Petition accepted.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION

No. 219 OF 1927.

August 24, 1927.

Present:—Mr. Justice Boys.

BHOLA NATH—ACCUSED—APPLICANT

versus

MRS. VASHESHWAR NAUTH SINGH—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Officials of district connected with case—Transfer of case, desirability of.

Where a number of officials in the district in which an accused is being prosecuted are personally concerned in the case, whether as witnesses or otherwise, it is desirable that it should be tried elsewhere.

Criminal miscellaneous application for transfer of a case from the Court of the Magistrate, Moradabad.

Mr. Kailash Nath Katju, for the Applicant.

Mr. U. S. Bajpai, for the Crown.

ORDER.—This is an application for transfer of a case from the Court of Mr. Gokaran Nath Ugra, a Magistrate at Moradabad. It is unnecessary to enter into details either of the allegations in the affidavit or of any other matters beyond this: that there can be no shadow of a doubt but that some of the district officials at Moradabad have been unavoidably or otherwise very closely connected with this case. The District Magistrate himself approves of the transfer of the case, while, at the same time he points out that his personal concern with it only originated in the fact that allegations were being made "of the possibility of murder and suicide." This order of transfer must not be taken as in any way a reflection upon any body concerned with the case, whether official or non-official. I order it simply on the ground that where a number of officials in the district are personally concerned as in the circumstances of this case whether as witnesses or otherwise in the case, it is desirable that it should be tried elsewhere, and the District Magistrate himself says that he sees the propriety of this. The transfer is opposed by the

complainant, and it is a matter of regret if the complainant is put to further expense by the transfer; but I have to weigh the several considerations in the case, and I have no hesitation in holding that the case should be transferred. On behalf of the applicant it is agreed that the case may be taken up by the new Magistrate from the stage at which it has at present arrived, and that such evidence as has already been taken need not be taken *de novo*.

I accordingly transfer the case from the Court of the Magistrate at Moradabad to the Court of the District Magistrate of Bareilly, who will proceed to try the case himself from the stage which it has reached, or direct such trial by such experienced Magistrate as he may deem fit.

R. A. N. A.

Case transferred.

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION
No. 426 OF 1926 AND No. 10 OF 1927.

April 11, 1927.

Present :—Mr. Justice Crump and
Mr. Justice Madgavkar.

JEHANGIR ARDESHIR CAMA—

ACCUSED—APPLICANT

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V. of 1898), ss. 14, 154, 155, 162, 164, 197—Appointment of Magistrate to try a case—'Case,' whether includes all charges—Sanction to prosecute—Mistake as to date of offence, effect of—Preliminary inquiry by Criminal Investigation Officer—Statement of witnesses, whether falls within s. 162—Accused's right to copies—Magistrate's power to record statements of witnesses under s. 164—Misuse of statement under s. 162, effect of—Evidence Act (I of 1872), ss. 145, 154—Power of Court to allow witness to be treated as hostile—Revision—Interference—Evidence of hostile witness, whether should be rejected wholly—Criminal trial—Respectable accused—Sentence.

A 'case' is not necessarily a single charge but comprises all charges or classes of charges. A Magistrate upon whom authority is conferred under s. 14 of the Criminal Procedure Code to try the case relating to the prosecution of a particular person is, therefore, empowered to try all the charges that may be laid against that person in that prosecution. [p. 101, col. 2.]

A mistake as to the date of commission of an offence in an order granting sanction under s. 197 of the Criminal Procedure Code for prosecution in respect of such offence will not necessarily vitiate the trial unless it has caused prejudice to the accused. In granting sanction under the section the Government need not specify the offence with the same degree of precision as in a charge. [p. 102, col. 1.]

Statements taken by a Criminal Investigation Officer in a preliminary enquiry conducted by him against a public officer before sanction for prosecution was given and he was ordered by a Magistrate to investigate under s. 155 (2) of the Criminal Procedure Code, are not statements falling within the purview of s. 162 of the Criminal Procedure Code. To all intents and purposes they are on a par with statements made in a departmental enquiry, and the accused is not entitled to copies of such statements. [p. 102, col. 2.]

Similarly, statements recorded by a Magistrate in such a preliminary inquiry at the instance of the Criminal Investigation Officer do not fall within the purview of s. 164 of the Code. [p. 102, col. 2; p. 103, col. 1.]

Section 164 of the Criminal Procedure Code is not confined to confession of the accused but applies also to statements taken from witnesses, and although it is not desirable that witnesses should be pinned down by statements under s. 164, recording statements of witnesses under that section is not illegal. [p. 103, col. 2.]

It is open to a Court to grant permission to a party calling a witness to treat the witness as hostile and to cross-examine him if it finds that the witness is equivocating, and a Court of revision will not ordinarily interfere with the discretion exercised in this matter by the trial Court. [*ibid.*]

The legal result of treating a witness as hostile is not to discredit his evidence *in toto*, and the party calling him is entitled to rely on those portions of his evidence upon which he wishes to rely, and it is for the Court in the particular circumstances of each case to credit or to discredit the different portions of his evidence. [p. 104, cols. 1 & 2.]

Bradley v. Ricardo (16), relied on.

Khajiruddin v. Emperor (15), not followed.

The misuse of a statement under s. 162 of the Criminal Procedure Code is not, in the absence of prejudice to the accused, sufficient to vitiate a trial. [p. 107, col. 2.]

Per Madgavkar, J.—The law is not a respecter of persons; and a respectable person as such must not escape with a lesser sentence. [p. 106, col. 2.]

Criminal applications against an order of the Sessions Judge, Surat, varying that of the Special Magistrate, First Class, at Surat.

Mr. G. N. Thakor (with him Mr. K. N. Koyajee), for the Accused.

Mr. Velinker (with him Mr. P. B. Shingne, Government Pleader), for the Crown.

JUDGMENT.

Madgavkar, J.—The accused, Jehangir Ardeshir Rustumji Cama, a Deputy Collector under suspension, was convicted by the Special First Class Magistrate, Mr. Willis, under s. 161 of the Indian Penal Code on three charges in this case and sentenced to simple imprisonment for three months and a fine of Rs. 500, in default two months' further simple imprisonment on each of the first two charges, and six months' simple imprisonment and a fine of Rs. 1,000, in default further three months' simple imprisonment on the third charge.

the sentences to run consecutively. In appeal he was acquitted in respect of the third charge, and the convictions and sentences on the first two charges were maintained. He has applied in revision to this Court against his convictions and sentences. Government have also applied to enhance the sentences. The result is that under s. 439 (6) of the Code of Criminal Procedure the accused, as he was entitled, has exercised his right to show *causes* against his convictions. Confining myself to the first case and the two charges which are known as the Harangam and Sadarvel cases, Mr. Thakor for Cama has taken us exhaustively through the record, pointed out to us the discrepancies and the improbabilities, and has also minutely argued each point of law. Mr. Velinker for the Crown has confined himself to the broad aspects of the case and relied in the main on the judgments of the Magistrate and the Sessions Court.

Before entering into the points of law taken, it will be convenient shortly to state the history of the case. Mr. Macmillan, the District Magistrate of Surat, under whom the accused was working as Deputy Collector and Sub-Divisional Officer, Southern Division, communicated with the Criminal Investigation Department. The Deputy Inspector General placed Mr. Kothavalla, on January 21, 1925, at the disposal of Mr. Macmillan to make a confidential enquiry and submit a report. He made his inquiries from March to May and recorded the statements of certain witnesses. Their statements were also recorded at his request in March by Mr. Dullabhbbhai, a *Mamlatdar* and Magistrate of the Bulsar Taluka. Subsequently, in August, 1925, Government, under s. 197 of the Code of Criminal Procedure, issued the necessary sanctions. Mr. Kothavalla then lodged formal complaints before Mr. Jayakar, Acting District Magistrate. Mr. Jayakar ordered Mr. Kothavalla, under s. 155 (2) of the Code of Criminal Procedure, to hold an investigation. Mr. Kothavalla thereupon recorded again these statements and some others and again sent up certain witnesses to Mr. Narandas Mehta, who had succeeded Mr. Dullabhbbhai, for recording their statements. The accused had been imprisoned in July. His trial commenced in December, 1925, and ended in April, 1926. He appealed, and was released on the same day on bail by the Court of

Session. His appeals were decided in October, 1926, with the result stated above. With this preliminary history I proceed at once to consider in their order the various points of law raised.

The first point has reference to the order of Government, Ex. 28 (L), under s. 14, Criminal Procedure Code, appointing Mr. Willis to try "the case." It was argued that this authority to try "the case" does not make Mr. Willis competent to try three charges. It may be conceded perhaps that it would have been preferable if the order had explicitly run, "the case or cases." At the same time a case is not necessarily a single charge. It comprises all charges or classes of charges. In construing this order as in construing any other document, a reasonable construction must be placed, and the question asked, what was the intention of the person responsible for the order, how far that intention clearly appears, and whether there is any real ambiguity such as to mislead or prejudice any of the parties concerned. Section 14 expressly authorises the Magistrate to try cases or class of cases. In this view, so far as the present case of two charges is concerned, I see no difficulty. This was the first case Mr. Willis tried, and he had ample authority to include in it the three charges, which were legally comprised within that case. The fact that Government appointed no other Magistrate and appointed Mr. Willis "to try the case relating to the prosecution of Mr. J. A. R. Cama" shows that Government intended that Mr. Willis should try the present charges, and expressed themselves to that effect. The contention, therefore, fails.

The second objection relates to the sanction under s. 197 of the Code of Criminal Procedure, Ex. 28 (F), page 517, and the words therein, "in the month of February" amended on January 26th, 1925, (page 523) by adding the words "or March (March 1, 1924)." It appears that in respect of the offence referred to in this sanction the books of the goldsmith at Navsari showed a purchase on Saturday, *Magh Vad* 10th *Sambat* 1980. A reference to authoritative Government diaries shows that *Magh Vad* 10th *Sambat* 1980, was shown as Friday, February 29th, 1924. And the prosecution, somewhat hastily, perhaps, assumed and proceeded from the sanction onwards on the assumption that the Saturday was a mistake and that the correct date was the

English date shown in the Government diaries as corresponding to *Magh Vad* 10th *Sambat* 1880, viz., February 29, Friday. In the course of the trial, however, the prosecution decided that this assumption was a mistake and that the Saturday was correct, and that the confusion was due to the confused system of the Hindu calendars and lunar years; and the charge was altered from the original February 29, to March 1st. Proceedings were stayed and the sanction amended as above. Under these circumstances it is contended for Cama that the previous sanction was, so to speak, null and void and with it all the proceedings held thereunder end up to the amended sanction.

It is perfectly correct that under s. 197 of the Code of Criminal Procedure no Court could take cognisance of these offences except with the previous sanction of Government. The questions in regard to these sanctions are: Is the offence designated [*Queen-Empress v. Samavir* (1)] or is there any vagueness about it [*Emperor v. Madhav Laxman* (2)]? Applying again to this objection the same principles applied in regard to the order of appointment of Mr. Willis it appears that there is really no vagueness about the sanction. The other details specified make it clear that the offence charged and enquired into was what it was throughout alleged to be. I agree that in granting sanction Government need not specify the offences with the same degree of precision as in a charge: *Girwardhari Lal v. Emperor* (3). Had there been two offences, one on February 29, and another on March 1, the objection might have been valid; but as throughout the question is only of a single offence, which is otherwise properly described and specified, the sanction is not, in our opinion, bad. At the same time it may be conceded it would have been preferable if the sanction like the charge had used the words, "on or about" and not merely the word "on" or if the prosecution had been from the outset more careful whether it was Friday, February 29, or Saturday March 1, that the gold was alleged to have been purchased and given. More-

ever, the defence had reserved their cross-examination, and did not cross-examine any of the witnesses till after the charge. It is difficult to see what prejudice was caused to the defence.

The third objection relates to s. 360 of the Code of Criminal Procedure, and two rulings of the Calcutta High Court, *Hira Lal Ghosh v. Emperor* (4) and *Dargahi v. Emperor* (5), have been cited in support. My learned brother invited the attention of Counsel to the very recent Privy Council case, *Abdul Rahman v. Emperor* (6), overruling these two cases. It is not, therefore, necessary to consider the previous decisions, which will all be found in *Ramesh Chandra Das v. Emperor* (7) or to my judgment in *Pitoomal v. Emperor* (8) where I differed from the Calcutta view.

The last objection refers to the procedure of the Police and of the Magistrates, and particularly to statements recorded by both before the trial and their use. As regards the statements recorded by Mr. Kothavalla from March to May, 1925, before the Government sanctioned for prosecution, and before the District Magistrate ordered him to investigate the offences: these statements recorded by Mr. Kothavalla were not statements under s. 162 of the Code of Criminal Procedure, because there was no investigation within the meaning of the term, "during the course of the investigation" under s. 162 of the Criminal Procedure Code. To all intents and purposes they were on a par with the statements recorded in a departmental enquiry: *Queen-Empress v. Karigowda* (9). The witnesses were not bound to answer, and their ignorance of this fact does not affect the legal position.

Similarly the statements recorded by Mr. Dullabhbhai in March, 1925. Government had sanctioned no complaint and they were not made "in the course of an in-

(4) 83 Ind. Cas. 905; 52 C. 159; 28 C. W. N. 968; A. I. R. 1924 Cal. 889; 26 Cr. L. J. 201; 41 C. L. J. 224.

(5) 88 Ind. Cas. 733; 52 C. 499; A. I. R. 1925 Cal 831; 26 Cr. L. J. 1213.

(6) 100 Ind. Cas. 227; 29 Bom. L. R. 813; A. I. R. 1927 P. C. 44; 31 C. W. N. 271; 25 A. L. J. 117; (1927) M. W. N. 103; 38 M. L. T. 64; 8 P. L. T. 155; 4 C. W. N. 283; 28 Cr. L. J. 259; 6 Bur. L. J. 65; 5 R. 53; 52 M. L. J. 535; 45 C. L. J. 441 (P. C.).

(7) 50 Ind. Cas. 660; 46 C. 895; 23 C. W. N. 661; 29 C. L. J. 513; 20 Cr. L. J. 324.

(8) 86 Ind. Cas. 33; 16 S. L. R. 255; 26 Cr. L. J. 657.

(9) 19 B. 51 at pp. 69, 70; 10 Ind. Dec. (N. s.) 34.

(1) 16 M. 468; 3 M. L. J. 227; 2 Weir 220; 5 Ind. Dec. (N. s.) 1033.

(2) 48 Ind. Cas. 871; 43 B. 147 at p. 153; 20 Bom. L. R. 607; 20 Cr. L. J. 71.

(3) 4 Ind. Cas. 13; 13 C. W. N. 1032 at p. 1065; 10 Cr. L. J. 463.

investigation or at any time afterwards" under s. 164 of the Code of Criminal Procedure, nor were the witnesses bound to answer. As to the propriety of these statements, speaking for myself, I find it difficult to see how Mr. Kothavalla could have made a report without recording the statements made to him. Even Mr. Thakor, who in other respects has pressed his arguments for the defence to the utmost possible extreme, has not suggested that Mr. Kothavalla could be expected to carry in his memory these statements without a written record of them.

It might be argued, however, with greater plausibility that the propriety of the statements before Mr. Dullabhbhai is more open to question, looked at from a purely judicial point of view. These confidential enquiries are in their nature difficult and delicate. What ever Mr. Kothavalla's reasons were, whether he desired to protect himself from allegations such as were subsequently made against his Assistant, Mr. Billimoria, or whether he was not sure of these witnesses, and particularly in view of the fact that evidence has been adduced of attempts by the defence to tamper with witnesses such as the visit of the son-in-law of the main witness Adam Isap to Mr. Gandhi the Counsel for the accused (I desire to add that there is no imputation whatever made against Mr. Gandhi)—in the face of all those circumstances I confess myself unable to condemn the taking of the witnesses before Mr. Dullabhbhai, provided the witnesses were not taken there against their will. The Courts may not tolerate any breach of the law; but they must also be alive to the realities and difficulties in cases such as the present when it has to be discovered whether allegations of corruption are idle rumour or malice or whether there is any substratum of truth in them.

But the statements recorded by Mr. Kothavalla after Mr. Jayakar's order under s. 155 (2) clearly fall under s. 162, Criminal Procedure Code. Nothing can be said against their legality or their propriety.

The statements recorded by Mr. Naranadas Mehta fall under s. 164. The Calcutta High Court has held [*Queen-Empress v. Jadub Dass* (10) and *Emperor v. Nuri Sheikh* (11)] that it is hardly desirable that

witnesses should be pinned down by statements under s. 164, and that Sessions Judge should not admit them under s. 283 without making proper enquiry. The very fact that such statements are recorded under s. 164 leads to a presumption on the showing of the prosecution itself that these witnesses are weak. At the same time s. 164 is not confined to confessions of the accused. If then the Police take the risk, and their action is not outside the law, it is difficult to see how the Courts can prevent or discourage their so doing. In the present case it is only fair to add that there are no allegations of ill-treatment in the real sense of the term against the Police.

The next objection is that the prosecution sought and were allowed to treat as hostile their own witnesses when they chose and previous statements were put to them and in re-examination they were really cross-examined.

It appears that in some matters considered important by the prosecution, the evidence before the trying Magistrate of certain witnesses differed from their previous statements. The prosecution sought to obtain leave under s. 154 of the Indian Evidence Act to treat these witnesses as hostile. The Magistrate evidently thought that these witnesses were at least equivocating. It was open to him under the law to grant the permission sought. In *Kalachand Sircar v. Queen Empress* (12) it was held that a witness is not hostile merely because he tells at Sessions a different story from that before the Committing Magistrate. But it is difficult for this Court sitting in revision and not seeing the witnesses or their demeanour to say that the trying Court was wrong. At the best it merely amounted to permission to the prosecution to put leading questions.

As to questions about these previous statements, the statements themselves, in virtue of s. 162 as now amended could not be put to them by the prosecution: *Vithu Balu Kharat v. Emperor* (13). Mr. Velinker frankly and very properly conceded and expressed his regret that in the case of one witness, Ex. 6 (page 241), he wrongly asked the Magistrate to allow questions on such a statement. But as regards the other witnesses, they were questioned on statements made by them before Mr. Dullabhbhai.

(10) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. s.) 194.
(11) 29 C. 483; 6 C. W. N. 596.

(12) 13 C. 53; 6 Ind. Dec. (N. s.) 532.
(13) 83 Ind. Cas. 1007; 26 Bom. L. R. 965; A. I. 1924 Bom. 510; 26 Cr. L. J. 223.

bhai. Copies of these statements or of those recorded in March by Mr. Kothavalla were apparently not supplied to the defence but a copy of statements recorded from September onwards both before the Police and the Magistrate were so supplied. No authority is shown to entitle the defence to the statements recorded prior to August. From the judgment of the learned Sessions Judge it appears as a matter of fact that there was little or no difference between the statements before August and the statements afterwards.

It follows, as regards the statements before Mr. Dullabhbhai, from the strictly legal point of view that they would fall under ss. 145, 147 of the Indian Evidence Act and not under s. 162 of the Code of Criminal Procedure.

The propriety of questions on these statements, however, is a more difficult question. On the one hand the prosecution adduced evidence to prove attempts by or for the accused to tamper with the witnesses. On the other hand it might be argued that the practical result of questions on these statements was to nullify the provisions of s. 162 of the Code of Criminal Procedure; and these provisions have been deliberately enacted by the Legislature and are entitled to respect not merely in the letter but also in the spirit so long as the section remains unamended.

Cases such as the present in which one set of statements is recorded before investigation and another after, are, however, rare. Under these circumstances and bearing in mind the peculiar difficulty and delicacy of such inquiries, I do not think it necessary to pursue the question of propriety any further.

As to the legal consequence, the prosecution sought to discredit the statements of witnesses they considered hostile only on certain points. It is contended for the defence that the legal result was to discredit the evidence *in toto* of these witnesses including those portions on which the prosecution wished to rely. This view is founded on the dictum of Lord Campbell, C. J., in *Faulkner v. Brine* (14) accepted by the Calcutta High Court in cases such as *Khajiruddin v. Emperor* (15). But as was pointed out in the lower Courts, the view of Lord Campbell is not accepted even

in England: *Bradley v. Ricardo* (16); Halsbury's Laws of England, Vol. XIII, p. 600. It does not find support in any provision of the Indian Evidence Act or other enactment in India. With all respect, therefore, I am unable to say that the total discarding of the evidence of such witnesses can be formulated as a necessary legal result, amounting in fact to *falsus in uno falsus in omnibus*. If it cannot be so formulated, then the result must be the same as in other cases; and it must be a matter for the Court on the particular facts in each case to credit or to discredit the different portions of the evidence of each witness as in other cases.

The other objections are less serious. On the general question of latitude enough has been said to show the difficulty experienced by both sides. The Magistrate rightly gave each side full opportunity to elaborate its case. To the objection that the re-examination was in the nature of a cross-examination, the reply was that it was an explanation of certain portions of the cross-examination. The difficulty really arose from certain witnesses being treated as hostile. There is no substance in the argument of prejudice to the defence. They apparently desired to reserve cross-examination of each witness after all the witnesses had completed their examination-in-chief. The charge was framed and all the witnesses were recalled and cross-examined. How the defence or the Court would have been any better off by recalling all the witnesses immediately before the charge and again immediately after, I am unable to understand. The forty hearings and the record of 600 pages are mainly taken up by the cross-examination for the defence, which is as exhaustive as it well could be.

Again it was suggested that the case should have been adjourned to enable the defence to put Mr. Macmillan into the box. Mr. Macmillan was on leave in England. He did not return until October 6, 1926. He is not alleged to have any knowledge himself of the charges or to have questioned any of the witnesses. The rumours he might or might not have heard would not be admissible in evidence. The Magistrate was right in declining to adjourn the case for six months to enable the defence to examine Mr. Macmillan.

(14) (1858) 1 F. & F. 254.

(15) 92 Ind. Cas. 442; 53 O. 372; 42 O. L. J. 504; 27 Or. L. J. 266; A. I. R. 1926 Cal. 139.

(16) (1831) 8 Bing. 57; 1 Moo & Sc. 133; 1 L. J. Q. B. 36; 131 E. R. 321; 34 R. R. 624.

On considering all these objections in detail I arrive at the conclusion that there has been no failure of justice within the meaning of s. 537 of the Code of Criminal Procedure such as to vitiate the trial. Subject to the remarks above, the prosecution and the Magistrate appear to me to have treated the defence very fairly and given the accused every facility. He has fully availed himself of it as shown by the mass of materials and the time occupied by arguments on his behalf in all the Courts. Even the application for enhancement of sentence has enabled him to argue the case afresh on the merits before us.

I pass on to these merits. In so doing it is impossible for me to take up each discrepancy pointed out on his behalf, nor is it necessary to consider each minute point such as the number of carts when the witnesses returned on January 18, 1924, from Athgam to Harangam, or the nature and number of the tents occupied by the accused on January 20, 1924. One Adam Isap Patel of Harangam states that he gave the accused ten *tolas* of gold on two occasions, once at Athgam on January 28, 1924, in order to get the accused to appoint him Patel of Harangam, and again at Jalalpor on March 1, 1924, in order to get his friend Dayalji appointed Patel of Sardarvel. Certain pieces of corroborative evidence are brought forward. First and on January 18, that the accused's servant Chand beckoned to Adam and took him to the accused and the accused demanded the gold; and Adam on his way back to Harangam informed some of his companions of the accused's demand; and, secondly, that Adam purchased the gold at Bulsar on January 20, and at once took it to the accused's camp. Similarly, in the second case (Sardarvel), that on the night of February 27 Adam saw the accused at Jalalpor at a bungalow called the Khoja's bungalow between 9 and 10 o'clock at night and asked him to appoint Dayalji, whereupon the accused demanded ten *tolas* of gold. Secondly, that Adam informed Dayalji, and obtained from him the necessary amount; thirdly, that Adam taking with him the witness Ismail Isaf (Ex. 6) went to Navsari on Saturday, March 1, purchased the ten *tolas* of gold and returned to the accused's camp and gave it to him some time shortly after 10 o'clock in the morning. The defence is generally that the entire story is a fabrication, the result

of a conspiracy on the part of some subordinates of the accused because he had been unduly strict; and more particularly, a defence of *alibi* that at the particular hours alleged by Adam the accused was not at Athgam on January 20, or at Jalalpor on March 1.

The question, therefore, in both the charges is how far Adam's evidence that he gave the accused the gold on these two occasions is or is not worthy of acceptance.

Adam is undoubtedly in law an accomplice, and there is no other eye-witness to the alleged payments. It is even argued by Mr. Thakor that the persons who are said to have accompanied Adam in the purchase of gold are accomplices in law, to say nothing of the witnesses treated as hostile, and, therefore, unreliable. This is an extreme contention, for which there is no authority. I do not propose to add to the case-law on the subject of accomplices. Their name is legion. Instead of being treated as applications of the law as laid down in s. 114 of the Indian Evidence Act with ill. (b), and the further illustration as to ill. (b), they are taken as adding to or subtracting from the law. I accept the enunciation of the law in *Govind Balwant Laghate v. Emperor* (17).

It is clear, however, that the single word accomplice may cover various categories. The extent and depth of the taint may vary greatly. The part taken by the accomplice, his interest in minimising his own share at the expense of the accused, the moral element, all these and other factors would gravely affect the total amount of the legal taint. Even in cases such as the present, there is assuredly a difference between a rich man tempting a poor public servant and a public servant presumed to be above corruption extorting money from a subordinate subject to his own power, in order to show him favour. Even in this very case the first charge to which the accused is alleged to have demanded money and the second in which Adam of his own accord went to recommend Dayalji suggest a certain amount of difference. I content myself with holding that in law Adam and Dayalji are the only two accomplices and that the other witnesses are subject to no such taint. The question whether Adam and Dayalji are or are not to be believed must depend on

(17). 34 Ind. Cas. 976; 18 Bom. L. R. 266 at p. 275; 17 Cr. L. J. 256.

the corroboration of their evidence on what may be termed material points.

Without reiterating what has been said in the judgments below, the difficulty, speaking for myself, which I have experienced in appreciating the arguments for the accused is this. It may be there are a number of discrepancies. But the further point which must always be in the mind of the Court is this, what follows from these discrepancies? Are they the discrepancies of *bona fide* and truthful witnesses, or are they the discrepancies of false witnesses and conspirators? In this particular case even when their statements were first recorded by Mr. Kothavalla the witnesses were asked to speak to events over a year old; and when they gave evidence before the Magistrate, more than two years had elapsed. Many incidents were such that there would not be any particular reason for the details remaining in the minds of these witnesses. Each witness had undergone four examinations before he came into Court. In Court some were treated as hostile by both sides and examined and cross-examined at great length. Under these circumstances, the simple fact of discrepancy does not suffice. And in a record of this length there always appears to me to be a danger of not seeing the wood for the trees. [His Lordship then referred to the evidence and continued:—] The result is that the lower Courts were, in my opinion, right in finding the accused guilty.

There remains the difficult question of sentence. The main ground on which enhancement is sought is that these are cases very difficult to detect, and false and reckless allegations of conspiracy, perjury and forgery have been made by the accused. As regards the latter ground, although it might in certain cases be an element in so far as it is a part of the defence, I would be reluctant to allow the sentence to be aggravated by it. The single point taken by the learned Magistrate is the ruin pecuniary and social of the accused which the sentence involves. From the point of view of the individual accused that is, no doubt, correct. But, on the other hand, there are certain other elements, public and more important, which it is impossible to ignore. In these cases it is not merely a question of the amount that is taken; nor are they on a par with the case of a breach of trust by a private employee. The accused occupied an official position, and a

position of public trust. The higher that position, the more serious is the breach, and the heavier, in my opinion, should be the sentence. The law must not be respecter of persons; and a respectable person as such may not escape with a lesser sentence. In the present case it is not for us to ask ourselves why this application for enhancement has been made. It might be that but for the acquittal on the third charge it might not have been made. But however that may be, I am constrained, reluctantly yet clearly, to the conclusion that there are certain points in the case which justify this application. The record leaves small doubt that since the accused came to this district and was entrusted as Deputy Collector with the charge of the southern division, he embarked on a career of unblushing corruption. I am unable to make the distinction argued on his behalf between Deputy Collectors not acting in their magisterial capacity and Subordinate Judges. In these cases the wrong is not confined to the person who paid the bribe; the wrong is to the Government and the public. It sullies and makes a breach in the tradition of probity which other public servants have built up with years of labour. It affords a handle to the unthinking and the hostile against the administration and the particular service to which he belongs. Under these circumstances after making every allowance for the various considerations put forward on his behalf, I am of opinion that the sentences passed are inadequate. I would enhance them on each of the two charges as follows; six months' rigorous imprisonment and a fine of Rs. 500, in default two months further rigorous imprisonment, the sentences to be consecutive, and the sentences of simple imprisonment undergone being considered as part of these sentences.

Crump, J.—The exhaustive judgment which my learned brother has just delivered saves me the task of dealing with the various points that have arisen in this case at any length. So far as the merits are concerned I agree entirely with the conclusions that he has reached. Speaking for myself, dealing as we are with a case under s. 439, I should be content to express my agreement with the conclusions arrived at by the two Courts below who have dealt with the facts of these two charges in full and adequate judgments. But if it is necessary to say more than that, then all

that is necessary to say has been said in the judgment which has just been delivered, and I do not propose to add anything to it. So far as the questions of law are concerned which have been raised in this case I desire to make a few remarks. First as to the order under s. 14 of the Code of Criminal Procedure. The words used in the order are as follows: "To try the case relating to the prosecution of Mr. J. A. R. Cama, Deputy Collector under suspension." Those words must be interpreted in the light of the facts in relation to which they are used. The accused was suspended on June 25, 1924, and on August 21, 1924, his prosecution was sanctioned under s. 197 of the Code of Criminal Procedure. The order sanctioning his prosecution dealt with all four cases with which we are concerned in the present proceedings, and it is, in my opinion, reasonable to suppose that the words which I have quoted from the order under s. 14 are used with reference to that which had gone before, and are meant to cover the four charges for which this prosecution had been sanctioned by the Government. That is, in my opinion, the reasonable interpretation of those words, and I may point out that the word 'case,' so far as I am aware, has no strict technical meaning, and is used in a compendious sense as covering all charges which may arise against an accused person. The order, I agree, is not happily expressed, but I think that its words, fairly interpreted, are wide enough to confer upon the Magistrate jurisdiction to try all those charges for which the sanction of Government had already been given.

Then as regards the question of sanction under s. 197 of the Code of Criminal Procedure the fact is that the sanction is expressed to be for an offence committed in the month of February, and in the margin of the sanction the date given is February 29. What happened has been explained in my learned brother's judgment. Now under s. 197 the local Government is not in my judgment bound to state the precise day on which the offence for which sanction is given has taken place. They have elected to do so here, and I think unwisely, but in all other respects the offence for which the accused has been tried is in every detail the offence for which the sanction was given, and the true light in which to regard the matter is this. The Government in sanctioning the prosecution of the accused

erroneously described it as having taken place on February 29. When that error was discovered and it was an error that it would perhaps have been difficult to foresee arising as it did from a discrepancy in the Hindu and English calendar, they issued what was not in truth a fresh sanction, but was no more than an erratum correcting the mistake in the date in the sanction they had already given. That is the light in which I look upon this matter, and it appears to me that there was throughout these proceedings one offence and one only for which the prosecution of the accused was directed under s. 197, and that, therefore, even apart from the issue of that erratum, it would have been competent to the Magistrate, holding that the offence took place on March 1 and not on February 29, to have tried the case upon that understanding without any further sanction from the local Government.

Then as regards the statements under s. 162 I wish to say that I agree with the view expressed by my learned brother that the statements recorded by Mr. Kothavalla in the confidential enquiry are not within the scope of s. 155. With reference to that I would wish to point out what is Mr. Kothavalla's position with reference to this case. He is an officer of the Criminal Investigation Department and not an officer in charge of a Police station within the meaning of s. 154, and the suggestion that as soon as he received information from the District Magistrate he must be held to have been empowered to investigate by an order under s. 155 appears to me to miss the mark and overlook that which really took place according to the evidence. What the District Magistrate did was not to direct an enquiry under s. 155. He asked an officer of the Criminal Investigation Department to make confidential enquiries for the purpose of ascertaining whether any grounds existed for instituting criminal proceedings. That being so, it is impossible to argue that the various statements recorded before the order under s. 155 was issued by Mr. Jayakar falls under s. 162 of the Code. Then as regards the misuse of the statements under s. 162, that misuse is now conceded, but it seems to me impossible to hold that it is sufficient to vitiate the trial. The point in my judgment is covered by s. 537 of the Code of Criminal Procedure, and in the absence of any prejudice to the accused, and there was

no prejudice as my learned brother has explained, there is no basis on which sitting as a Court of revision we can set aside the proceedings of the Courts below. That is all that I wish to say as regards the questions of law arising in this case, and I will only add a few remarks as regards the enhancement of the sentence.

It is with much reluctance that I consent to the exercise of our powers under s. 439 to enhance the sentences in these cases, but I do so because I conceive that it is our plain duty to do so. The accused held a responsible public position and exercised wide powers. He abused that position; and he abused it in a way which shows that he was disposed to corruption when an opportunity offered itself. In such a case the sentence passed by the Magistrate is not adequate to the gravity of the offence. It is impossible when such offences as this come to light and when we are asked to mark our sense of their gravity that we should abstain from doing so. And thus, though I say I do it with reluctance, I conceive it to be my duty to substitute for the sentence passed by the Magistrate the sentence which my learned brother has set out in his judgment. I will only add this that in estimating that sentence of rigorous imprisonment we direct that any sentence of simple imprisonment which the accused has already undergone should be regarded as having been rigorous imprisonment and deducted from the term now imposed.

A N. A.

*Application dismissed;
Sentence enhanced.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 181 of 1927.

August 14, 1927.

Present :—Mr. Justice Tek Chand.

SAMMAN SINGH—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 514—
Surety bond—Failure of surety to produce accused
on day fixed for appearance—Magistrate not holding
Court on that day—Bond, whether forfeited.*

The failure of a surety to produce an accused on the day on which he has undertaken to produce him will not cause forfeiture of his bond, where the Judge does not hold Court on that day.

Case reported by the District Magistrate,

Amritsar, with his No. 93477/1924, dated the 12th February, 1927.

REPORT.—FACTS.—In the case of Pal Singh and Saudagar Singh etc., under s. 497/498, Indian Penal Code, the accused Samman Singh and Kesar Singh stood sureties to produce certain persons in Court on 2nd June, 1925; but they failed to do so. Hence they were ordered to pay Rs. 1,000 each by way of penalty under s. 514, Criminal Procedure Code.

The accused, on conviction by Sardar Arur Singh exercising the powers of a Magistrate of the First Class in the Amritsar District were sentenced, by order dated 6th February, 1926, under s. 514 of the Criminal Procedure Code, to pay Rs. 1,000 each as penalty.

GROUND.—This is an application for revision of order passed under s. 514, Criminal Procedure Code, by Sardar Arur Singh, Magistrate, First Class, forfeiting the amount of security given by the applicants for the appearance in the Court of certain persons, on the ground that on 2nd June, 1925, they did not produce these persons in Court.

I am satisfied that good reasons exist for the delay in putting this application. I recommend that it be taken into consideration on the following grounds:

1. That on 2nd June, 1925, the Court before which appearance was to be made did not in point of fact sit; and

2. that in the case of Kesar Singh appellant no personal bond had been taken from the person for whom he was asked to give security. Therefore, it is argued that no bond should be taken from him as a surety's liability cannot be greater than his principal.

Note : No amount has yet been realized.

Lala Faqir Chand and Lala Har Pershad, for the Petitioner.

Mr. Raj Krishna, for Government Advocate, for the Respondent.

ORDER.—On the 16th of May, 1925, one Pal Singh lodged a complaint under ss. 497-498, Indian Penal Code, against Saudagar Singh and Mussamat Guro. Bailable warrants for Rs. 1,000 were issued against both Saudagar Singh and Mussamat Guro for appearance in Court on the 2nd of June, 1925. These warrants were served on the 23rd of May, 1925, on which date Samman Singh and Kesar Singh peti-

tioners executed bonds undertaking to produce the accused persons before the Court on the 2nd of June, 1925.

It appears that on the 2nd of June, 1925, the Magistrate Sardar Arur Singh did not hold his Court but had gone to Gurdaspur. The Reader made a note on the record that Pal Singh complainant was present but that the accused persons were absent, that the warrants had not been received back after service and that the case should come up on the 6th of June, 1925. The complaint was ultimately withdrawn by Pal Singh on receipt of Rs. 1,800 from Saudagar Singh.

The Magistrate Sardar Arur Singh took proceedings under s. 514, Criminal Procedure Code, against the two petitioners who had, as already mentioned, undertaken to produce them in Court on the 2nd of June, 1925, and ordered that the amount of the security be forfeited. On revision, the learned District Magistrate, Amritsar, has forwarded the proceedings to this Court with a recommendation that the order of forfeiture be set aside. After hearing Mr. Fakir Chand for the petitioners and Mr. Raj Krishna for the Crown I am of opinion that the recommendation of the District Magistrate must be accepted and Sardar Arur Singh's order of forfeiture set aside. The Magistrate did not hold his Court on the 2nd of June, 1925, the only date on which the petitioners had undertaken to produce the accused persons. When the Magistrate himself was not holding his Court the accused were under no obligation to appear nor the sureties under any obligation to produce them. I, therefore, accept the petition and set aside the order of the Magistrate forfeiting the amount of the security of Rs. 1,000 each furnished by each of the petitioners.

A. N. A.

Petition accepted.

BOMBAY HIGH COURT.
CRIMINAL APPLICATION FOR REVISION
No. 17 of 1927.
June, 28 1927.

Present:—Mr. Justice Madgavkar
and Mr. Justice Patkar.

NANA KHANDERAO GHADGE—

ACCUSED—PETITIONER

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1908), s. 195 (a)

—Offence committed before Commissioner appointed by Court—Power of Court to make complaint—Commissioner, status of.

A Court which has appointed a Commissioner to examine accounts is competent to make a valid complaint under s. 195 (a) of the Criminal Procedure Code in respect of an offence committed by a person before the Commissioner under s. 179 of the Penal Code. A Commissioner is a public servant subordinate to the Court which appointed him.

Criminal application for revision against an order of the Sessions Judge, Satara, confirming that of the Sub-Divisional Magistrate, First Class, at Satara.

Mr. Ambedkar (with him Mr. K. A. Padhye), for the Applicant.

Mr. P. B. Shingne, Government Pleader, for the Crown.

JUDGMENT.—The petitioner Nana Khanderao has been convicted under s. 179, Indian Penal Code, for refusing to answer questions put to him by the Commissioner appointed by the Subordinate Judge of Koregaon. The learned Subordinate Judge under s. 195 of the Code of Criminal Procedure sanctioned his prosecution under s. 179 of the Indian Penal Code and he has been convicted and applies in revision. The single ground taken in revision is that the sanction by the Subordinate Judge is incompetent and should have been by the Commissioner. The offence alleged being under s. 179, Indian Penal Code, the sanction would naturally be under s. 195, cl. (a), of the Code of Criminal Procedure. The question on the present application is whether the Commissioner before whom the alleged offence took place was or was not subordinate to the Subordinate Judge.

It is conceded that the Commissioner is a public servant under s. 21, cl. (4), of the Indian Penal Code. In the present case, the Commissioner to examine accounts was appointed under O. XXVI, rr. 11 and 12. He was appointed by the Subordinate Judge; the Subordinate Judge could have terminated his appointment at any time; his specific duties were laid down with instructions: and under O. XXVI, r. 12 cl. (2), the Subordinate Judge had power to direct further inquiry if he had reason to be dissatisfied with the proceedings and report of the Commissioner. It is difficult, in our opinion, to conceive of greater subordination than what is implied by all these acts. Appointment, exercise of power and termination of appointment were all throughout in law subject to the orders and supervision of the Subordinate Judge. Reliance was

placed for the petitioner on the case of *Narasimhayya v. Venkatasawmi* (1). There in the judgment it was observed (page 586*): "The subordination of one public servant to another may arise either from express enactment or from the fact that both public servants belong to the same department, one being superior in rank to the other." There it was held that a Village Munsif in Madras to whom a theft was reported was not subordinate to the Sub-Magistrate. The dictum has no application to the facts of the present case. As far as we can judge of the intention of the Legislature and in the light of public policy the offence to refuse to take the oath and answer the questions put by the Commissioner appointed by the Court is an offence against the Court itself, and the Court perhaps can more appropriately consider the question of sanction rather than the Commissioner appointed by it. For the purposes of the present application, however, it is not necessary to consider this question more deeply.

We hold that the Commissioner was subordinate to the Subordinate Judge who appointed him and the sanction is, therefore, proper. The application fails and is dismissed.

A. N. A. *Rule discharged.*
(1) 18 M. L. J. 584; 4 M. L. T. 214; 8 Cr. L. J. 72.

*Page of 18 M. L. J.—[Ed.]

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 406 AND 407
OF 1926.

January 12, 1927.

Present:—Mr. Justice Jackson.

PUBLIC PROSECUTOR—APPELLANT

versus

GANAPATHI HEGDE AND ANOTHER—
ACCUSED.

Madras Motor Vehicles Rules, 1923, r. 30 (1)—License, renewal of, whether may be taken during year—"Annually"; meaning of.

The word 'annually' in r. 30 of the Madras Motor Vehicles Rules does not mean at the expiry of every twelve months but means once in a calendar year.

Where the registration certificate for running a motor bus expired on 29th March, 1926, but an application for renewal was not made till some days thereafter:

Held, that the owner was not guilty of an offence under r. 30 and that if a certificate was obtained before the end of December 1926, r. 30 would be sufficiently complied with.

Criminal appeals against the acquittal of the aforesaid accused by the Stationary

Sub-Magistrate, Karkal, in C. C. Nos. 99 and 100 of 1926 on his file respectively.

FACTS.—The accused was the Manager of Karkal Motor Service in South Kanara and was charged with having allowed his bus to run for hire after 29th March, 1926, without getting the registration certificate of the bus renewed and thereby committed a breach of r. 30 (2) of the Madras Motor Vehicles Rules punishable under s. 16 of the Indian Motor Vehicles Act VIII of 1914. The accused was granted a certificate in 1925 and it expired on the 29th March, 1926, but the application for renewal was not made till 8th April and was not received in the Collector's office till 10th April, 1926.

Rule 30 (2) runs as follows.—"Every motor vehicle which is let or plies for hire shall be registered annually." The Sub-Magistrate held on a construction of the rule and on a comparison of r. 33 of the rules relating to Heavy Motor Vehicles Rules which stated that "certificate shall continue in force for a period of not more than 12 months." That the registration certificate in this case need not be renewed exactly 12 months after its issue and that the certificate granted in 1925 did not cease to be in force after 12 months but that the rule only required that the registration certificate should be renewed every year i. e., calendar year which in the present case expired only on 31st December, 1926. The application for renewal made in April 1926 was held to be in time. The accused was accordingly held not guilty.

Mr. K. Sanjivi Kamat, for the Appellant.

Mr. K. Y. Adiga, for the Respondent.

JUDGMENT.—The accused was prosecuted for not registering annually his motor vehicle as required by r. 30 (1) of the Madras Motor Vehicles Rules, 1923. The Sub-Magistrate acquitted him holding that annually means once sometime in 1927 and so on. I am not prepared to say that this is wrong. If the time was strictly for 12 months it would have been said so (*vide* Form G condition 1.) Accordingly the appeal is dismissed.

V. N. V.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.CRIMINAL APPLICATION FOR REVISION No. 409
OF 1926.

February 7, 1927.

Present:—Mr. Justice Fawcett and Mr.
Justice Patkar.

CHHAGAN VITHAL—ACCUSED—

PETITIONER

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), s. 339—Wrongful restraint, what constitutes—Presence of person obstructed, whether necessary—Any direction, meaning of—Vertical direction, whether included—Offence and mere infringement of property rights, difference between.

The physical presence of the person obstructed at the moment of obstruction is not necessary for the commission of an offence under s. 339 of the Penal Code. [p. 111, col. 2.]

Section 339 of the Penal Code covers the case of obstruction to a person who reasonably wants to go in any direction, even vertically upwards if he has a right to do so. [*ibid.*]

But the section does not cover cases where there is no ordinary or special reason for a person to proceed in the direction which is obstructed. [p. 112, col. 1.]

During the absence of the complainant the accused constructed a tin projection hanging over the complainant's court-yard at a height of over 6 feet. The projection was such that it did not prevent anybody from moving under it but only caused obstruction to white-washing and repairs:

Held: that the accused was not guilty of an offence under s. 339, Penal Code. [*ibid.*]

Criminal application for revision against an order passed by the Sub Divisional Magistrate, First Class, at Broach.

Mr. M. T. Patel with him Mr. K. V. Patel, for the Accused.

Mr. P. B. Shingne, Government Pleader, for the Crown.

Mr. J. G. Mody, for the Complainant.

JUDGMENT.

Fawcett, J.—The petitioner has been convicted of the offence of wrongful restraint under s. 341, Indian Penal Code, and sentenced to pay a fine of Rs. 15. The Magistrate found that the accused had put a tin projection over the complainant's compound-wall, so as to hang over his paved court-yard; that the projection was six feet and ten inches above the ground and was high enough for any one to move below it; but that it would be an obstruction, whenever the wall had to be white-washed or repaired. He held that the case, therefore, fell under s. 341 of the Indian Penal Code. He remarks in his judgment that this projection did not exist before the complainant

went away to attend a marriage, and that on his return it was there.

Two objections have been taken to the conviction. The first is that the complainant was absent at the time the projection was put up, and so there can be no offence under s. 341, Indian Penal Code. On this point, however, I agree with the view taken in *Arumuga Nadar v. Emperor* (1) that there is nothing in s. 339, which requires the physical presence of the person obstructed at the moment of obstruction. The case of *Emperor v. Rama Lala* (2) which is relied upon is on a different point, viz., whether obstruction to a person taking his cart by a path falls within the section, when no obstruction is offered to that person passing along it without his cart.

The second objection is that the projection does not prevent the complainant from proceeding in any direction such as referred to in s. 339, and the question is whether this section covers a person proceeding in a vertical direction, as he would have to do to be obstructed by this projection.

In my opinion, the section does cover the case of a person reasonably wanting to go vertically upwards, if he has a right to do this, and being prevented from so doing by a voluntary obstruction. It would, for instance, in my opinion, cover the case of a person going up a mountain, if he has a right to get to the top and is voluntarily obstructed from so doing. The path might, in parts, be at an angle of 75 degrees; what difference does it make if the angle of progression is even 90 degrees? The only real question is, has he a right to proceed in that direction?

Again, take the case of a house owner wanting to get on to his roof and being obstructed from doing so. This would surely be covered by s. 339, just as it has been held to cover the converse case of a person wanting to get down from the roof of a house, and being obstructed by the accused's removal of a ladder: *In re Telapolu Subbada* (3).

Suppose that there is a procession going on the other side of a wall, and its owner wants to view it by placing a ladder or steps against the wall, and then standing on the latter, but is voluntarily obstructed in so

(1) 8 Ind. Cas. 757; 34 M. 547; (1910) M. W. N. 727; 9 M. L. T. 103; 11 Cr. L. J. 708.

(2) 19 Ind. Cas. 177; 15 Bom. L. R. 103; 14 Cr. L. J. 177.

(3) 1 Weir 310.

doing; I should say the case would fall under s. 339. Even if he was absent, and the obstruction was deliberately put to prevent him doing this at the time the procession was to take place, I would still say that it is covered.

On the other hand, I think the section obviously does not cover cases, where there is no ordinary or special reason for a person to proceed in the direction which is obstructed. To hold otherwise would be to render criminal acts which do not really affect the "personal liberty of the subject" to go when and where he likes, which has been said to be the object of the protection afforded by this section: *In re Saminada Pillai* (4). It would, in fact, make a person, who merely infringes an easement, criminally as well as civilly liable, although such an infringement does not involve any obstruction to the natural or reasonable movements of any person. This would be to depart from the rule of strict construction of a penal law, which "requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment" (Maxwell on the Interpretation of Statutes, 6th Edition, page 463). The Illustration to s. 339 refers merely to the ordinary case of a path.

In the present instance, the Magistrate finds that the projection does not prevent any one moving below it, but that it is an obstruction to white-washing or repairing this wall. This, in my opinion, is not equivalent to preventing any person from proceeding, etc., within the meaning of s. 339 and the facts found do not, in my opinion, bring the case under that section.

I would, therefore, set aside the conviction and direct the fine, if paid, to be refunded.

Patkar, J.—I agree. In this case the complainant went to Navsari on May 22, 1926, and returned on the 24th. In the interval, on May 23, 1926, the accused put in a tin projection over the complainant's compound wall. The complaint was filed before the Magistrate charging the accused with the offence of wrongful restraint under s. 341, Indian Penal Code, in that by virtue of this tin projection he obstructed the free movement of the complainant and also with the offence of insulting the complainant under

s. 504, Indian Penal Code. The accused was acquitted of the offence under s. 504, but the accused was convicted under s. 341 on the ground that though the projection was high enough—six feet and ten inches—for any one to move below it, the projection would still be an obstruction when the wall would be white-washed and repaired.

It was urged on behalf of the accused that under s. 339 the obstruction was a wrong against the person and should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed, and reliance was placed on the case of *Emperor v. Rama Lala* (2) where the accused was acquitted on the ground that though the complainant was hindered from driving his cart through the passage, he himself was unobstructed. It was also argued that as the complainant was absent, no offence under s. 341 was committed. The case of *Emperor v. Rama Lala* (2) was considered in a later case of *Lahanu Manaji v. Emperor* (5) where the accused were convicted for wrongful restraint inasmuch as they obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks. Section 339 of the Indian Penal Code is primarily intended to penalise a personal obstruction. In certain conceivable cases an offence might be committed even though the complainant may not actually be present, as for instance, in the case of *Arumuga Nadar v. Emperor* (1) where, during the temporary absence of the complainant, the accused put a lock to the outer door and thereby obstructed the complainant from getting into the house. But the finding in the present case is that the accused's act did not obstruct the complainant's movement as the tin projection was six feet and ten inches high. The ordinary, normal and reasonable movements of the complainant would not in any way be interfered with by this tin projection. The obstruction to the white-washing and repairing of the wall does not amount to an obstruction of the complainant to proceed in any direction in which he has a right to proceed.

I, therefore, think that the conviction should be set aside, the accused should be acquitted, and the fine, if paid, should be refunded.

A. N. A.

Accused acquitted

(4) 1 Weir 339 at p. 340.

(5) 61 Ind. Cas. 811; 27 Bom. L. R. 1419; 27 Cr. L. J. 150; A. I. R. 1926 Bom. 118.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1664 of 1918.
ORIGINAL CIVIL JURISDICTION SUIT No. 3163
OF 1920.

August 11, 1926.

Present:—Mr. Justice Mirza.

KESSERBAI—PLAINTIFF

versus

KAKU VALLABHDAS RAVJI.

—DEFENDANT

BILASRAI LAXMINARAYAN—PLAINTIFF

versus

KARSONDAS DAMODAR & CO.

—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Partnership action—Receiver, appointment of—Execution of decree against partnership—Charging order—Priority.

It has been the recent practice of the Bombay High Court for a Chamber Judge to make a charging order whenever execution is sought against assets in the hands of a Receiver appointed by the Court in a partnership action. [p. 113, col. 1.]

The creditor who obtains such a charging action is entitled to rank in priority to all other creditors who have not obtained charging orders or who are not otherwise attaching creditors. [p. 117, col. 1.]

Kewney v. Attrill (1), *Shidlingappa v. Shankarappa* (2), *Haji Ismail & Co. v. Rabiabai* (3) and *Visvanadhan Chetti v. Arunachalam Chetti* (4), discussed.

Mr. Mulla, in support of the summons.

Mr. Pandia, for the Defendant, in Suit No. 3163 of 1920.

Mr. B. J. Desai, for Bilasra, to show cause.

JUDGMENT.—This is a summons taken out by the plaintiff in Suit No. 3163 of 1920 for directions, as to whether the plaintiff in Suit No. 1664 of 1918 is entitled to priority over the other creditors of the firm of Messrs. Karsondas Damodar & Co., by reason of the charging order dated October 7, 1925, and for costs.

I made the charging order on October 7, 1925, as Chamber Judge following a long-standing practice of this Court whereby such charging orders are made whenever execution is sought against assets in the hands of a Receiver appointed by the Court. The practice was started by Macleod, J., as Chamber Judge, and has been followed by succeeding Chamber Judges. The older practice of issuing in such cases a notice to the officer concerned in the manner provided by O. XXI, r. 52, was abrogated and the party seeking execution was required instead to obtain a charging order from the Judge. The practice of this Court in such cases has, since the institution of these

charging orders, been to order *pro rata* distribution of the net assets in the hands of the Receiver among all the creditors of the partnership notwithstanding the charging orders so granted.

Our charging orders are taken from the one formulated by Kay, J., in *Kewney v. Attrill* (1). In that case after judgment had been pronounced in a Chancery action for dissolution of a partnership, and a Receiver had been appointed, a creditor obtained judgment in the Queen's Bench Division against the firm for the amount of his debt and costs. He applied in the Chancery action for leave to execute his decree against the assets in the hands of the Receiver. Kay, J., made an order giving the judgment creditor a charge for his debt and costs on all the partnership monies come or coming to the Receiver; he, the creditor, undertaking to deal with the charge according to the order of the Court. In making the charging order Kay, J., made his intention clear as follows (page 346*) :—

"...If there is a bankruptcy the trustee in bankruptcy will take subject to prior equities and, therefore, subject to a charge. I give the applicants, the judgment creditors, a charge now on the moneys which are in the hands of or may be taken possession of by the Receiver, and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest at four per cent., and the costs in Chambers and here. The intention of the Court is to preserve to the applicants all the rights which they would have had if they had issued execution and the Sheriff had seized and sold the assets to day."

It is clear from the judgment of Kay, J., that it was not his intention to deprive the execution creditor of the benefit of his execution owing to the accident that the assets against which execution was sought to be levied were in the hands of an officer of the Court. By his charging order he effectively preserved to the execution creditor the benefit to which he would in law be entitled but postponed the payment until further orders. In the course of arguments from the Bar Kay, J., however, is reported to have made the following remark (page 346*) :—

(1) (1887) 34 Ch. D. 345; 56 L. J. Ch. 448; 55 L. T. 805; 33 W. R. 191.

*Page of (1887) 34 Ch. D.,—[Ed.]

"By the appointment of a Receiver the Court aims at equality amongst the creditors. If I give you leave it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the Court may make."

Those remarks form no part of the judgment of Kay, J., and the judgment makes it clear that it was not the intention of Kay, J., by the charging order to deprive the execution creditor of any fruit of his execution. The form of the charging order adopted in English practice is set out in Seton on Judgments and Orders, 7th Edition, Vol. I, page 471, as follows:—

"Upon motion &c., by Counsel for A. B., and upon hearing Counsel for the plaintiff and the defendant. This Court doth declare that the said A. B. is entitled to a charge for the amount of his judgment debt, interest, and costs recovered against the defendant by judgment dated &c., in an action in the K. B. Div. of C. v. D., and for costs of the said order dated &c., and of this application to be taxed &c., upon the assets which now are in or hereafter come to the hands of the Receiver in this action, the said A. B. by his Counsel submitting that such charge shall be dealt with in such manner as the Judge shall direct, the intention of this Court being to preserve to the said A. B. such legal rights as he would have had if the sheriff had seized under the execution and sold on this day."

In *Shidlingappa v. Shankarappa* (2) our Appeal Court has referred to and commented on *Kewney v. Attrill* (1). In the case before the Appeal Court the plaintiff and defendants traded in partnership and in a suit for dissolution of partnership a decree was passed appointing a Receiver with the usual directions for accounts and enquiry. In the meanwhile, a creditor of the partnership had sued the plaintiff and the defendants for the debt due to him, but the Court had passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree dissolving the partnership and appointing the Receiver. The plaintiff had satisfied the decree and had instituted a suit to recover from the defendants their share of the decretal debt. The Subordinate Judge had awarded the plaintiff's claim. The Appeal Court upheld the Subordinate Judge's judgment to the

extent that the plaintiff was entitled to call upon the defendants to meet their share of the liability which had been discharged. The Appeal Court, however, proceeded to discuss the *ratio decidendi* in *Kewney v. Attrill* (1). Chandavarkar, J., remarks as follows (page 179*):—

"As between the parties to the present suit; however, there has been already a decree dissolving the partnership, ordering accounts to be taken and the debts of the partnership to be paid. The mutual rights and liabilities of the parties to this action for contribution must, therefore, be decided with reference to that decree. By it not only was the partnership declared dissolved and accounts directed to be taken, but a Receiver was appointed to recover outstandings, pay debts, and do all that might be necessary. By the appointment of a Receiver the Court must be taken to have aimed at equality amongst the creditors. It was open, of course, to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt; but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that appointment, to the prejudice of other creditors of the partnership. To obtain satisfaction of it he was bound to go to the Court which had appointed the Receiver and take its directions. That was recognized as the law in such cases in *Kewney v. Attrill* (1)."

The above remarks of the Appeal Court appear to me to be *obiter dicta*. With great respect I am unable to agree with this statement of the effect of *Kewney v. Attrill* (1). There is no reason adduced why in the case of the dissolution of a partnership the judgment-creditors of the partnership seeking execution should be put on a level of equality with all other creditors of the partnership, both ascertained and unascertained. There is no analogy in the case of a partnership with that of the insolvency of an individual or the winding up of a limited liability Company. The creditors of a partnership have their remedy not only against the partnership assets, but against the private property of the partners. Where an individual is adjudicated bankrupt or a company has gone into liquidation it may be equitable to hold that as the Court is administering the affairs of the bankrupt or of the Company by means of its Official Assignee or the liquidator as the case may

(2) 28 B. 176; 5 Bom. L. R. 912

*Page of 28 B.—[Ed.]

be that all creditors, whether judgment-creditors or ordinary creditors, should rank equally. Indeed the Insolvency Act and the Companies' Act provide that on adjudication of a person or liquidation of a company all executions then pending against the property of the insolvent or the assets of the Company cease. In the case of an administration suit the suit is primarily for the benefit of the creditors of the deceased, and where the assets are in the hands of the Court through its Receiver, equity requires that all creditors should rank equally and there should be no scramble among them for priority as the liability of the legal representative is to the extent of the estate only. But in the case of a partnership, the liability of the partners is unlimited. I am unable to appreciate why the Court should aim at equality among the creditors of a partnership firm. A suit for the dissolution of a partnership cannot be said to be for the benefit of the creditors; it is primarily for the benefit of the partners themselves. If the debts of the partnership are to be ascertained by the Court that is because the rights of the partners *inter se* in respect of the assets cannot be determined until such debts are ascertained and provided for. Ordinarily there is no reference to the Commissioner in a partnership suit requiring him to pay off the debts of the partnership or to invite creditors' claims. In an administration suit the Commissioner has to invite creditors' claims which on being proved may be paid off from the assets in the hands of the Court.

In *Haji Ismail & Co. v. Rabiabai* (3) an attorney claimed a lien for his costs against certain partnership assets. The plaintiffs had obtained a decree against the defendants and were granted leave to levy execution against the assets of the partnership in the hands of the Receiver. They took out a garnishee notice against the Receiver to pay the monies to the plaintiffs. Macleod, J., held that the moneys in the hands of the Receiver were subject to the lien of the Solicitor in the partnership suit for his costs. With regard to the procedure adopted in execution, however, he remarked as follows (page 485*) :—

"...the procedure adopted by the plaintiffs in this suit is, in my opinion, wrong.

They should not have issued execution against the assets in the hands of the Receiver. The proper course was to ask the Court for a charging order in the form granted by Kay, J., in *Kewney v. Attrill* (1). The assets of the partnership can then be dealt with by the Court by giving directions to the Receiver and it is desirable that this procedure should be followed in future."

By this judgment Macleod, J., instituted the practice of charging orders on assets in the hands of Receivers. There is nothing in Macleod, J.'s judgment, however, to warrant the conclusion that by giving the charging order the Court aims at equality among the creditors irrespective of their rights as attaching creditors.

Pratt, J., had a similar point before him which he has dealt with in an unreported judgment in *Kakubhai Bhimji v. Hargovan Kanji*, O. C. J. Suit No. 1934 of 1919, decided on December 23, 1920. The applicant before the learned Judge had obtained a decree against the partnership firm. He obtained a Judge's order giving him leave to attach in execution of his decree the moneys of the partnership in the hands of the Receiver. The applicant thereafter applied to the Judge for an order on the Receiver to pay to him the amount of his decree. The learned Judge held that the procedure adopted by the applicant was altogether wrong and misconceived. He should not have issued execution against the assets in the hands of the Receiver, but should have applied for a charging order in the form granted in *Kewney v. Attrill* (1). The learned Judge proceeds : "The effect of the judgment in that case is well stated by Chandavarkar, J., in *Shidlingappa v. Shankarappa* (2)," and cites with approval the passage from the judgment of Chandavarkar, J., which I have above set out and from which I respectfully dissent. The learned Judge further proceeds :—

"The procedure adopted by the plaintiff in this case was condemned by the present Chief Justice in *Haji Ismail & Co. v. Rabiabi* (3). His Lordship in that judgment said it was desirable that the procedure laid down in *Kewney v. Attrill* (1) should be followed in future. But unfortunately, it does not appear that much attention has been paid to that direction. It should be clearly understood that the appointment of a Receiver of partnership assets operates as an injunction not only to partners, but also to creditors: and that no creditor is entitled

(3) 4 Ind. Cas. 135; 34 B. 484; 11 Bom. L. R. 1062.

*Page of 34 B.—[Ed.]

to payment except under the directions of the Court and the Court will not direct payment until all the assets have been realised. A creditor who has obtained a decree may obtain priority by obtaining the 'charging order' in the form prescribed in *Kewney v. Attrill* (1). But even that order is given on an undertaking to deal with the charge according to the orders of the Court."

Pratt, J., recognized in his judgment that by obtaining a charging order the creditor would *prima facie* obtain priority, but that priority would be subject to the further orders of the Court.

With great respect, I am of opinion that there was no need for our Courts to complicate the procedure in execution by inventing a form of charging order for which there is no warrant under the Code of Civil Procedure. Order XXI, r. 52, of the Code of Civil Procedure is applicable to such cases. It provides:—

"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

"Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

The provisions of O. XXI, r. 52, appear to me to be wide enough to protect the Receiver as well as the interests of which he is the custodian.

Order XXI, r. 52, has now been construed in the recent Full Bench decision of the Madras High Court in the case of *Visvanadhan Chetty v. Arunachalam Chetti* (4). That case decides that:—

"Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court and it is the duty of the attaching Court, if the property attached is money, to call upon the custody Court to pay it into the attaching Court

and in other cases, to provide for the realization of the property, and to divide the money or proceeds rateably between the attaching decree-holder and the other decree-holders who are entitled to distribution under s. 73, Civil Procedure Code, viz., those who have applied to it for execution before the receipt of such assets.

"Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateable distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to O. XXI, r. 52, Civil Procedure Code to determine claims to priority, etc., does not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders...

"Where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of s. 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor's suit."

It has been urged on behalf of the applicants that the charging order obtained by the plaintiff in Suit No. 1664 of 1918 is irregular, inasmuch as the assets being in the custody of a Receiver he should have obtained leave to proceed against that officer in the suit in which he was appointed Receiver. The irregularity, if at all, is due to the confusion which has resulted in the office by the adoption of the form of charging order to which I have referred. It appears to have been the intention of the plaintiff in Suit No. 1664 of 1918 by his application for execution to apply for leave to execute against the Receiver. If owing to a misunderstanding of the situation created by the practice of this office, the plaintiff in Suit No. 1664 of 1918 has been misled, it is open to the Court to rectify the error at any moment by granting him the leave required. In my opinion he is entitled to receive the balance of his decretal amount subject to the Receiver's costs, charges and expenses and further subject to the Solicitors' lien for the costs of the partnership action in the partnership suit

(4) 60 Ind. Cas. 302; 44 M. 100; 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14 (F. B.).

His claim should be satisfied before any further distribution of the assets takes place among those who are not attaching creditors.

I direct, therefore, that subject to the costs, charges and expenses of the Receiver and of the Solicitors' costs in the partnership action the Receiver do pay over to the plaintiff in Suit No. 1664 of 1918 the balance of the decretal amount and he will rank in priority to all other creditors who have not obtained charging orders or who are not otherwise attaching creditors. The costs of the summons will be tacked on to his claim. The plaintiffs in Suit No. 3163 of 1920 to get their costs of this summons out of the assets in the hands of the Receiver; the defendant Kaku Vallabhdas to get his costs out of the partnership assets after the claims of all creditors are satisfied.

Counsel certified.

Z. K.

Order accordingly.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 70

AND 123 OF 1924.

February 28, 1927.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Roy.

Raja BHUPENDRA NARAYAN SINHA
BAHADUR—PLAINTIFF—APPELLANT

versus

RAJESWAR PROSAD BHAKHT AND

OTHERS—DEFENDANTS—RESPONDENTS.

Patni—Patnidar's right to minerals—Patni tenure, history and incidents of—Construction of grant—'Chhayahrad', 'sayer', 'darabast hakuk', meanings of—Patni and mokarrari compared—Adverse possession of quarries—Principles—Vendor and purchaser—Mere agreement, whether can convey title.

The grant of a patni conveys to the patnidar all rights including underground rights, in the absence of reservation. [p. 120, col. 1.]

Alli Quader Syed Hossein Aly v. Jogendra Narain Roy. (3), followed.

[History and incidents of patni taluks discussed.]

The word 'chhayahrad' in a patni lease does not mean any right to underground minerals. The word 'sayer' means all sorts of imports in addition to land revenue but does not include minerals. [p. 119, col. 2.]

The expression 'darabast hakuk' in a patni lease is a familiar expression intended to throw a net so as to include every thing which might be considered as belonging to the zemindari right. [p. 120, col. 2.]

Alli Quader Syed Hossein Aly v. Jogendra Narain Roy (3), followed.

Although there are various points of similarity between a mokarrari and a patni, a patni tenure is different in many respects from the former. [ibid.]

[Points of difference enumerated by Ghose, J.]

The period of adverse possession of a quarry cannot be counted from the time when different sorts of minerals are found at different depths of the quarry. [p. 121, col. 2; p. 122, col. 1.]

The rule that a stranger cannot ordinarily acquire title to the whole of a mine by working a part of it and only acquires possession of the minerals which he actually digs does not apply where the stranger works the mine in such a manner as to prove possession of the whole of it. [p. 122, col. 1.]

Ashton v. Stock (10) and Satya Niranjan Chakravarti v. Ram Lal Kaviraj (2), relied on.

Where the law requires a conveyance for the purpose of transfer of title this cannot be done by a mere agreement. An agreement by a person giving up his right to a property and acknowledging another's right of primogeniture cannot, therefore, convey his title to the latter. [p. 123, col. 1.]

Jadu Nath Poddar v. Rup Lal Poddar (11), followed.

Appeal against a decree of the Subordinate Judge, Birbhum, dated the 28th November, 1923.

Mr. S. C. Bose, Babus Brojo Lal Chakravarty, Panna Lal Chatterjee and Santimoy Majumdar, for the Appellants in No. 70 and Respondents in No. 123.

Dr. Sarat Chandra Basak, Babus Sitaram Banerjee and Suresh Chandra Das, for the Appellants in No. 123 and Respondent in No. 70.

Babu Suresh Chandra Taluqdar, for the Minor Respondents.

JUDGMENT.

B. B. Ghose, J.—These two appeals arise out of one suit brought by the plaintiff Rajah Bhupendra Narain Sinha Bahadur for declaration of his right to a certain hillock within his estate as *shebait* of idol Parbutty Mata, and in the alternative for a declaration, by virtue of his right as *zemindar* of the estate, that the principal defendants have no right to take away earth and stones and minerals from the hillock in the exercise of the right that the defendants have as *darpatnidars* under the *patnis* within his estate. The plaintiff is one of the four sons of Maharaja Ranjit Sinha. The other sons and grandsons by those sons are defendants Nos. 16 to 20 in the case. The *patni* was created of three *mahals* within the estate No. 1152/1 by a predecessor-in-interest of the plaintiff's father. The *patni* was granted to two persons in equal shares by deeds, dated the 30th May, 1861. The three *mouzhals* of which the *patni* was granted was called Taraf Nalhati, Hat Nalhati and Kalindipur.

Out of these three *mouzahs* the *patnidars* granted *darpatni* of Taraf Nalhathi and Hat Nalhathi by separate leases to one Ganga Prosad Saha in 1862. The defendants Nos. 1 to 9 came into the possession of the *darpatni* interest through various *mesne* purchases by their deed, dated 11th October, 1898. The defendant No. 9 died during the pendency of the suit and is represented by his sons defendants 9 *ka*, 9 *kha*, 9 *ga*, 9 *gha* and grandson 11 *ka*. The defendants Nos. 10 and 11 were lessees under the *darpatnidars* of the portion of the property now in suit. The plaintiff's claim with regard to ownership on the ground that the hillock is the property of the idol Parbati Mata has been found against him in the Court below, and no question has been raised before us about that right of the plaintiff; so we have to consider only the question as regards the plaintiff's right as *zemindar*. The plaintiff claims the *zemindari* right in himself on the ground that by custom of primogeniture prevailing in his family he is entitled to the entire estate to the exclusion of his brothers and their descendants. He also relies upon an *ekrar* said to have been executed in his favour by his adult brothers and his mother acting as guardian for his infant brother with regard to his sole right to succeed to the estate left by his father. The defendants disputed the title of the plaintiff on the ground of primogeniture to the entire property. They further alleged that they were entitled to take away stones and earth and minerals within their *darpatni* by virtue of the right granted to the *patnidar* under the *patni* settlement, and they also pleaded limitation. The Subordinate Judge found in favour of the plaintiff with regard to the question of title to the minerals and gave a decree to this effect that the plaintiff's title to the minerals lying in the hill by virtue of his being the *zemindar* be declared and a perpetual injunction be issued restraining the principal defendants from raising the said minerals by digging and from appropriating the same, but it is ordered that the defendants will be competent to dig and take such stones and gravel as are found on the surface of the hills. The Subordinate Judge found against the plaintiff on the question of primogeniture and he held that the plaintiff was entitled to only 1/4th of the pro-

perty and gave him a decree for a fourth of the sum which he found the defendants are liable to pay on account of damages for the quantity of earth or minerals taken away by them. The principal defendants Nos. 1 to 11 appeal to this Court with regard to that portion of the decree which is against them, namely, the injunction granted against the defendants from raising minerals and the amount of damages allowed to the plaintiff. Their appeal is No. 70 of 1924. The plaintiff appeals against that part of the decree which dismissed a portion of his claim. His appeal is No. 123 of 1924.

Appeal No. 70 is the principal appeal and it should be taken up first. The first ground that was taken in the appeal was as to the question of the title of the plaintiff. This question was raised clearly under a misapprehension. It was urged that the *zemindari* under which the *patnis* were created belonged to the idol Ramchandra Jiu and it was Touzie No. 1152/2. This argument as was pointed out by the learned Advocate for the respondent was based upon a misconception of the evidence of plaintiff's *am-mukhtar* and Pleader printed at page 63, Part I of the paper-book. At line about 25 the figure 1152/2 ought to have been 1152/1 and this is also clear from the fact that the *kobala* by which the defendants acquired the *darpatni* mentioned the *patni* to be within Estate 1152/1. Further it appears that in the lower Court the title of the plaintiff as *zemindar* was not disputed as will be found from the observation of the Subordinate Judge on issue No. 17. In reply, however, on behalf of the appellants a futile attempt was made to sustain the plea that it was *debutter* property, but such a plea could not be allowed to be heard in the circumstances stated above.

The principal points raised are really three, that under the terms of the *patni* lease the *patnidars* were expressly granted all minerals and underground rights; secondly, even if there was no express grant of underground rights, in the absence of any reservation, the grant of *patni* conveys all rights including underground rights which belonged to the *zemindar*; and thirdly, the plaintiff's right is barred by limitation. The fourth ground is that the amount of damages is excessive. Another ground was taken but was not elaborated that the substance taken out by the defendants was not mineral but mere earth. It

was further argued that the defendants had not worked underground but their working had not gone below the level ground and as *patnidars* they are entitled to remove any maunds of earth within the *patni* and they cannot be charged with having worked any mines.

I propose to take up the question with reference to the construction of the grant of *patni* first. There are three documents on the record relating to the *patni* grant, one *pattah* and two *kabuliyats* executed by the two *patnidars*. They are all in the same terms and one of them was taken by both sides for the purpose of their argument. This was the document which is marked Ex. 42, the *kabuliyat* executed by one of the *patnidars* Uma Sundari Dassya in favour of Rani Lachmi Kumari Saheba the ancestress of the plaintiff. The official translation of the document with regard to certain parts was questioned by both sides and I have taken the translation which has been agreed to by both sides except with regard to one expression which I shall put down in the original. This document Ex. 42 after stating under what right the lessee wanted to take the property, on payment of a premium of Rs. 3,655 and after stating that the *zemindar* was willing to grant a *patni* of the *mahals* in question excluding establishment charges and expenses in connection with deities, *bund*, *pulbundi* and wages and so forth, and after mentioning other things excluded proceeds thus:—"I shall enjoy down to my sons and grandsons, etc., in succession in great bliss the *mahals* within the four boundaries without any deduction, the *chhayahrad* (shades and lakes), land and water, whatever has been produced and all seeds of production, *mal* and *sayers*, barring those *sayers* prohibited by Government, all sorts of land held without payment of rent but which are liable to be assessed, *hasil* and *patit*, *nalkar*, *bankar*, *falkar* and *jalkar* and *bils*, *jhils* and all tanks, gardens, trees whether fruit bearing or non-fruit-bearing and with the exception of *debutter* and *brahmattar* and *mahatran*, *piran*, etc.....which have been confirmed under the orders of Government, and except the aforesaid gifted *brahmattars*, etc., all rights and interests (*darabast hakuk*) I shall possess in *patni taluk* in the *mofussil*.....I shall never make any application to any Government official for *kharij* (mutation of my name)." Towards the end of the *pattah* after making certain other

recitals there is the provision that the grantee will not be entitled to cut down those trees the cutting of which will cause damage to the *mahal* or loss to the *jama*. There is a further provision that the *zemindar* would get the money which will be due from the Government on account of land acquisition for cart-roads and Railways and *cacha* roads, as well as any kind of road that may be made in future.

The first contention on behalf of the appellants is that the expression *chhayahrad* means sky and underground. *Chhaya* literally means shadow, but in the dictionary it is found that it may also mean sun from which it is contended that it is sky. *Hrad* means a deep piece of water naturally formed, or in other words a lake. But nowhere it can be found that it means something underground. This expression *chhayahrad* in the *pattah* or *kabuliyat* is unmeaning, and I confess it is new to me. In the course of my experience I have seen a large number of these *pattahs* and *kabuliyats* but I have never met with this expression. I cannot hold that this expression distinctly means any right to underground minerals.

The next contention is that the word *sayer* includes the minerals, because it is stated that *sayer* means all income which is not derived from land revenue. I am unable to accept that contention, because my impression is that *sayer* means all sorts of imports in addition to land revenue.

Lastly, it is contended that all the expressions taken together along with the expression *darabast hakuk* conveys the entire interest of the *zemindar* in the *mahals* in question to the *patnidar* and nothing was reserved. In my judgment that is the proper construction which may be given to those words used. The only doubt that has been cast upon this construction is on account of the observation made in the judgment of Lord Shaw in the case of *Girdhari Singh v. Megh Lal Pandey* (1), where it has been observed that the words *mai hak kakuk* only refer to the rights that were granted previously and not to all the rights of the grantor. However that may be, the contention of the learned Advocate is that when *mahals* are granted in *patni taluk* without any deduction, of everything that

(1) 42 Ind. Cas. 651; 44 I. A. 246; 45 C. 87; 22 C. W. N. 201; 22 M. L. T. 358; 15 A. L. J. 851; 33 M. L. J. 687; 3 P. L. W. 169; 26 C. L. J. 584; (1917) M. W. N. 232; 7 L. W. 90; 20 Bom. L. R. 64 (P. C.).

can be mentioned within the four boundaries, all rights of the *zemindar* have been conveyed, and, in my opinion, there is considerable force in this contention. It is argued on behalf of the respondent on this question that when there are reservations as regards the cutting of trees and compensation money that would be obtained for land acquisition for public purposes, it should be held that all rights of the *zemindar* were not conveyed by the grant. In my opinion that argument is of very little substance. It seems to me that after giving all the rights to the *patnidar* there was a small reservation about cutting down trees which would cause damage to the *mahal* or loss to the *jama* so as to affect the right of the *patnidar* to the rent reserved. With regard to the compensation money the same observation may be made. In the absence of the stipulation about compensation money it would have been divided between the *zemindar* and the *patnidar* under the law. By special contract the *zemindar* provides that the entire amount should be taken by himself. That does not take away from the rights of the *patnidar* anything more than what was reserved under the grant. It seems to me that the special mention of these reservations shows that nothing else was reserved. I need only add that minerals were not reserved.

The next question is whether by the grant of a *patni taluk* underground rights have been conveyed. I will rest content by referring to the observations of their Lordships of the Judicial Committee in the case of *Satya Niranjan Chakravarti v. Ram Lal Kaviraj* (2). Their Lordships did not agree with the dictum of the Patna High Court that the judgment of Prinsep and Hill, JJ., in *Ali Quader Syed Hossein Aly v. Jogendra Narain Roy* (3) has been overruled by the decisions of the Privy Council cited in the judgment. It follows, therefore, that that case decided by the learned Judges of this Court is still good law so far as we are concerned; unless we are prepared to differ from it and refer the question decided there to a Full Bench, we are bound to follow it. We are not prepared to differ from what was laid down in that case. So we are bound to follow

the law laid down in it. The learned Advocate for the respondent endeavoured to distinguish that case from the present on the ground that the words there used in the *patni pattah* were "*darabast zemindari hakuk*," while the words in the present grant are only "*darabast hakuk*." I do not think that there is any difference in substance, because the word "*darabast*" means "all," "entire" and "*hakuk*" is the plural of "*hak*" which means "right," and when the *zemindar* grants "*darabast hakuk*" he grants "*darabast hakuk*" of his *zemindari* right. It was next contended that the terms "*darabast hakuk*" were intended to refer only to those rights which had been previously described, rights generally known as *ejusdem generis*. This argument was advanced in the case of *Ali Quader Syed Hossein Aly v. Jogendra Narain Roy* (3) cited above, and the learned Judges observed that this expression was intended, to use a familiar expression, to throw a net so as to include everything which might be considered as belonging to the *zemindari* right. With those observations I respectfully agree.

It was next contended by the learned Advocate for the respondent that there is really no essential difference between a *mokarrari* and a *patni taluk* and he referred to the case of *Sonet Kooer v. Himmatt Bahadoor* (4) and his contention was that it is open to us to decide notwithstanding the observation of Lord Dunedin in the case of *Satya Niranjan Chakravarti v. Ram Lal Kaviraj* (2) cited above, that a *mokarrari* and a *patni* are similar in all respects. It is unnecessary for me to hazard the opinion that a *mokarraridar* should have the same interest as a *patnidar*. Although there are various points of similarity between a *mokarrari* and a *patni* there are evidently many points of difference, and I think it is necessary for me to point out the essential characteristics of a *patni* which may not belong to a *mokarrari*. First, I would refer to s. 3 of Regulation VIII of 1819. In cl. (1) of that section it is mentioned that the interest of the *patnidar* was capable of being transferred by sale, etc., in the same manner as other "real property." It is contended by the learned Advocate for the appellants that in 1819 this Regulation being drafted by English lawyers the ex-

(2) 86 Ind. Cas. 289; 52 I. A. 109 at p. 117; 29 C. W. N. 725 at p. 731; A. I. R. 1925 P. O. 42; 6 P. L. T. 42; 21 L. W. 289; 48 M. L. J. 328; 27 Bom. L. R. 753; 23 A. L. J. 712; 4 Pat. 244 (P. O.).

(3) 16 Ind. Cas. 441; 16 O. L. J. 7.

(4) 3 I. A. 92; 1 C. 391; 25 W. R. 239; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).

pression real property has a particular significance, because a leasehold was not considered real property in English Law. So a *patni* although in form a lease was not a mere leasehold property. There appears to be some substance in that contention. In the second clause power is given to the *patnidar* of letting out the lands composing their *taluks* in any manner that may be deemed conducive to their interest. That also is a matter which should be borne in mind. In s. 11, cl. (1) the defaulting *patnidar* is described as the 'defaulting proprietor,' and in the second paragraph of the first clause it is stated that the rent receivable by the *zemindar* is in fact his reserved property in the tenure. In the second clause of s. 11 again the defaulting *patnidar* is described as the late proprietor. I may refer also to Field's Introduction to the Regulations which is a well known authority with regard to land tenures. The learned author observes with reference to such *taluks* and subordinate *taluks* in s. 36 of his Introduction:—"Considerable sums are paid by way of fine on the creation of both the parent and subordinate *taluks*. Men who do not like to part with the status, of *zemindar* by an absolute sale of the *zemindari* will readily enough raise money by allowing the proprietary right to be carved up into estates of minor value, the whole substance going into the hands of others, while the name alone remains to them." Again in the case of *Gyaram Mondal v. Gyaram Naik* (5), it was held that by the *patni* deed every right that the *zeminder* had passed to the *patnidar* and that unless there is some limitation expressly mentioned the *patnidar* can without let and hindrance exercise those rights. The observations of the Privy Council in the case of *Joykissen Mookerjee v. Collector of East Burdwan* (6) as well as in *Ranjit Singh Bahadur v. Kali Dasi Debi* (7) are to the same effect. In *Tarinee Churn Gangooly v. Watson & Co.* (8), Mr. Justice Markby in delivering the judgment of the Court observed with

reference to a *patni* interest—"Though, of course, we do not mean to deny that it is a tenure, yet the relation between the *zemindar* and *talukdar* has scarcely any analogy to the ordinary one of landlord and tenant. The *zemindar* parts with all control over his property, and all interest in it except to an annual rent which has been likened to what in England is called quit-rent." Lastly, I may cite the observations of Mr. Justice Chakravarty, who has considerable experience with reference to land tenures, in the case of *Surendra Narain Sinha v. Bejoya Singh Dudhuria* (9) to the effect that *patni taluks* were really transfer of the *zemindari* interest, the consideration being payable not in a lump sum but by annual payment in the shape of rent; and lower down, he observes these *patni taluks* are really grants of the *zemindar's* interest without restriction unless specially mentioned in the *pattah*. I need hardly add that I quite agree with the observations made above as regards the nature of a *patni taluk*.

On these grounds, in my opinion, the *patnidar* and the defendants as *darpatnidars* being grantees from the *patnidar* are entitled to all the minerals included within the *patni* grant.

The next question of importance is the question of limitation. This hillock as it appears from the plaintiff's evidence is about half a mile in length and a quarter of a mile wide. The height is about 40 feet and the diggings are from 10 to 30 feet and the quarries were down to the level ground. It also appears from the evidence that there are about 300 to 400 pits in all parts of the hillock. The Subordinate Judge has found that the defendants have been working the quarries for stones and earth for about 60 years and it also appears that a Railway siding was taken to the hillock for the purpose of carrying stones and gravel. There is no question that the defendants have been making quarries quite openly and there is no question of surreptitious possession. The Subordinate Judge, however, decides in favour of the plaintiff on the ground that the yellow earth or ochre which is now being taken and found to be of some value was found in large quantities only about six years before suit and, therefore, the plaintiff's right is not barred by limitation. I do not think that the period of adverse

(5) Marsh. 28.

(6) 10 M. L. A. 16; 1 W. R. P. C. 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 54; 19 E. R. 879.

(7) 40 Ind. Cas. 981; 44 I. A. 117; 44 C. 841; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 489 (P. C.).

(8) 12 W. R. 413; 3 B. L. R. A. C. 437.

(9) 89 Ind. Cas. 785; 41 C. L. J. 527 at p. 530; 52 C. 655; A. I. R. 1925 Cal. 962; 30 C. W. N. 238.

possession of the quarries on the hillock may be counted from the time when different sorts of earth were found at different depths of the quarry. In my opinion adverse possession should be considered to have commenced when the defendants began to make quarries on the side of the hillock. I am aware that it has been held that a stranger cannot ordinarily acquire title to the whole of a mine by working a part of it and he only acquires possession of the minerals which he actually digs. But the question may be different where a stranger works a mine in such a manner as to prove possession to the whole of it. See the observations of Hall, V. C., in *Ashton v. Stock* (10). As I have already said, here the defendants worked the quarries in all parts of the hillock openly and not underground. It is hardly necessary to say anything further than to rely upon the observations of the Privy Council in the case of *Satya Niranjan Chakravarti v. Ram Lal Kaviraj* (2). Their Lordships say:—"The working by the defendants was, therefore, working not under a lease but by a mere trespasser. If, therefore, the suit is possessory then it is barred under Art. 144, for more than 12 years have elapsed since the possession became adverse. If, on the other hand, the suit is declaratory, it is barred under Art. 120, for more than six years have elapsed since the right to sue the declaration emerged." The question of limitation, therefore, must also be decided against the plaintiff.

There is the question whether the article taken out is mineral or not. The appellants rely upon the contradictions in the evidence of the two expert witnesses examined by the plaintiff. One is Monmotho Kumar Roy who says that the earth that is mineral contains sodi carbonate and sodium sulphate, and his witness G. N. Fruthin gives in his evidence an analysis of the thing taken away but does not mention that there is either sodi carbonate or sodium sulphate. I do not think much depends on this question. It may be a mineral or some valuable earth underground. If nothing underground was given to the defendants by the *patni* the plaintiff would be entitled to it. If everything passed to the *patnidar* then the plaintiff would not be entitled to it.

It is unnecessary to discuss another small point which was urged by the appellants and it is this, that the earth itself has no

commercial value but is used for the purpose of adulteration of real yellow ochre. There is evidence on the part of the plaintiff that the earth that is taken from there can be sold in the market and there is evidence on the plaintiff's side about its sale in the locality. If it had really no market value no body would ever endeavour to raise a quarrel about it. Lastly, with regard to the question of damages it was argued on behalf of the appellants that damages have been calculated at a very excessive rate. The defendants, however, have not given any evidence on the basis of which the amount can be reduced. From the evidence on the record the Subordinate Judge has made a calculation and I do not think there is any reason to differ from it.

As, however, the plaintiff's case fails on the other grounds I have already stated this appeal must be allowed and the suit dismissed with costs in both Courts.

It was pointed out on behalf of defendant No. 11 *ka* that he obtained the interest of defendant No. 9 in the property in question by a deed of gift, dated 19th November, 1919. So, if the defendants are liable for any damages this defendant would be liable along with the other heirs of defendant No. 9 for damages up to 18th November, 1919, and defendant No. 11 *ka* would only be liable for damages payable by defendant No. 9 from the 19th November, 1919. This circumstance should be noted.

The appeal of the plaintiff that is Appeal No. 123, relates to the matter of damages and incidentally the question of primogeniture arises. It is urged on behalf of the plaintiff that the Subordinate Judge has refused to give the plaintiff the entire amount of the damages on insufficient grounds. The plaintiff, however, has not been able to show that there was any custom of primogeniture in his family. On the other hand, there is evidence of a plaint in a suit brought by the plaintiff's father in 1895, Ex. U, where it was stated by him that his father Raja Kirti Chandra Bahadur got the entire interest in the property under the Will executed by his brother Kumar Uday Chand. This statement strikes at the foundation of the claim of right on the basis of primogeniture by custom. The learned Advocate then refers to the agreement, I have already stated, (Ex. 43, dated the 18th June, 1918,) entered into between the plaintiff and his bro-

thers Nripendra Narain, Rajendra Narain and Kumar Birendra Narain, minor represented by his mother and next friend Moharani Kamal Kumari Saheba in which the right of primogeniture was acknowledged and the other three brothers gave up their rights to the property. Assuming that the minor's interest can be legally given up by such an agreement the right of these persons to the property could not be taken to have been transferred by an agreement like this. The law requires a conveyance for the purpose of transfer of title and this cannot be made by a mere agreement, see *Jadu Nath Poddar v. Rup Lal Poddar* (11).

This is the only ground that was urged in this appeal. This appeal must be dismissed with costs apart from the questions which have been found against the plaintiff's contention in the other appeal.

The costs are to be recovered in both the appeals by the defendants-appellants in Appeal No. 70, one set in each appeal.

Roy, J.—These appeals arise out of a suit brought by the plaintiff *zemindar* to establish his right to minerals in a small hill within *Mouzah Nalhati*. The Subordinate Judge decreed the suit in part. The *darpatnidars* who resisted the suit are appellants here. The plaintiff has a separate appeal in respect of his title. It appears that the *darpatnidars* have quarried stones on the surface of the hill without objection or opposition for many years. Recently ochre has been found below the surface and it has turned out to be of value in the market. A question was raised that the substance was not mineral and that the defendants were not really going below the surface. It has been found by experts that the substance found is a mineral and since pits have been dug up to a depth of 30 feet it may be taken that the dispute is in respect of the sub-soil, i. e., of mineral rights in the sub-soil.

The substantial question in dispute is whether or not a *patni* lease, as such, conveys minerals to the *patnidar*. Our task in this discussion is easy. The question was decided in favour of the *patnidar* by Prinsep and Hill, JJ., in the case of *Alli Quader Syed Hossein Aly v. Jogendra Narain Roy* (3). It was held here and in the Behar High Court that the authority in favour

of the *patnidar* has been overruled by the decisions of the Judicial Committee in a series of cases. Their Lordships of the Judicial Committee have now in the case of *Satya Naranjan Chakravarti v. Ram Lal Kaviraj* (2) pronounced that the judgment of Prinsep and Hill, JJ., has not been overruled, and that the question whether a *patni* lease, as such, conveys the minerals to the *patnidar* is, so far as the Judicial Committee is concerned, still open. Their Lordships go on to say that "the question turns on what is, the true nature of a *patni* tenure." So far as we are concerned, therefore, the judgment of Prinsep and Hill, JJ., still rules the field. We are bound by that decision.

It would appear, therefore, that the principle that minerals will not be held to have formed part of a grant unless there was an express grant, applies to the cases of *mokarrari* lease, maintenance grant, *talabi brahmattar* and grants of that kind. Dr. Basak contended that the nature of a *patni* tenure is in no way different from the *mokarrari* grant discussed in the case of *Girdhari Singh v. Megh Lal Pandey* (1) and he invites us to refer this case to a Full Bench. We are unable to do this for the reason that we do think that a *patni* tenure is different in many respects from a lease-hold interest.

The difference will be apparent from a brief historical survey of *taluks* in Bengal. The word '*taluka*' is derived from the Arabic word *alak* which signifies 'to hang from,' 'to depend upon'; *alak* also means a leech which hangs from the body to which it has attached itself and as another quality said to have belonged to the *talukdar* and means connection and dependence. In Upper India the *taluk* was dependent upon and subordinate to the Sovereign. In Bengal the *taluk* was subordinate to the *zemindar* but not always. The larger *talukdars* were *huzuri*, i. e., they were immediately under the supreme Government to which they paid their revenue direct; while the smaller ones were *mazkuri* or specified, i. e., in the *sanad* of the *zemindar* through whom they paid their revenue. Doubtless all were originally *huzuri* but when the revenue came to be collected through the *zemindars*, the small *talukdars* were directed to pay their revenue through this channel in order to avoid the inconvenience of a multiplicity of small payments into the *khalsa* or trea-

surey." (Field's Introduction to the Regulations, page 30 notes). I mention this to show that the *talukdar* was in status equal to the *zemindar*. Regulation VIII of 1793, s. 51 recognised the dependent *taluks* created by the *zemindars* before the Permanent Settlement and protection was given to them subject to the payment of the fixed rent. A number of the *talukdars* was given the option of getting separated and holding directly under the Government as owners of separate estates. At the same time Government declared by Regulation XLIV of 1793 that no *zemindar* shall grant *pattahs* to *raiyyat* or other persons for cultivation of lands for a term exceeding 10 years. The *zemindars*, however, continued to grant leases in violation of the prohibition. Regulation V of 1812 removed the restriction of 10 years but no provision was made for validating the leases granted in violation of the prohibition. Regulation VIII of 1819, i. e., the Patni Regulation remedied the omission. The preamble to the Regulation recites the circumstances and s. 2 validates these leases.

What happened was that the *zemindar* of Burdwan was threatened with ruin on account of the high land revenue assessed on the estates settled with him at the Permanent Settlement, and large tracts were let out by him in perpetuity and at fixed rent. Thus were created permanent tenures known as *patni taluks* and the object was easy and punctual realisation of rent to enable the *zemindar* to pay the revenue to the Government. By 1819 it was found that permanent alienations of this kind had been extensively effected in other *zemindaris* in the neighbouring districts and these alienations were formally legalised by Regulation VIII of 1819. By the Permanent Settlement, Government gave up its position as the exclusive owner of the soil and contented itself with a permanent rent charge on the land, thus escaping the labour, risk and odium attendant upon detailed *mofussil* management. The *zemindars* followed the suit and they made the *talukdars* proprietors in the same way as the Government had made the *zemindars* proprietors. The Patni Regulation was designed to provide a way to the *zemindar* to recover arrears of rent from the *patnidars*, almost identical with that by which the demands of Government revenue were enforced against themselves. Henceforth the *zemindar* had to be content with his rent reserv-

ed and the *patnidar* was the proprietor to the *raiyyats*. Hence has grown up the popular idea that the *patnidar* is also a proprietor. It is well-known that many of the mining leases are derived from *patnidars* and it is an astonishing fact that the *zemindars* have not challenged the *patnidars'* right except, as far as I know, in this case in which Prinsep and Hill, J.J., gave their decision.

The *patnidar* has been able to maintain his position that unless there was anything expressly reserved in the *patni* contract everything passed to him. One class of cases is that of *chaukidari chakran* lands. The last case in the subject is that of *Ranjit Singh Bahadur v. Kali Dasi Debi* (7) and it was the *patnidar* who got the lands. Recently there was the case of *Surendra Narain Sinha v. Bejoya Singh Dudhoria* (9) before this High Court. The *zemindar* sought to restrain the *patnidar* from making bricks and it was held that the *zemindar* could not complain when his property was not jeopardised nor his rent threatened. Chakravarty, J., discussed the nature of *patni taluks* and observed that "these *patni taluks* were really grants of the *zemindar's* interest without restrictions unless specially mentioned in the *pattah*."

Minerals were not thought of when these *patnis* were created. They were no more thought of when the Permanent Settlement was made with the *zemindar*. The position as between the *zemindar* and the *patnidar* is that the latter gets everything except what was expressly reserved. This follows from his position that he is a proprietor. The Regulation itself calls the tenure a *taluk* and the tenure-holder the *talukdar* and it is not unreasonable to hold that the old significance of the word *taluk* was retained. In s. 3 it is stated that the *patnidar's* property may be dealt with as other "real property." Mr. Field in his Digest of the Law of Landlord and Tenant, puts a note of interrogation against the words. I take it the framers of the Patni Regulation had the same idea in their minds as the framers of the Settlement of 1793 whereby they recognised and proceeded upon the footing that the *zemindars* are the actual proprietors of the land. In s. 11 again the *patnidar* is called the defaulting proprietor and attention was drawn by the Court in *Ali Quader Syed Hossein Aly v. Jogendra Narain Roy* (3) to the 2nd para. of s. 11 wherein it is mentioned that "the rent is in fact his reserved property in the

tenure." The *zemindar*, therefore, has no grievance if his rent is not jeopardised. If there is no reservation, therefore, the minerals will pass to the *patnidar*.

Turning to the actual terms of the *patni* grant it is contended that there are no such terms as *adhak* and *urdhak* as in the case of *Satya Niranjan Chakravarti v. Ram Lal Kaviraj* (2) and that the words "*darabast hakuk*" in it are not enough since "*mai hak hakuk*" were not considered sufficient in *Meghlal Pandey's case* (1). My learned brother has dealt with the matter in detail on this point. I agree with him and all I need say is that all the exclusions and reservations were catalogued and there is along category of things conveyed, giving rise to the inference that everything else was granted by the instrument.

I agree, therefore, with my learned brother in the conclusions he has arrived at in the case.

A. N. A. *Appeal No. 70 decreed:*
Appeal No. 123 dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 271 OF 1926.

March 4, 1927.

Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.

SITHAMBARAVADIVU AMMAL—

PLAINTIFF—APPELLANT

versus

THIRUPALKANDANATHA PILLAI

AND ANOTHER—DEFENDANTS NOS. 1 AND 3—
RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 16—Issue of certificate to one claimant—Time given to other claimant to sue—Dismissal of suit on preliminary ground, effect of—Interest on debt, right to.

Where on the death of a person disputes arose between his widow and his brother in respect of a debt due to the estate and a Succession Certificate was issued to the widow on her undertaking not to collect the amount in a month from the date of the certificate so as to enable the brother to institute a suit and to prove an alleged Will set up by him, and the suit instituted by the brother was dismissed on the ground that he had not obtained Probate:

Held, (1) that on the dismissal of the suit the creditor was bound to pay the amount to the widow as s. 16 of the Succession Certificate Act afforded him a complete indemnity; [p. 126, col. 1.]

(2) that the widow was entitled to interest from the date of demand. [*ibid.*]

Letters Patent Appeal against the judgment of Mr. Justice Spencer, in S.A. No. 881 of 1923, preferred against the decree of the

Court of the Subordinate Judge, Tuticorin, in A. S. No. 16 of 1923, preferred against that of the Court of the District Munsif, Sriyaikuntam, in O. S. No. 383 of 1920.

Mr. T. L. Venkatarama Aiyar, for the Appellant.

Mr. A. Swaminatha Aiyar, for the Respondents.

JUDGMENT.—The question in this appeal is whether the plaintiff in the suit is entitled to claim interest and costs. Her deceased husband subscribed to a chit, of which the father of the defendant was the *karaiswan*. He paid 17 instalments before his death, after which the plaintiff paid the remaining four. The chit closed on 6th April, 1919, and Rs. 2,100 were then due to her. She claimed this sum but the *karaiswan* did not discharge till August, 1922, his pretext being that till that time her title was in question in a suit brought by her brother-in-law. This pretext did not commend itself to the District Munsif, who tried the suit or to the Subordinate Judge, who dismissed the first appeal. In second appeal, however, Spencer, J., came to the opposite conclusion, finding that the *karaiswan* was justified in withholding the money till the suit had been concluded.

The facts are these. The plaintiff's husband died in February, 1917. Some months later, the plaintiff applied for a Succession Certificate which was opposed by her brother-in-law on the strength of a Will alleged to have been executed by her husband, of which he produced not the original, but what purported to be a duplicate. A certificate was issued to the plaintiff on her "undertaking not to collect the outstandings due to the deceased for one month from the date of the certificate in order to enable the respondent to file a suit to prove the Will."

A few days later the suit was filed. The brother-in-law applied for an injunction against the widow but it was refused as regards the amount now in question. This occurred on 15th October, 1918. The intention of the Judge who granted the certificate is perfectly clear. The widow was not to collect the money for a month. If in that time no suit was filed, she could collect it at once. If a suit was filed, further proceedings were left to the Court which was seized of it. The brother-in-law failed to get a further stay and the *karaiswan* could not plead good faith when he re-

fused to pay the money on the date on which it fell due. Nor was that all. A week after the injunction has been refused, the Munsif found on a preliminary issue of law that the Will propounded could not be sued on in the absence of Probate or Letters of Administration. The present 1st defendant was a defendant in that suit and was dismissed from it on 21st October, 1918. As the Munsif has remarked: "from that date he was free to pay the money to the widow." The Will had been pronounced to be useless and there was no injunction against him. Under the circumstances, s. 16 of the Succession Certificate Act afforded him a complete indemnity. It is idle to plead that it was still open to the brother-in-law to apply for Probate before his suit was disposed of, for he made no effort nor was he likely to do so. The *karaiswan*, however, went on refusing to pay on the ground that, if the brother-in-law's suit succeeded, he might have to pay twice over. As the Munsif has observed:

"The 1st defendant would have been lacking in *bona fides* in paying over to the plaintiff, only if he had reasonable grounds to suspect that the certificate was not validly obtained, but, when once the certificate had been placed beyond challenge by the alleged Will being put aside, the defendant could make no excuse to the holder of the certificate."

In these observations, we concur. We think, that the defendants did not act in good faith in refusing to pay, as they were completely indemnified. It is contended that the plaintiff is not entitled to interest as, in her notice, she claimed interest in the terms of the contract, which does not provide for it. We see no reason to accede to this contention. It is sufficient that she claimed interest. In what form or at what rate she claimed it is not material. We think that the Subordinate Judge's decision was right and restore it with costs throughout, subject to one reservation. The costs of the plaintiff's memorandum of objections, which was dismissed, must be excluded from the costs which have to be paid by the respondents.

V. N. V.

Appeal allowed.

ODH CHIEF COURT.

SECOND CIVIL APPEAL No. 250 OF 1927.

October 24, 1927.

Present :—Mr. Justice Pullan.

ABDUL GHAFOOR KHAN—DEFENDANT—

APPELLANT

versus

KARAMAT KHAN—PLAINTIFF—

RESPONDENT.

Occupancy tenant—Mortgage of occupancy rights acquired under agreement with landlord—Mortgagor, whether can challenge mortgage.

The representatives of a tenant who has executed a mortgage of occupancy rights acquired by him under a settlement decree subsequent to the year 1868 as the result of an agreement with the landlord are not entitled to challenge the mortgage on the ground that it is void in law.

Wazir Mohammad v. Har Prasad (1), followed.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 21st April, 1927, modifying that of the Munsif, Sultanpur, dated the 23rd December, 1926.

Messrs. H. Husain and A. C. Mukerji, for the Appellant.

Mr. R. D. Sinha, for the Respondent.

JUDGMENT.—The question for decision in this appeal is whether the representative of an occupancy tenant who has mortgaged his occupancy holding can challenge the mortgage on the ground that it is void in law. The answer to the question depends on whether the tenant was an occupancy tenant by Statute under s. 5 of the Oudh Rent Act of 1886 or whether he obtained his occupancy rights in some other way. In the present case the occupancy rights were conferred by a settlement decree subsequent to the year 1868 as the result of an agreement between the landlord and the tenant. The tenancy, therefore, is one covered by the proviso to s. 5, which says that nothing contained in the former part of the section shall affect the terms of any agreement in writing entered into between a landlord and tenant after the 22nd day of July, 1868. In my opinion there is ample authority of the Judicial Commissioner's Court to establish the principle that, in a case of this kind, the tenant cannot challenge the mortgage executed by the original tenant. It may be that the rights given to the tenant were not transferable, but this was a matter of contract between landlord and tenant and, though the landlord could object to a transfer on the ground that it was contrary to the agreement, the transfer itself was not contrary to law as would be the case if the tenant were one whose occupancy rights had been

obtained under the provisions of s. 5 of the Oudh Rent Act. The previous rulings on this point were considered by a Bench of the Judicial Commissioner's Court in 1911 and their decision is published in *Wazir Mohammad v. Har Prasad* (1). The rulings cited by learned Counsel for the appellant are published in *Umrao v. Narain* (2) and *Pratab Bali v. Suresh Dutt* (3). Neither of these rulings appears to me to be an authority for the claim made by the appellant that he is entitled to challenge this mortgage and so resist the possession claimed by the mortgagee. The lower Courts have rightly followed the ruling cited in *Wazir Mohammad v. Har Prasad* (1). I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

- (1) 13 Ind. Cas. 613; 15 O. C. 67.
 (2) 89 Ind. Cas. 175; 2 O. W. N. 318; L. R. 6 A. (O.) 74; 12 O. L. J. 334; A. I. R. 1925 Oudh 401.
 (3) 87 Ind. Cas. 1030; 2 O. W. N. 325; L. R. 6 A. (O.) 73; 12 O. L. J. 329; A. I. R. 1925 Oudh 457; 29 O. C. 77.

MADRAS HIGH COURT. FULL BENCH.

REFERRED CASE No. 7 OF 1926.

September 5, 1927.

Present:—Sir William Watkins Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

THE COMMISSIONER OF INCOME-TAX,
MADRAS—REFERRING OFFICER

versus

MESSRS. BINNY & Co., LTD., LONDON
BY AGENTS MESSRS. BINNY & Co.,
MADRAS—ASSESSEE.

Income Tax Act (XI of 1922), s. 50—"Tax was recovered," meaning of.

The words "tax was recovered" in s. 50 of the Income Tax Act mean "tax was received by the Government", and must not be read as meaning "tax was refunded to the assessee under the provisions of s. 27 of the English Finance Act of 1920."

Case stated under s. 66 (1) of Act XI of 1922 by the Commissioner of Income Tax, Madras, in the matter of Messrs. Binny & Co., Ltd., (London) by agents Messrs. Binny & Co., (Madras).

Mr. M. Patanjali Sastri, Special Counsel for the Referring Officer.

Mr. Vere Mockett, instructed by Messrs. Moresby & Co., for the Assessee.

JUDGMENT.—What we are asked to determine is the meaning of the words

"tax was recovered" in s. 50 of the Indian Income Tax Act. It is contended by the assessee that the word "recovered" which ordinarily has the meaning of taking back must refer to the re-payment of tax in the United Kingdom referred to in s. 49 and that the words "tax was recovered" must be read as meaning tax was refunded to the assessee under the provisions of s. 27 of the Finance Act of 1920. Unfortunately for this contention we see that s. 50 is applicable not only to s. 49 but also to s. 48; and if we are to apply this meaning of the word "recovered" to s. 48, it would mean that when a person had obtained a refund under s. 48 he is given under s. 50 another year within which to apply for that same refund. This certainly makes nonsense of these two sections. The word "recovered" does not necessarily mean the actual taking back of what has been given as is obvious from its use throughout the Income Tax Act. In s. 18 (8) which deals with "deduction" of tax in advance, it is observed that "the power to levy by deduction under this section shall be without prejudice to any other mode of recovery", implying thereby that deduction is one mode of recovery. Similarly under s. 41 tax is "recoverable" from the Court of Wards, Administrator-General, etc., and there it does not mean, taken back. It is suggested that tax can only be recovered by coercive process. The Act does provide for recovery by coercive process but even then there is no taking back of what has been given any more than when the tax is received by voluntary payment. Possibly there is an implication in the word "recover" that the tax is a sum which has to be deducted out of the income as really belonging to Government, and in that sense the word "recovered" would bear the meaning of taking back. Section 44 (a) is also a very strong argument against the assessee's contention as to the meaning of the word "recovered". We are, therefore, satisfied that the words "tax was recovered" mean "tax was received by the Government."

It has been pointed out to us that this interpretation may cause hardship in individual cases where there has been delay on the part of the Income-tax Authorities in England in making the refund there, such delay not being due to the default of the assessee. We would point out that this hardship can only be obviated by an

amendment of s. 50 and we are of opinion that this should be done by giving the Income-tax Commissioner power to extend the time in suitable cases. The petitioner will pay the costs of this application, i. e., Counsel's fee Rs. 250.

V. N. V.

Reference answered.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 171
OF 1924.

July 21, 1927.

Present:—Mr. Justice B. B. Ghose and
Mr. Justice Roy.

MADHU SUDAN KUNDU AND OTHERS—
APPELLANTS

versus

CHHALIMADDIN AHAMMAD AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 6—Mortgage suit—Appeal from preliminary decree after passing of final decree, whether maintainable—Preliminary decree, nature of—Amendment of memorandum so as to make it appeal against final decree, legality of.

A Court has power to amend a memorandum of appeal against a preliminary decree in a mortgage suit so as to make it an appeal both against the final decree as well as against the preliminary decree. [p. 129, col. 1.]

Kulada Prosad Chowdhury v. Ramanand Patnaik (1), followed.

Obiter.—Under the present Civil Procedure Code an appeal may be preferred from a preliminary decree in a mortgage suit even after the passing of the final decree. [p. 128, col. 2.]

A preliminary decree is now an independent decree which is not absorbed by the final decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. [ibid.]

Appeal against the decree of the Subordinate Judge, First Court, Barisal, Bakarganj, dated the 24th January, 1924.

Dr. Sarat Chandra Basak (with him Babu Pramatha Nath Bandopadhyaya), for the Appellants.

Mr. Gunada Charan Sen (with him Babus Prosanta Bhusan Gupta and Suresh Chandra Talukdar), for the Respondents.

JUDGMENT.

B. B. Ghose, J.—A preliminary objection has been taken on behalf of the plaintiffs-respondents that this appeal is incompetent. The appeal is against the preliminary

decree passed on a mortgage, dated the 24th of January, 1924. The final decree was made on the 28th of February, 1924. The appeal against the preliminary decree was filed on the 27th of May, 1924. It is, therefore, contended that having regard to some of the cases decided in this Court, this appeal is incompetent. Personally I am of opinion that the cases which have been decided after the passing of the Code of Civil Procedure of 1908 have not laid down the correct rule. Under this Code, a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The case was different under the old Code. What is now a preliminary decree was supposed to be a preliminary order and the final decree was held to absorb that order and by an appeal against the final decree that order might have been challenged. It was, therefore, held under the old Code that after the passing of the final decree in the case, the preliminary order had no separate existence, and, therefore, the appeal against that order was incompetent after the passing of the final decree. That reasoning, however, does not apply when the law is that you cannot challenge a preliminary decree by an appeal against the final decree. A preliminary decree is now an independent decree which is not absorbed by the final decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. The mischief of the procedure suggested by the learned Advocate for the respondents is this. There may be a very good ground for appeal against the preliminary decree but there may be absolutely no ground for appeal as against the final decree which merely works out the directions made in the preliminary decree. To compel a party to appeal against the final decree against which there is no ground whatsoever to urge in order that his appeal against the preliminary decree may be heard, seems to me to amount to a farce. Mr. Sen very rightly recognises that position but he relies upon the decided cases of this Court. I may say that the other High Courts have not followed this practice. I would have thought it necessary to have this question referred to a Full Bench for final decision if the appellants had not taken steps which

proper circumstances or not against a minor or his estate is another matter with which we are not concerned.

The second appeal is, therefore, dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 193 OF 1927.

October 13, 1927.

Present.—Mr. Justice Hasan and
Mr. Justice Raza.

TALUQDAR KHAN AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Musammat KHAIRULNISSA AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 47—Plaint
—Matter determinable in execution proceedings and
not by regular suit—Duty of Court to return plaint to
be presented to Execution Court.*

Where a matter which ought to have been laid in execution proceedings under s. 47, Civil Procedure Code, is brought up in a regular suit and the plaintiff asks the plaint to be treated as a proceeding under s. 47, Civil Procedure Code, the plaint ought to be returned for being presented as an application in execution proceedings in a proper Court. [p. 134, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Gonda, dated the 28th March, 1927, confirming that of the Munsif, Utraula, dated the 12th August, 1926.

Mr. Radha Krishna, for the Appellants.

Mr. Ali Raza, for the Respondents.

ORDER.—This is the plaintiffs' appeal from the decree of the Additional Subordinate Judge of Gonda, dated the 28th of March, 1927, affirming the decree of the Munsif of the same place, dated the 12th of August, 1926.

In the suit, out of which this appeal arises, the plaintiffs asked for a relief of declaration for a 2/3rds shar in certain plots of land situate in village Baundhar, Pargana Utraula, in the District of Gonda. They also prayed for possession of the same plots in the event it were found that they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of s. 47 of the Code of Civil Procedure, 1908.

In the lower Appellate Court the plaintiffs asked that the plaint in the present suit might be treated as proceedings under

s. 47. The Court below has refused the prayer on the ground that proceedings under s. 47 were barred by the rule of *res judicata*, arising out of a previous order, to which reference shall hereafter be made.

We are of opinion that there is no bar of *res judicata* and the plaint in the present suit should have been returned to the plaintiffs for being presented as an application in execution proceedings to the proper Court.

The facts are as follows:—

One Bismillah Khan had a son Muhammad Khan and four daughters. Muhammad Khan entered in course of time into the possession of the entire estate of his father, Bismillah Khan, on the death of the latter. Eventually the three sisters and the representative of the deceased sister brought four suits for the recovery of their shares in the inheritance of their father, Bismillah Khan. Naturally Muhammad Khan was the foremost defendant in the suits. But while Muhammad Khan was in possession of the estate he had made several alienations. These alienees were made party defendants to the four suits. They were large in number and amongst them were the present plaintiffs. Muhammad Khan confessed judgment and there was another defendant who compromised with the plaintiffs of those suits. The suits were decreed against Muhammad Khan and the said defendants but they were dismissed against the present plaintiffs and also against other defendants. They were instituted on the 13th of July, 1915, and the decrees were passed on the 5th of August, 1918. All this happened in the Court of the Subordinate Judge of Basti in the Province of Agra. The suits and the decrees included certain items of property which were situate in the District of Gonda. In that class of property were included the plots now in question. On the date of the suits mentioned above the plaintiffs of the present suit held a possessory mortgage of the plots in suit dated the 16th of February, 1915, executed by Muhammad Khan. During the pendency of those suits, that is on the 8th of March, 1916, they had obtained a sale-deed of the same property from the same Muhammad Khan.

It is agreed that the sale being *pendente lite* is wholly inoperative against the interest of the decree-holders of those suits; but there is no doubt that the mortgage

subsists and the decrees of the four suits mentioned above had not the effect of wiping off the said mortgage for the simple reason that the plaintiffs of those suits were granted no relief against the present plaintiffs. In other words, their suit was dismissed against the latter. The mortgage, therefore, subsists.

It appears that execution proceedings were taken by the decree-holders first in the Basti Court and afterwards in the Court at Gonda. We have before us the four applications which were made in the four suits mentioned above in the Court of the Subordinate Judge of Basti for execution (Exts. 24 to 27). There were two distinct reliefs for which prayer was made in those applications. One was for possession of the properties situate within the jurisdiction of the Basti Court. The second was for a certificate of transfer to the Gonda Court for execution proceedings being taken in that Court in respect of the properties situate in the District of Gonda. It follows that the reliefs did not embrace any proceedings against the present plaintiffs because the property in which they were interested was not situate within the jurisdiction of the Basti Court but was situate within the jurisdiction of the Court at Gonda. The plaintiffs, however, misconceived the scope of the execution applications and filed certain objections in the Gonda Court which were rightly thrown out by that Court on the ground that there were no execution proceedings being taken against them. The order is dated the 7th February, 1925, and is as follows:—

"The report of the execution clerk shows that the decree has not been executed against these objectors. They have, therefore, no grievance at present in the execution department. Their objection is, therefore, disallowed on this ground."

It is the above order which the Courts below in the present case consider to have the effect of *res judicata* in respect of the present proceedings. To our mind that order has no such effect. In the first place, as already pointed out, there was no relief sought in the applications with reference to which this order was passed against the present plaintiffs nor was any relief sought to be obtained in respect of the property situate in the Gonda District, as already said. In the second place, in the column relating to the name of the

persons against whom execution was being applied for the only name entered is the name of Muhammad Khan and the confessing defendant of those suits. In the third place, the order under consideration rightly and clearly does not decide the merits of the objections which the present plaintiffs had laid before the Court responsible for that order. Indeed the effect of the order is simply this that the objections were premature and uncalled for. This leads clearly to the inference that the right to object would arise at a proper time and in a proper Court. We accordingly think that this was a fit case in which the plaint of the present suit should have been treated as proceedings under s. 47 of the Code of Civil Procedure. As such it could not be entertained by the Munsif into whose Court the plaint was filed. The proper Court was the Court of the Subordinate Judge of Gonda to whose Court the decrees were transferred for execution by the Court at Basti.

We accordingly allow this appeal, set aside the decrees of the Courts below and direct that the plaint of the present suit be returned to the plaintiffs-appellants for the purpose of being presented as an application under s. 47 of the Code of Civil Procedure to the Court of the Subordinate Judge of Gonda. In the matter of costs, we direct that the parties shall bear their own costs all through. The plaintiffs have at every stage of the proceedings until to-day seem to have taken a wrong course of conduct and they are, therefore, not entitled to any costs.

G. H.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 148 OF 1924.

April 28, 1927.

Present:—Sir William Watkins Phillips, Kt., Officiating Chief Justice, and Mr. Justice Srinivasa Aiyangar.

DEVI RAMANUJACHARYULU AND OTHERS—DEFENDANTS NOS. 1 TO 4—

APPELLANTS

versus

ALAPATI SRIRAMULU AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 5—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Sanction by Collector of suit for certain reliefs—Institu-

tion of suit with additional prayers—Suit, whether bad.

Certain worshippers applied for and obtained the sanction of the Collector under s. 92, Civil Procedure Code, for the institution of a suit against a trustee for a scheme and for certain specified reliefs. The plaint when filed included a prayer for rendering of accounts for which sanction had not been given but the said prayer was subsequently withdrawn.

Held, that the suit was not bad *in toto* though the extra relief not covered by the sanction could not be granted. [p. 135, col. 2.]

[Case-law considered.]

The reliefs mentioned in s. 92 of the Civil Procedure Code are not mutually exclusive and a suit is not bad merely because some additional reliefs which are incidental to the main relief for which sanction has been granted are also included in the plaint. [p. 135, col. 1.]

Appeal against the decree of the Court of the Additional Subordinate Judge, Bapatla, in O. S. No. 30 of 1923 (O. S. No. 90 of 1922, Principal Sub-Court, Bapatla).

Mr. T. V. Venkatarama Aiyar, for the Appellants.

Messrs. Ch. Raghava Rao and K. Kameswara Rao, for the Respondents.

JUDGMENT.—This is an appeal against the decree in a suit filed for the removal of the defendants-appellants from the trusteeship of the plaint temple and for the framing of a scheme. The lower Court has ordered the removal of the trustees and framed a scheme. Objection is now taken mainly on the ground that the suit is bad as not being in accordance with the sanction granted to the plaintiffs by the Collector. In that sanction the Collector granted permission to oust the present trustees by filing a scheme suit. The contention for the appellants is that under ss. 92 and 93 of the Civil Procedure Code, under which sections this sanction was granted, the various reliefs mentioned in s. 92 are mutually exclusive, and that when a suit is filed for any one of these reliefs there must be specific sanction to that effect. The logical effect of this argument is that if sanction is given under cl. (g) for settling a scheme no orders could be passed by the Court directing accounts in the future or declaring what portion of the trust property shall be allocated to any particular object, or authorising any part of the trust property to be let etc. But in a scheme for the management of a temple these are almost necessary incidents and certainly probable incidents in the management thereof; consequently it cannot be held that all these reliefs are mutually exclusive when there is no provision to that effect in the section. In the present case sanction was given to

file a scheme suit, namely, a suit, to settle a scheme for the proper management of the plaint temple. In framing such a scheme a Court must undoubtedly provide for some one to manage the institution and in so doing would be appointing a trustee under cl. (b) to s. 92. The appointment of a new trustee is the chief ground of the appellant's complaint for he cannot contend that sanction was not granted for the removal of the defendants themselves. Such a complaint, as shown above, has no force. The only prayer in the suit to which exception can be taken is that which asks the trustees to render an account of their management but that prayer was withdrawn and has not been granted.

Mr. Venkatarama Aiyar argues that that withdrawal is not sufficient to cure the defect but that the suit should have been dismissed *in toto* and relies on several cases in support of this proposition. The first one is *Srinivasa v. Venkata* (1) where it was held that when a sanction had included a claim for damages against the trustees and such a claim had been omitted in the plaint the suit was not within the terms of the sanction. In *Venkatesha Mallia v. Bammampalli Ramayya Hegade* (2) where a sanction had been granted to two persons and one alone sued, it was held that the suit was bad and similarly in *Maddala Bhagavanarayana v. Vadapalli Perumallacharyulu* (3) where two plaintiffs sued out of four to whom sanction had been granted. The principle underlying all these cases is that where it appeared to the Court that if the plaint as presented in Court had been before the authority granting the sanction it was possible that the sanction would not have been accorded to such a plaint that plaint was bad. Here the facts are quite different. The suit is in accordance with the sanction but an additional prayer which has not been sanctioned has been added and subsequently removed. Several similar cases have been cited and we may refer to *Sayad Hussain Miyan v. Collector of Kaira* (4), *Nizam ul-Haq v. Muhammad Ishak* (5) and Appeal No. 373 of 1924 of this Court. In all these cases it was held not that the suit was bad but that the extra reliefs sought for could not be granted but the other prayers

(1) 11 M. 148; 4 Ind. Dec. (N. S.) 103.

(2) 26 Ind. Cas. 202; 33 M. 1192; 27 M. L. J. 241.

(3) 31 Ind. Cas. 236; 29 M. L. J. 231.

(4) 21 B. 257; 11 Ind. Dec. (N. S.) 174.

(5) 51 Ind. Cas. 611; 50 P. W. R. 1919; 144 P. R. 1919.

were allowed. In the present case the lower Court has already disallowed the extra relief and, therefore, its decree is correct.

On the merits of the case it was sought to be argued that the plaint property was the *archaka* service *inam* of the defendants and not the property of the temple. At the time of the *inam* enquiry, statements were taken from various persons and we have the *inam* statement Ex. A and the *inam* register Ex. B. From these two documents it is clear that the *inam* was granted to the temple and not to the *archakas*. At the time of the *inam* enquiry in 1860 the defendants' ancestors were in actual possession of the lands and were parties to the enquiry; when, therefore, the matter was decided they must have known that the lands belonged to the temple and not to them. The defendants have been unable to adduce any evidence to show that they *bona fide* believed that they had a right to the property or that circumstances have changed since 1860. Inasmuch as they have set up their own right as against the temple and also have made alienations of the property it is clear that they have been properly removed from the trusteeship. It is useless for them to contend, even if they were not *archakas*—which is another disqualification for the office of trustee—that they ought to be appointed now. A scheme has been framed by the lower Court and the only objection taken by the appellants is that the word "*fastis*" in cl. 11 is wrong. A perusal of the decree shows that this is a clerical error for "families" and it may be corrected accordingly. There are, however, serious objections to the scheme as framed by the lower Court, i. e., the provisions made in it for the exercise by the Court of superintendence over the temple. It is not the Court on which this duty should fall for it is within the province of the various temple committees appointed throughout the Presidency. Under this scheme, therefore, for the words "the Court" there will be substituted the words "the temple committee having jurisdiction over the suit village" in para. I and in the succeeding paragraphs where the word "Court" occurs the words "the said temple committee" shall be substituted. As a result of this, para. 20 must be struck but and we also think that paras. 18 and 19 must be removed as they confer a right of procedure which is not strictly in accordance with law. Objection has been taken to the appointment

of the three plaintiffs as the new trustees, but the lower Court has apparently exercised its discretion in the matter and we have no materials on which we can say that the discretion has been improperly exercised.

With the above modifications the decree is confirmed and the appeal is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos.

300 AND 642 OF 1925.

August 10, 1927.

Present:—Mr. Justice Cuming and
Mr. Justice Ray.

IN APPEAL No. 300 OF 1925.

RAMANATH BHATTACHARJEE
AND OTHERS—PLAINTIFFS—APPELLANTS
versus

JAGANNATH MONDAL AND OTHERS
—DEFENDANTS—RESPONDENTS.

IN APPEAL No. 642 OF 1925.

KANGALI MONDAL AND OTHERS—
DEFENDANTS—APPELLANTS
versus

RAMANATH BHATTACHARJEE AND
OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 50—Enhancement of rent—Increase in area, proof of—Duty of landlord to show area at inception of tenancy—Confirmatory *kabuliyats*, value of—Purchase of holding by landlord and re-settlement with same tenant—Transfer of tenancy—Tenancy, whether continues.*

In a suit for enhancement of rent a landlord cannot succeed in showing that there has been an increase in area by merely proving that the area under cultivation is in excess of that which is mentioned in a confirmatory *kabuliyat*; he must show what the area was at the inception of the tenancy. [p. 137, col. 2.]

Rajkumar Pratap Sahay v. Ram Lal Singh (1), followed.

Where a landlord purchases a holding at a rent sale and re-settles the land with the same tenant, the continuance of the old tenancy is broken and the presumption under s. 50 of the Bengal Tenancy Act does not apply. [p. 138, col. 1.]

A new tenancy is created when a tenant sells or transfers a portion of his holding and the landlord recognises the transferee, and the presumption under s. 50 of the Bengal Tenancy Act, similarly, ceases to apply. [*ibid.*]

Appeals against the decrees of the Special Judge, Jessore, dated the 22nd November, 1924, modifying those of the Assistant Settlement Officer, Jessore (Kotechandpur), dated the 17th September, 1923.

IN No. 300 OF 1925.

Babu Profulla Kamal Das, for the Appellant,

they have taken in this case and which do not compel me to make such reference. The steps that they have taken are that they have made an application after the filing of their appeal to be allowed to amend their memorandum of appeal so as to make it also an appeal against the final decree. This procedure was suggested by the case of *Kulada Prosad Chowdhury v. Ramanand Patnaik* (1). We grant the application made on behalf of the appellants. Let the memorandum of appeal be so amended that it would be an appeal both as against the final decree as well as against the preliminary decree. Now we propose to deal with the merits.

The only point urged before us in the appeal was a question of limitation. The defendants Nos. 5 to 10 and 25 were alleged to have obtained the interest in the mortgaged property under a paramount title, that is to say, they had purchased in execution of a mortgage prior to that of the plaintiffs. But in the previous suit brought by the prior mortgagees the present mortgagees, who were puisne mortgagees were not made parties. Thereupon the right of the plaintiffs as puisne mortgagees to redeem the prior mortgage was left intact. Although the defendant No. 25 was impleaded in the suit long after the plaintiffs' suit as against the mortgagors was barred by limitation, still the plaintiffs' right to redeem defendant No. 25 was not barred. Therefore, the question of limitation as between the plaintiffs and the appealing defendants does not arise.

There is, however, a very small point with regard to the amount of money which the appealing defendants were held by the Court below to be entitled to on a sale of the mortgaged property. There is no objection by either party as to the form of the decree. The Court below has ordered the sale of all the properties mortgaged to the plaintiff and has allowed the appealing defendants a first charge on the purchase money for the amount of their mortgage debt under the previous mortgage bond. In working out that sum the appellants have been allowed somewhat less than what they might have been entitled to. The Subordinate Judge has only given them a decree for the amount which was sued for in the plaint. But under the decree in their mortgage suit the defendants were allowed

interest at the bond rate of Rs. 1.80 till the date of redemption which was fixed for the 24th August, 1913. The appellants are, therefore, entitled to the interest up to that date on the amount sued for plus the costs and after that date interest on the whole at 6 per cent. per annum till the date of sale which was the 22nd of May, 1915. This sum has been worked out by the learned Vakils for both the parties agreeing to the figure as Rs. 2,400. The decree of the Subordinate Judge must, therefore, be varied to this extent that defendants Nos. 5 to 10 and 25 will get Rs. 2,400 out of the money realised by sale of the mortgaged properties prior to the plaintiffs in this case getting anything out of it.

With this modification this appeal is dismissed. There will be no order as to costs in this appeal.

This, however, will not preclude the appealing defendants or any other defendants from redeeming the plaintiffs' mortgage as directed by the decree of the Subordinate Judge, dated the 24th January, 1924.

Roy, J.—I agree.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 427 OF 1927.

May 5, 1927.

Present:—Justice Sir William Watkins Phillips, Kt.

MAKAM CHANDRAYUDU—PETITIONER
versus

MADASU PEDDA RANGAPPA—
RESPONDENT.

Madras District Municipalities Act (V of 1920)—Election Rules, r. 15—Voting by illiterate voter—Marking by polling officer in presence of candidates or agents, whether illegal.

In regard to marking of votes of illiterate voters, r. 15 of the Rules for the conduct of election to Municipal Councils under the Madras District Municipalities Act does not insist on the absence of the candidates or their agents from the place where the ballot paper is marked by the polling officer and, therefore, the marking by the polling officer in the presence of the candidates or their agents is not illegal.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order, dated the 18th February, 1927, of the District Court of Anantapur, in O. P. No. 44 of 1926.

Mr. P. Siva Rao, for the Petitioner.

Mr. B. Somayya, for the Respondent.

JUDGMENT.—The question that arises

(1) 61 Ind. Cas. 923; 33 O. L. J. 414; 25 O. W. N. 776; 48 C. 1036.

for decision is whether under r. 15 of the Municipal Election Rules an illiterate voting paper must be marked by the polling officer in secret, and not in the presence of the candidates or their agents. In the rules for election to the Local Boards there is a specific provision in the rule corresponding to r. 15 that this paper shall be marked in the presence of the candidates or their agents. There is also a similar provision in the English Electoral Rules. In the Municipal Rules as in the rules for election to the Legislative Council, etc., there is no such provision and r. 15 reads as follows:—

"If the voter is unable to read the ballot paper or to make a cross thereon, and applies for assistance in doing so, the polling officer shall read it for him and, if so required, mark the ballot paper according to the directions of the voter and give it to him to put in the ballot box."

It is contended for the petitioner that there is no direction that the polling officer shall go either to the place set apart for literate voters to record their votes or to some other place where the candidates and their agents are not, and that, therefore, there is no rule prohibiting the marking of the vote in the presence of the candidates. No reason has been put forward for the difference in the two sets of rules for the Local Boards and the Municipal Councils, respectively and, therefore, the matter resolves itself into a question of the interpretation of r. 15. There is no provision in the rule for the polling officer going apart or for the withdrawal of the candidate and their agents. No doubt secrecy as far as possible is the object of the rules and it might be considered that some such action as above should be adopted by the polling officer, but it might be remembered that in the case of illiterate voters there cannot be absolute secrecy as the polling officer must know for which candidate the vote is to be recorded. It is also to be noted that cl. 3 of r. 15 says that the marking of a ballot paper by the polling officer shall not be questioned "subsequently" on the ground that it was not in accordance with the voter's directions. The word "subsequently" may possibly imply that at the time of marking it can be questioned, but that is only a possible inference. I am, however, satisfied that there is no provision in the rules insisting on the absence of the candidates or their agents from the place where the ballot paper is

marked by the polling officer and, therefore, the marking in the presence of the candidates cannot be said to be a violation of any of the rules. I must, therefore, allow this petition and as it is said that there are other objections which have not been disposed of by the learned District Judge, the petition will have to be referred back to him for disposal on the other points.

I may observe that the District Judge after finding that the paper had not been marked in the proper manner omitted to record a finding on the question of whether this non-compliance with the rules had affected the result of the election as required in r. 11, cl. (c) of the rules for decision of disputes.

The respondent will pay the petitioner's costs.

V. N. V.

Petition allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 577 OF 1927.

September 27, 1927.

Present:—Mr. Justice Addison.

SMAIL AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

GAJJAN—DEFENDANT—RESPONDENT.

Adverse possession—Fallow land—Possession follows title.

Until 15th November, 1912, the land in dispute was *shamilat* land in the possession of the defendant. In July 1913 the land was partitioned and fell to the share of the plaintiff. The defendant did not sow any crop in 1913. After the 15th November 1913 the defendant was again in possession. A suit for possession was brought by the plaintiff on 9th November, 1925:

Held, that the suit was within time as the defendant's adverse possession must be held to have commenced only from 15th November, 1913.

In case of fallow land possession follows title.

Second appeal against the decree of the District Judge, Gujranwala, dated the 22nd December, 1926, reversing that of the Third Class Sub Judge, Hafizabad, dated the 12th April, 1926.

Mr. Mukand Lal, for the Appellants.

Mr. L. Saunderson, for the Respondent.

JUDGMENT.—On the 9th November, 1925, the plaintiffs sued the defendant for possession of 25 *kanals* 11 *marlas* of land on the allegation that they were the

owners and that the defendant had taken forcible possession four or five years before suit. The defendant replied that the land was his and he had been in adverse possession for some 40 years. The trial Court held that the land was *shamilat* land which was partitioned in 1913 when the land in suit fell to the share of the plaintiffs. This finding is not challenged and there is no doubt that title is in the plaintiffs. The trial Court further held that the suit was within time as the mutation of partition stated that the partition was to take effect from *Kharif* 1913. In the view of the trial Court this meant that the partition was to take effect any time during the *kharif* harvest of 1913 that is, up to the 15th of November, 1913. As the suit was brought on the 5th of November, 1925, it was held that it was within time. The plaintiffs' suit was, therefore, decreed. On appeal the learned District Judge held that the land was partitioned according to the meaning of the final order in the partition case as from the beginning of the *Kharif* of 1913. The *kharif* crop is sown in July. The lower Appellate Court goes on to state that if the defendant sowed this crop his possession became adverse from the time he sowed it and that the limitation started to run from the time of sowing the crop and not from the time of cutting it. It, therefore, held that the suit was barred by time on the assumption that the *kharif* crop was sown some time in July, 1913. Against this decision this second appeal has been preferred.

The only evidence on the record consists of the statement of the *patwari* who also proved certain copies from the *khasra girdawari*. It is clear from this evidence that there was no crop during the *Rabi* of 1913 and the *Kharif* of 1913. That means that the land was lying fallow from the 15th of November, 1912 to the 15th of November 1913. Before the 15th of November, 1912, the land was *shamilat* land in the possession of the defendant who, however, would be considered to be holding on behalf of all the co-sharers. After the 15th of November, 1913, the defendant again was in possession. In the meantime about July 1913 exclusive title had accrued to the plaintiffs. In these circumstances it seems to me that it must be held that the plaintiffs were in possession up to the 15th of November, 1913, as up

to that time from the date when the partition took effect title was in the plaintiffs and the land was fallow. It was not till the 15th of November, 1913, that it can be said that the defendant was exclusively in possession of the land holding adversely to the plaintiffs. The suit is, therefore, within limitation and I accept the appeal and decree the plaintiffs' suit with costs throughout.

R. L.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1411 OF 1924.

March 23, 1927.

Present :—Mr. Justice Srinivasa Iyengar.
VENKATARAMAN, MINOR, BY NEXT FRIEND
SESHAPPIER—PLAINTIFF—APPELLANT
versus

PONNUSAMI PADAYACHI AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 51—Voidable lease by guardian—Repudiation by third person for minor, whether effective—Alienee's right to improvements made bona fide.

A transaction entered into by the guardian of a minor, cannot be repudiated by a third person on behalf of the minor unless he takes proceedings in Court on behalf of the minor and is allowed by the Court to act as next friend. [p. 132, col. 1.]

Where an alienation made by the guardian of a minor is set aside, the purchaser is entitled to reimbursement of the expenses *bona fide* incurred by him in improving the property before he had any legal and valid notice of the claim on behalf of the minor to set aside the transfer. [p. 132, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Tiruvalur, in A. S. No. 9 of 1924 (A. S. No. 163 of 1923, District Court, East Tanjore) preferred against that of the Court of the District Munsif, Tiruvalur, in O. S. No. 582 of 1921.

Mr. K. Rajah Aiyar, for the Appellant.
Mr. A. Sundaram, for the Respondents.

JUDGMENT.—The only point that arises in this second appeal has reference to the amount allowed to the defendant as the value of the improvements made by him the payment of which has been made a condition precedent before the plaintiff is allowed to recover possession of the property. The amount was allowed for the casuarina plants in the land in question. The lease granted by the mother was for

10 years. It is in evidence that even before admitted that he is not in a position to show that any portion of the expenditure was really incurred after the service of summons in the suit. If so, it follows that all the amount allowed to the defendant must have been incurred not only before the transaction was set aside but even before he had any legal notice of the claim on behalf of the plaintiff repudiating the same. There is no question about the amount itself. In these circumstances I do not see any reason or warrant for depriving the defendant who incurred the expenditure on the faith of the transaction. I think the lower Appellate Court was right in its judgment. The second appeal fails and must be dismissed.

I might add one word with regard to the order for costs which was referred to by Mr. Rajah Iyer and that was an order for costs to be paid personally by the next friend in the lower Appellate Court. Mr. Rajah Iyer wished to contend that the Court had no power to direct the cost to be paid by the next friend personally. He has, however, cited no authority for the position. I am aware that it has been the practice of Courts to direct in proper cases that the costs of a suit should be paid by the next friend of the minor plaintiff personally. I say in proper cases because it depends upon the discretion of the Court whether the Court considers the action or proceeding taken by the next friend on behalf of the minor plaintiff to be *bona fide* or prompted by any other consideration. No question of the exercise of discretion itself has been raised before me. It has been argued on the question of the power of the Court itself. If the Court should have no such power it follows that it would be within the power of any man passing in the street to exploit and ruin the estate of a minor by merely seeking to file a suit for and in the name of the minor and saying that the costs of the other side ought to be paid or directed to be paid from the estate of the minor. I should be surprised if the Legislature intended any such consequence. The costs of the suit should always be within the discretion of the Court and when the Court is satisfied that a certain proceeding was such that the minor's estate should not be made liable in respect of the same but should be paid by the next friend personally the Court has the right to do so. Whether the next friend has any right of reimbursement in

10 years. It is in evidence that even before admitted that he is not in a position to show that any portion of the expenditure was really incurred after the service of summons in the suit. If so, it follows that all the amount allowed to the defendant must have been incurred not only before the transaction was set aside but even before he had any legal notice of the claim on behalf of the plaintiff repudiating the same. There is no question about the amount itself. In these circumstances I do not see any reason or warrant for depriving the defendant who incurred the expenditure on the faith of the transaction. I think the lower Appellate Court was right in its judgment. The second appeal fails and must be dismissed.

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LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 92 OF 1927.
(FORMERLY CIVIL APPEAL No. 2592 OF 1926).

February 1, 1927.

Present:—Mr. Justice Addison.

THE COURT OF WARDS FOR THE ESTATE
OF Sodhi RICHHPAL SINGH—

JUDGMENT-DEBTOR--PETITIONER

versus

DEVIDASS—DECREE HOLDER—RESPONDENT.

Punjab Court of Wards Act (II of 1903), s. 31—Assumption of management by Court of Wards—Decree against ward—Deputy Commissioner's certificate, necessity of, to proceed with execution—Execution without certificate—Jurisdiction—Revision—Punjab Courts Act (VI of 1918), s. 44.

Execution of a decree against a person whose estate has come under the management of Court of Wards under the provisions of the Punjab Court of Wards Act must be stayed until the decree-holder files a certificate from the Deputy Commissioner that the claim has been notified in accordance with s. 26 of the Act. Where a Court proceeds with the execution in the absence of such certificate it acts without jurisdiction and the proceedings are liable to be set aside in revision. [p. 141, col. 2.]

Petition for revision of an order of the Senior Sub-Judge, Ferozepore, dated the 25th August, 1926.

Mr. C. H. Carden Noad, for the Petitioner.

Mr. Mulk Raj Chhibbar, for the Respondent.

JUDGMENT.—The estate of Sodhi Richhpal Singh came under the management of the Court of Wards under ss. 9 and 10 of Act II of 1903 on the 18th March, 1926. At that time there was an outstanding decree for Rs. 15,000 with costs against the ward. The decree-holder had, on the 13th December, 1925, i.e., prior to the estate coming under the Court of Wards, applied for execution and a certain house was attached. Though it is alleged to be a very valuable property, it was knocked down to the decree-holder for Rs. 400 at the auction sale which took place on the 6th July, 1926, i.e. long after the estate had come under the Court of Wards. On the 9th August, 1926, i.e., 33 days after the date of the auction sale, the Manager of the Court of Wards appeared before the Executing Court and presented an application that all the proceedings were void as the estate was in the charge of the Court of Wards and it was necessary for the decree-holder to inform the Deputy Commissioner before he could proceed to execute his decree. The Executing Court on the 25th August, 1926, treated this as an application objecting to the sale

and held it to be time-barred as it had been presented more than thirty days after the sale. Consequently the Executing Court confirmed the sale on the above date. Against this order this application for revision has been preferred.

It is obvious that there was no objection to the sale but a general objection by the Manager of the Court of Wards that the Executing Court has no jurisdiction to go on. This being the case, this is not so much an appeal as a revision against the order of the Executing Court, dated 25th of August, 1926, on the ground that it acted without jurisdiction in going on with the execution proceedings when it had been brought to its knowledge that such proceedings were barred under Act II of 1903.

It was admitted before me that under the provisions of Chap. VI of Punjab Act II of 1903 it was necessary for the decree-holder after the 18th March, 1926, to obtain a certificate from the Deputy Commissioner before he could proceed any further with his execution. It is true that it is stated in s. 31 (1) that the Deputy Commissioner should not disallow any claim based upon a decree, but from s. 31 (2) it follows that, after the 18th March, 1926, all suits and all proceedings in execution of any decree against the ward should have been stayed until the plaintiff or decree-holder filed certificate that the claim had been notified in accordance with s. 26. In the present case the Deputy Commissioner was never approached and no certificate was ever obtained. It follows that all the proceedings after the 18th March, 1926, were without jurisdiction.

It was argued on behalf of the respondent that proceedings could now be stayed by me in order to allow him to obtain the necessary certificate. This is, however, impossible as the proceedings have ended. Though the Deputy Commissioner may be compelled under s. 31 (1) of the Act to allow a claim based upon a decree, still the application for the certificate would have put him on his guard and allowed him to make arrangements for paying off the decree or coming to a settlement with the decree-holder. He had no such opportunity in the present case. There is no doubt that the Executing Court had no jurisdiction to go on with the execution after the 18th March, 1926. I, therefore, accept this petition and set aside all the proceedings

of the lower Court regarding the sale of the house in question. I, however, maintain the attachment upon the house in question. But further proceedings for the sale of the house cannot be taken until the decree-holder files a certificate under s. 31 (2) of Punjab Act II of 1903. The petitioner will have his costs here.

R. L.

Petition accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1349 OF 1924.

April 25, 1927.

Present:—Mr. Justice Devadoss and
Mr. Justice Jackson.

BATCHU PERRAJU—PLAINTIFF—
APPELLANT

versus

BACHU VENKATARATNAM AND

OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXVIII,
r. 1—Attachment before judgment of property of minor
defendant, without guardian, legality of.*

A conditional order which simply prevents the property involved in a suit against a minor from being alienated pending the disposal of an application for the appointment of a guardian cannot be said to be invalid merely because the guardian proposed subsequently comes and states he is unwilling to act: [p. 143, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 53 of 1923, presented against that of the Court of the Additional District Munsif, Cocanada, in O. S. No. 171 of 1923.

Mr. P. Somasundaram, for the Appellant.

Mr. B. Somayya, for the Respondent.

JUDGMENT.—The question in this second appeal is whether the property of defendants Nos. 3 to 5 purchased by the plaintiff was subject to the attachment before judgment ordered in O. S. No. 128 of 1919. That was a suit brought by the 1st defendant herein against defendants Nos. 3 to 5 and their maternal uncle for a sum of money said to be due to the 1st defendant. The plaint was presented to the Court on the 19th June, 1918. An application was made for attachment before judgment on the 17th July, 1918. The District Munsif ordered conditional attachment on 17th July, 1918, and the conditional order of attachment was made absolute on 13th August, 1918. Defendants Nos. 3 to 5 were minors at that time and the 1st defendant

their maternal uncle was proposed as their guardian. He seems to have informed the Court before 14th August, 1918, that he was unwilling to act whereupon the 1st defendant (plaintiff in that suit) proposed their mother, Ramalakshmi, as guardian of the minor defendants. That application was supported by an affidavit of the same date. In the affidavit it is stated: "The 1st defendant has refused to act as guardian." It is quite clear, therefore, that on the date on which the order for attachment was made the minors were not represented by a proper guardian. The question is whether the order for attachment was good in the absence of a proper guardian to represent the minors in the suit? The Subordinate Judge has held that there was a proper attachment and the plaintiff having purchased the property subject to the attachment he is not entitled to treat the property as if it was not subject to the attachment. The contention of Mr. Somasundaram is that as there was no proper guardian for the minors at that time, therefore, the minors could not be properly represented and the order against them could not be valid. No doubt an order made against minors who are not represented by a proper guardian would be infructuous but in this case there is the fact, that the order for conditional attachment was made on 17th July, 1918, and at that time the uncle was proposed to be the guardian. Subsequently he came and expressed his unwillingness to act as guardian and the question is whether the conditional attachment is a good attachment or a bad attachment. It is usual for a plaintiff to file an application along with the plaint for the attachment of the property of the defendants and if there are minors in the suit to propose some person as their guardian. If afterwards the guardian is found unwilling to act the Court appoints a proper guardian. But the conditional attachment made in the hope that the proposed guardian would act cannot be said to be invalid by reason of the proposed guardian being unwilling to act. The Court should see before making the conditional order absolute that a guardian is appointed to properly represent the minors as the guardian might represent to the Court that the plaintiff has not made out a good case for attachment before judgment or that he is willing to give security for any decree that may be

passed in the suit, and, therefore, the attachment before judgment is not necessary. Therefore an order absolute for attachment before judgment could not be made in the absence of a proper guardian. But a conditional order that simply prevents the property from alienation by the defendants pending the disposal of the application cannot be said to be invalid merely because the guardian proposed comes and says he is unwilling to act.

In the view we take the conditional order for attachment still subsists. The fact that the petition has been disposed of would not in any way affect the question of the propriety and the validity of the conditional attachment, but as there is no order absolute as regards the attachment against the minor defendants, the proper course would be for the District Munsif's Court to treat the application as if on file and proceed with it according to law. If the Munsif finds that the plaintiff is able to make out a case in the circumstances of the case existing in July, 1918, then he should make the conditional order absolute but if he finds that the circumstances existing in July, 1918, would not justify an order for attachment before judgment, he should dismiss the petition. If he makes the order absolute then the property would be subject to the attachment order so made. The appellant herein will be entitled to intervene in the proceedings to show that the conditional order for attachment should not be made absolute. The appellant is entitled to the costs of this second appeal.

V. N. V.

*Appeal allowed.***CALCUTTA HIGH COURT.**

CIVIL REVISION No. 474 OF 1927.

June 22, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Costello.

RE FAZOO MIA—PETITIONER

versus

SULTAN AHMED CHOWDHURY—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89
—Non-transferable holding—Sale for arrears of rent
—Purchase by landlord—Purchaser of part of holding, whether entitled to deposit money and avoid sale.

The purchaser of a part of a non-transferable holding is entitled to have a sale of the holding for arrears of rent set aside on making a deposit under O. XXI, r. 89 of the Code of Civil Procedure, even though the holding has been purchased by the landlord himself. [p. 144, col. 1.]

Omar Ali Majhi v. Moonshi Basirudeen Ahmad (1), followed.

Rule against an order of the District Judge, Chittagong, dated the 11th November, 1926, made in an appeal from the decision of the Munsif, North Ronjan, dated the 15th May, 1926.

Babus *Dhirendra Lal Kastgir* and *Phanindra Nath De*, for the Petitioner.

Mr. M. A. K. *Fazlal Huq* and Babu *Jahnabi Charan Das Gupta*, for the Opposite Party.

JUDGMENT.

Rankin, C. J.—This is an application by a decree-holder who is at the same time the auction-purchaser of a non-transferable occupancy holding and the landlord. The landlord obtained a rent decree and has purchased the holding at the execution sale. Thereupon the opposite party who claimed to have purchased the entire holding from the tenant, but who has been found by both the Courts below to have purchased a part only of the holding from the tenant, seeks to exercise the right given by r. 89 of O. XXI of the Code of Civil Procedure. The Courts below have both held that he is entitled to exercise that right and the landlord applies in revision to us to hold that the purchase of a part of a non-transferable occupancy holding is not within the language of r. 89. The matter is a very important one and it is difficult not to have recourse to a comparison with s. 170 of the Bengal Tenancy Act. At first the course of decisions under s. 170 appears to have tended in favour of a purchaser of the non-transferable *jote*, but it is now settled by decisions that such a purchaser does not come within the description in sub-s. (3) of s. 170 of "any person having in the tenure or holding any interest voidable on the sale." Now the language of that section is different from the language of r. 89 which speaks of a person "either owning such property or holding an interest therein by virtue of a title acquired before such sale." It is now settled as, I have said, that such a person as the opposite party before us does not hold an interest voidable on the sale. That seems to be reasonably clear upon the wording of sub-s. (3), because if the sale is

to stand at all it is quite clear that the transfer to the previous purchaser cannot subsist with it. An interest voidable on the sale means an interest the existence of which is compatible with the auction-purchase, though a qualification of it, as for example, an encumbrance. We have, however, to apply r. 89 and we find that both the Courts below have proceeded upon the decision in the case of *Omar Ali Majhi v. Moonshi Basirudeen Ahmad* (1), where it was definitely laid down under s. 310-A of the Code of Civil Procedure of 1882 that such a person as the opposite party before us, has the right to have a sale set aside on paying the money prescribed as a deposit under s. 310-A of the previous Code. I am far from saying that the question is an easy one. To my mind there are three governing principles. In the first place, it does not seem to me to matter for purposes of r. 89, whether the purchaser is a purchaser of a part or of the whole of a non-transferable occupancy *jote*. In the second place, it seems to me unreasonable that any difference should be operated by the fact that the landlord happens to be the auction-purchaser himself. It is anomalous that the landlord by using the machinery of the Code should be able to give a better title to himself as an auction-purchaser than he could have given in the same way to a third party auction-purchaser.

The other matter that seems to me to govern the consideration of this question is this:—If the withdrawal of the deposit made under r. 89 is to mean that the landlord has recognised the depositor as tenant of this non-transferable occupancy *jote* then it does seem anomalous that such a person as the opposite party here should have the right to make the deposit. It clearly cannot be the law that the landlord by the machinery of r. 89 can be obliged either to go without his rent or to recognise the transferee whom he does not wish to recognise in the case of a non-transferable *jote*.

There are other difficulties and serious difficulties in the question before us and when I find that as far back as 1902 this question was decided by a Division Bench in favour of a purchaser of a portion of a non-transferable occupancy holding, I am obliged to follow that ruling unless I can

be persuaded that it is a ruling from which this Court ought to differ. In that case it would be our duty to refer the matter—and a very important matter—to a Full Bench for decision. On the whole I am not prepared to say that I differ from the ruling laid down in *Omar Ali Majhi v. Moonshi Basirudeen Ahmad* (1). I doubt extremely whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognise this tenant but, whether it be true or not, it is perhaps somewhat late in the day to abridge still further the rights of a transferee of a non-transferable occupancy *jote* in Bengal. It would be putting back the clock to overrule the decision which is more than 20 years old and to hold that the interest which such a person as the opposite party before us has obtained from the tenant is no interest at all or that merely because the landlord is the auction-purchaser he cannot exercise the right under r. 89. On the whole I think this is a case where we ought to obey the principle of "*stare decisis*."

In my judgment this Rule should be discharged with costs: hearing-fee two gold mohurs

Costello, J.—I agree and for the same reasons.

A. N. A.

Rule discharged.

MADRAS HIGH COURT. FULL BENCH.

ORIGINAL SIDE APPEAL No. 99 of 1926.

April 22, 1927.

Present:—Justice Sir William Watkins Phillips, Kt., Mr. Justice Ramesam and Mr. Justice Wallace.

In the matter of THE INDIAN SPECIFIC RELIEF ACT AND THE MADRAS CITY MUNICIPALITIES ACT.

In the matter of THE ELECTION OF A COUNCILLOR FOR 29TH ROYAPETTAH DIVISION, MADRAS.

THE COMMISSIONER, CORPORATION OF MADRAS—APPELLANT

versus

T. EKAMBARA NAICKER AND ANOTHER—RESPONDENTS.

Madras City Municipal Act (IV of 1919), s. 55 (2)—Rules for conduct of elections—Power of Government-in-Council to fix date of election—Government of India Act, 1919 (9 & 10 Geo. V, Ch. 101), s. 49—Notification by Department of Local Self

(1) 7 C. L. J. 292.

Babus Mukunda Behari Mullik and Biraj Mohan Majumdar, for the Respondent.

IN No. 642 OF 1925.

Babu Mukunda Behari Mullik, for the Appellants.

- Babu Profulla Kamal Das, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs who are the appellants in this Court sought to enhance the rents of some 17 tenants. These persons were holding separate lands separately under the landlords. They sought to enhance the rent first on the ground of rise in the price of the staple food crops, and secondly, they asked for additional rent for additional area on the ground that the tenants were holding more lands than what had been settled with them. What practically amounts to 17 suits have been tried together as a single suit. The inconvenience of this procedure is only too obvious and it is quite possible that the plaintiffs have suffered from having adopted this procedure. Be that as it may, the law allows this procedure to be adopted and the plaintiffs having deliberately adopted this procedure can hardly now complain.

The Assistant Settlement Officer dismissed the suit on both grounds. He would seem to hold that the *jamias* were *mokarrari* ones being held at a fixed rate of rent from the time of the Permanent Settlement and also that the landlords had failed to prove that there had been any increase in the area. The landlords-plaintiffs appealed to the District Judge. With regard to what I may describe as 4 *khatians*, namely, Nos. 14, 18, 21 and 32 he decreed the appeal so far as it concerned the claim to enhancement of rent on the ground of rise in the price of the staple food crops. With regard to the claim for additional rent for additional area he dismissed the appeal as regards these *khatian* numbers also. With regard to the other 13 *khatians* he dismissed the appeal.

The plaintiffs have appealed to this Court. They contend that as regards *khatians* Nos. 16, 24 and 19 it is quite clear from the construction of the *kabuliyats* that these *kabuliyats* are not confirmatory as held by the learned District Judge and they further argue with regard to all the *khatians* that the lower Appellate Court was wrong

in holding that the landlords having failed to prove the original area on which the present rent was based had failed to prove that there had been any increase in area. They would seem to contend that there were certain *kabuliyats* and in these *kabuliyats* certain areas were stated and these *kabuliyats* formed the basis of the contract, that it must be taken that the area as given in these *kabuliyats* was the amount of lands for which the defendants agreed to pay the rent mentioned in the *kabuliyat* and, therefore, it was sufficient for them to show that the present area was much larger than the area given in these *kabuliyats*. The simple answer to this contention is this—the landlords in order to succeed in showing that there had been an increase in area were bound to prove what was the area of the tenancy at the time of its inception. This is the principle laid down in the case of *Rajkumar Pratap Sahay v. Ram Lal Singh* (1). The *kabuliyats* in these cases do not really form the contract on which the tenancies are based. They are really only confirmatory of the former contract and nothing more. It cannot, therefore, be said that the defendants having agreed in these *kabuliyats* to pay so much rent for a certain area stated in these *kabuliyats* it would be sufficient for the landlords to show that the present area varies from that area. As I have stated these *kabuliyats* being only confirmatory and not the original contract it is necessary for the landlords to show as is laid down in the case of *Raj Kumar Pratap Sahay v. Ram Lal Singh* (1) what was the area at the inception of the tenancy. We are not prepared to interfere with the finding of the learned Judge on this point that the landlords having failed to prove what the original area was on which the present rent was based they were not entitled to additional rent for additional area.

The learned Vakil for the appellants has then specifically argued with regard to *khatians* Nos. 16, 24 and 19, and he argues that on proper construction of the *kabuliyat* in *khatian* No. 16 there has been a change of rent. In this *kabuliyat* it is stated that the original rent was Rs. 29-4-0 and that the defendant now pays Rs. 29, four annas being kept in *suspense* or *hajat*. In other words the rent is nearly the same, namely, Rs. 29-4. Four annas

(1) 5 C. L. J. 538.

out of this rent is kept in suspense and it is open to the landlord at any time to insist upon the payment of this four annas. In other words, the rent is Rs. 29 4 0. There is really no change in the rate of rent in this *khatian*. This *kabuliyat*, therefore, does not prove that there has been any change in the rate of rent so far as *khatian* No. 16 is concerned.

With regard to *khatian* No. 24 the position would appear to be this the landlords purchased it at a rent sale and after the sale he re-settled the land with the same tenant. The learned Vakil argues that in this case there has been a break in the continuity of the tenancy, that although the land was settled again with the same tenant he cannot be considered as successor-in-interest of himself. There has been a break because his present tenancy is a new tenancy although it has been settled with the same tenant at the same rate of rent. This contention, we think, is sound. It is quite clear that the landlords having purchased it at a rent sale were entitled to the *khass* possession of the tenancy of the former tenant. It was open to them to have settled it at any rate they chose. In our view this constitutes a new tenancy and the presumption under s. 50 of the Bengal Tenancy Act does not apply. As regards *khatian* No. 24 the appeal will be decreed and the case will be remanded to the Court of first instance to determine how much, if any, increase the landlords are entitled to for the rise in the price of the staple food crops.

With regard to *khatian* No. 19 the position would appear to be this. The original holder sold or transferred a half of his tenancy. The landlord recognized the transferee as his tenant. It seems to us that in this case a new tenancy was created and, therefore, presumption under s. 50 of the Bengal Tenancy Act does not apply and the landlords in this case are entitled to an increase on the ground of rise in the price of the staple food crops. *Khatian* No. 19, therefore, must be remanded to the Court of first instance to be determined how much if any increase of rent the landlords are entitled to for rise in the price of the staple food crops. The appeal with regard to *khatians* Nos. 19 and 24 is decreed and the costs will abide the result—hearing-fee one gold *mohur*.

The appeal with regard to the other

khatian numbers will stand dismissed with costs. Hearing-fee three gold *mohurs*.

Appeal No. 642 of 1926 is not pressed and is dismissed with costs. Hearing-fee one gold *mohur*.

Ray, J.—I agree with the conclusion arrived at by my learned brother and the orders he has passed.

A.N.A.

Decreed accordingly.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 332 OF 1925.

July 21, 1927.

Present:—Mr. Justice Madhavan Nair
and Mr. Justice Curgenven.

VELUSWAMI NAICKEN—DEFENDANT
—APPELLANT

versus

DHANAKOTTI BALASUBRAMANIA-
CHETTIAR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 57, 66—Sale proclamation—Omission to mention income, effect of—Execution petition "closed"—Attachment, whether terminates.

The omission to specify in a sale proclamation the income of the properties proclaimed for sale does not necessarily render the proclamation defective. [p. 139, col. 1.]

Under O. XXI, r. 57, Civil Procedure Code, an attachment of properties made in execution of a decree terminates only on the dismissal of the execution application by reason of the default of the decree-holder. [p. 139, col. 2.]

Where a decree-holder omitted to mention the existence of an encumbrance in an application for sale and the Court 'closed' the petition directing that the petitioner may file a fresh petition containing such information:

Held, that the petition could not be held to have been dismissed and that the attachment did not, therefore, terminate under O. XXI, r. 57, Civil Procedure Code. [*ibid.*]

Appeal against an order of the Court of the Subordinate Judge, Coimbatore, in E. A. No. 77 of 1925, in E. P. R. No. 241 of 1924; in O. S. No. 20 of 1918, dated the 13th August, 1925.

Mr. S. T. Srinivasa Gopalachariar, for the Appellants.

Mr. T. M. Krishnaswami Iyer, for the Respondent.

JUDGMENT.—This appeal arises out of an application by the judgment-debtor in O. S. No. 20 of 1919 on the file of the Subordinate Judge of Coimbatore to set aside the sale in execution of the decree in that suit, under O. XXI, r. 90, Civil Procedure Code. Various irregularities alleged to vitiate the sale have been brought to our

notice by the learned Counsel for the appellants, but we are satisfied that there is no substance in any one of them.

It was stated that the sale proclamation was settled in the absence of the judgment-debtor. The facts show that the notice for the settlement of the sale proclamation was served on the appellant, and in it, it was stated that the sale proclamation would be settled on the 25th October, 1924. On that day, he did not go before the Court. The proclamation, as a matter of fact, was not settled on that day but the consideration of the question was adjourned to the 6th of November, 1924. It was again adjourned to the 19th January, 1925. If the sale proclamation was settled in the absence of the judgment-debtor, it was due to his own fault, because he did not present himself in Court on the 25th October, 1924. If he had done so, he would have known the precise date when it was intended to settle the sale proclamation. We will now consider whether the proclamation was defective or the sale was held contravening any of the provisions of law.

It was urged that in the sale proclamation the decree holder did not make any mention of the income accruing from the properties. We have not been referred to any rule of law or procedure which makes it incumbent on the decree-holder to specify in the sale proclamation the income of the properties, though it would be very useful for the intending bidders if the income is mentioned. Very often the income of the properties put up for sale is mentioned in the sale proclamation but the omission to mention it does not necessarily make the sale proclamation defective.

The next ground which has been very strongly pressed before us was that the properties have been undervalued, that they were sold in the absence of a sufficient number of bidders and that they were purchased by the decree-holder himself paying only small sums over the upset price mentioned in the sale proclamation. The properties were sold in 5 lots of which the first three lots consisted of encumbered properties, the 4th and 5th lots being unencumbered ones. It is true that the decree-holder purchased these encumbered properties paying only small sums in addition to the upset price. But this was not due to any fraudulent conduct on his own part. As pointed out by the learned Counsel for the respondents, at the time of the sale

these items were subject to a mortgage of about Rs. 13,000. That probably was one of the reasons why the properties did not fetch any high value. It is true there were only two or three independent bidders, but this again, has not been shown to be due to any conduct on the part of the decree-holder. The evidence shows that the sale proclamation was duly published in the locality and tom-toms were beaten and the Amin sent a return to the effect that everything that is usually done has been done in this case. It very often happens that only persons living in the neighbourhood of the properties sold appear for making bids at auction-sales and when they find that the properties are encumbered, they do not come forward with high bids. The present case seems to be one of such instances. Items Nos. 4 and 5 were unencumbered properties and we cannot say that the evidence shows that they were sold for a low price. In these circumstances the argument that the properties were sold for a very low price and were purchased by the decree-holder himself does not carry much strength.

The last argument was, that at the time of sale there was no attachment in existence. The point was not very seriously pressed by Mr. Srinivasa Gopalachariar because the facts show that it is not possible to urge the point with any force. In the execution petition filed prior to the present one, the decree-holder omitted to mention the existence of an encumbrance and the Court ordered that "the petitioner may file fresh petition for sale giving the amount due to him." So, the petition then pending was "closed" and the present petition was filed by the decree-holder. In these circumstances there can be no doubt that the present application is only a continuation of the prior application and there has not been any termination of the attachment. The order 'petition closed' does not in this case mean that the petition was dismissed. There are no circumstances to make O. XXI, r. 57, Civil Procedure Code, applicable; there has been no dismissal of the prior application by the default of the decree-holder. So this petition also falls to the ground.

It has not been proved that the sale held was irregular and that there was any substantial injury resulting from it to the judgment-debtor. We must, therefore, dismiss the appeal.

In passing, we may observe that an ap-

plication was filed by the judgment-debtor on the 16th January, 1925, to issue a fresh proclamation making various allegations. The learned Judge accepted that application, issued notice to the other side but proceeded with the sale and concluded it on the 19th without disposing of this application. We must observe that it would have been more satisfactory in the circumstances if the learned Judge disposed of the application before holding the sale. One or two mis-statements of fact contained in the judgment were brought to our notice by the learned Counsel for the appellants, but we have not discussed them in the judgment as we are satisfied that they do not affect the disposal of the case on the merits. We dismiss the appeal with costs.

V.N.V.

Appeal dismissed.

A.N.A.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1506 TO 1530
OF 1925.

April 20, 1927.

Present :—Mr. Justice Devadoss and
Mr. Justice Jackson.

KALIAPPA NADAR AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MUTHU VYAIJA THUMBAYASAMI
CHUM BICHI NAICKER AVERGAL—

DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 112—Tender of patta to heir of deceased pattadar with name of deceased pattadar, whether bad—Persons with joint right—Right of some alone to sue.

In the case of a ryot coming under the Madras Estates Land Act the heir stands in the shoes of the ryot and is entitled to bring a suit under s. 112 of the Act and a tender of patta made to the heir with the name of the deceased pattadar is not, therefore, bad.

Persons who have got a joint right should join in an action to assert that right and it is not open to one or two persons who have a joint right along with others to bring a suit for the assertion of that right on behalf of all without joining them as defendants.

Second appeals against the decrees of the District Court, Madura, in A. S. Nos. 36 of 1924, 561 of 1923, 41 to 44, 46 to 53, 57 to 61, 66, to 68, 70, 71, 77, 78, 82 to 84, 90, 102 and 103 of 1924, preferred against those of the Court of the Deputy Collector, Usilampatti Division, in S. S. Nos. 1381, 1472, 1391, 1394, 1395; 1400, 1415, 1428,

1427, 1429, 1431, 1433, 1419, 1451, 1453, 1457, 1459, 1473, 1479, 1494, 1495, 1522, 1533, 1428 and 1477 of 1922 respectively.

Mr. Watrap S. Subramania Aiyar, for the Appellants.

Messrs. B. Sitarama Rao, L. Venkatanarasiah and R. Rama Subba Aiyar, for the Respondent.

JUDGMENT.—There is no point of law in this batch of second appeals except in the few cases noticed below. In A. S. No. 561 of 1923 the *pattadar* died in February, 1921, and the *patta* was prepared in May 1921. It is urged by Mr. Subramania Aiyar, for the appellant [that the tender of *patta* with the name of the deceased *ryot* is not a proper tender of a proper *patta*. But the tender was made on the daughter who was the heir of the *pattadar*. In the case of a *ryot* coming under the Madras Estates Land Act the heir stands in the shoes of the *ryot* and is entitled to bring a suit under s. 112. That being so, there is no force in the argument that the tender made to the heir with the name of the deceased *pattadar* is bad.

With regard to S. A. Nos. 1515, 1520 and 1526, it is urged that the learned District Judge was wrong in dismissing the suit on the ground that all the persons interested in the holding did not join in the suit. It is an elementary principle of law that persons who have got a joint right should join in an action to assert that right and it is not open to one or two persons who have a joint right along with others to bring a suit for the assertion of that right on behalf of all without joining them as defendants. The judgment of the learned District Judge is correct on this point.

With regard to S. A. No. 1511, there is no question of law.

The only other point urged is with regard to Vakil's fee in the lower Court. We think the District Judge was right in allowing Rs. 5 as Vakil's fee in each case. In this Court we allow a consolidated fee of Rs. 150 for the whole batch.

The second appeals are dismissed with costs.

V. N. V.

Appeals dismissed.

Government, validity of—Evidence Act (I of 1872), ss. 78, 114—Presumption as to regularity of official acts—Rules for conduct of Municipal Election, r. 6—Schedule of valid nominations—Proceedings before election Judge questioning Returning Officer's order—Original nomination schedule, whether available for election on subsequent date.

Under the rules for the conduct of elections under s. 55 of the Madras City Municipal Act, a notification fixing the date of election has to be published by the Governor-in-Council. But a notification published in the Gazette by the order of the Government, Ministry of Local Self Government, is proof under s. 78, Evidence Act, of the order of the Government fixing the election and must be presumed to have been issued in accordance with law and consequently valid. Such a notification does not contravene s. 49, Government of India Act and is not liable to be called in question in any legal proceeding. [p. 145, col. 2.]

Where under r. 6 of the Election Rules framed under s. 55 of the Madras City Municipal Act the Commissioner prepared and published three days before the date fixed for election a schedule of valid nominations, but his order excluding a candidate from the schedule was called in question before the Chief Judge, Small Causes Court, and was ultimately upheld, and the election was ordered to be held on a subsequent date:

Held, that the original schedule of nominations having been published as prescribed by the rules was in force and was available for the election which was ordered to be held on a subsequent date and that a fresh publication of nomination papers was not necessary. [p. 146, col. 1]

Appeal from the judgment of Mr. Justice Srinivasa Aiyangar, dated the 7th October, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and reported as 99 Ind. Cas. 18.

Messrs. Mockett and S. Rangaswami Iyengar, for the Appellant.

Messrs. A. Krishnaswami Aiyar and V. C. Gopalratnam, for the Respondents.

JUDGMENT.—This is an appeal against an order made under s. 45 of the Specific Relief Act and relates to the holding of the election of a Councillor for the 29th Division of this City. A great many objections to the validity of the proceedings prior to the actual election were taken before the learned Judge in the lower Court but he has disposed of nearly all of them in favour of the appellant. The ground on which he granted this order staying the election was that the order of Government and its notification in the *Fort. St. George Gazette* fixing the date of election as the 30th September, 1926, were invalid because they were not proved to be orders framed in accordance with law. The learned Judge held that the order had to be one made by the Governor-in-Council meaning thereby the

Governor in consultation with his Ministers. It was suggested that there were rules under which the order had been issued and that in accordance with those rules the order was a perfectly valid one within the meaning of s. 49 (1) of the Government of India Act. The learned Judge, however, held that the power of the Governor-in-Council could not be delegated and could not be exercised under any departmental rules by any persons other than those constituted as the proper authority. No rules were produced in the lower Court because neither party was in a position to obtain these rules from Government but now the learned Advocate-General on whom the notice of this appeal was served appears and has produced a copy of the rules framed under s. 49. Apart from these rules it seems to us that the learned Judge was wrong in disregarding the Government order and the notification. The notification fixing the election was published in the *Local Gazette* and under s. 78 of the Evidence Act, it is proof of the order of Government fixing that election. Under s. 114 of the Evidence Act a presumption arises that all official acts are regularly done. There is, therefore, a presumption that this act of publication was done regularly, namely, in accordance with the rules. Rules are contemplated under s. 49 and, therefore, we may presume that the notification was properly published in the absence of any evidence to the contrary. In addition we have a Government order produced which itself orders the publication of the notification in the *Gazette* and that Government order is authenticated as being by order of the Government, Ministry of Local Self Government complying with the rules framed under s. 49 which have not been shown to be *ultra vires*. We are, therefore, satisfied that the order was properly published and consequently under s. 49 itself these proceedings and orders cannot be called in question in any legal proceeding.

This disposes of the appeal so far as the appellant is concerned; but the respondent seeks to support the order on various other grounds. Those grounds relate to the interpretation of the election rr. 1 to 6 and have been dealt with fully by the learned Judge in the lower Court, and we agree in his conclusion on all points except one. This point relates to r. 6 of the

Election Rules. That rule lays down that three days before the election the Commissioner should prepare a schedule of valid nominations of candidates for election and prescribe further procedure. This schedule of valid nominations was prepared by the Commissioner before the date originally fixed for election namely, the 22nd September, 1926. Objections were taken to this list but they were not upheld and, consequently, when the final orders of the Chief Judge had been passed, the list of valid nominations remained the same as originally framed. This having been published as prescribed by the rules was in force and was available for the election which was ordered to be held on a subsequent date. We consequently hold that the provisions of r. 6 were satisfied in this case. In the result the appeal must be allowed and the petition dismissed with taxed costs throughout.

V. N. V.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 369 OF 1926.

July 13, 1926.

Present :—Mr. Justice Panton and
Mr. Justice Mallik.

DASARATHI GHOSE—PETITIONER

versus

KARTICK CH. GHOSE—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 6
—*Small Cause decree by Munsif—Application for execution against immoveables—Formal order of transfer to regular side, whether necessary—Rejection of application—Appeal.*

An application for execution of a decree passed by a Munsif in the exercise of his Small Cause powers, was made to the Munsif with an affidavit addressed to him as a Small Cause Court Judge and containing a prayer that execution may be levied against immoveable properties after the issue of a certificate. The Munsif, without passing a formal order of transfer dismissed the application on the ground of limitation :

Held, that the provisions about transfer and those of O. XXI, r. 6, Civil Procedure Code, were in effect complied with, that the order of the Munsif must be deemed to have been passed by him in his capacity as a Munsif and not as a Judge of a Small Cause Court, and that the order of dismissal was, consequently, appealable. [p. 147, col. 1.]

Rule against an order of the Subordinate Judge, Hooghly, dated the 16th January, 1926, preferred against that of the Munsif, Second Court, Serampore, dated the 21st March, 1925,

Dr. Bijon Kumar Mukherjee and Babu Sudanshu Kumar Bose, for the Petitioner.

Babus Ramani Mohun Chatterjee and Moni Lall Bhattacharjee, for the Opposite Party.

JUDGMENT.

Mallik, J.—This Rule was directed against an order passed by the Subordinate Judge of Hooghly setting aside an order passed by a Munsif, Serampore, whereby an application for execution of a Small Cause Court decree had been rejected. There had been a Small Cause Court decree passed and when an application for its execution was made, it was made to the Second Munsif of Serampore who in his capacity as a Small Cause Court Judge had passed that Small Cause Court decree. In the application for execution it was stated that as the judgment-debtor had no moveable properties, action might be taken against his immoveable properties. The officer before whom this application for execution was filed and who exercised two functions—one as a Small Cause Court Judge and another as a Munsif—rejected the application for execution on the ground of limitation. Against this order an appeal was filed before the Subordinate Judge and the Subordinate Judge, as stated above, allowed the appeal setting aside the order passed by the Munsif.

The contention on behalf of the petitioner before us has been that the Subordinate Judge had no jurisdiction to entertain the appeal inasmuch as the order appealed against had been passed by a Small Cause Court Judge, an order passed by a Small Cause Court Judge being final in these matters.

On behalf of the opposite party it was said that the order passed by the Munsif against which the appeal was preferred before the Subordinate Judge was not an order passed by a Small Cause Court Judge but by a Munsif in his ordinary regular capacity. We have looked into the records of the case and from the records it appears that the application for execution was addressed to the Munsif, Second Court, Serampore, but it was accompanied by an affidavit wherein the Munsif was described also as a Small Cause Court Judge, and wherein a prayer was also made for the issue of a certificate. On behalf of the petitioner it was argued that this was not in accordance with the provisions about transfer of an application for execution or

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BHUKHANDAS LALLUBHAI v. THAKORERAM KAPILRAM.

in accordance with the provisions as laid down in O. XXI, r. 6 of the Civil Procedure Code. It is true that no specific order about transfer or sending the application for execution was passed by the Munsif before whom the application was made, but taking the application along with the affidavit we are of opinion that the provisions about transfer and of O. XXI, r. 6 were in effect complied with, and that being so, the order passed by the Munsif rejecting the application for execution was, in our opinion, passed by him, not in his capacity as a Small Cause Court Judge but by him as a Munsif. In this view of the matter, the learned Subordinate Judge, in our opinion, was justified in entertaining the appeal and we are unable to hold that when he set aside the order passed by the Munsif he passed the order without any jurisdiction.

The result, therefore, is that the Rule is discharged with costs, hearing-fee one gold mohur.

Panton, J.—I agree.

A. N. A.

Rule discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 434 OF 1925.

July 29, 1927.

Present :—Sir Amberson Marten, Kt.,
Chief Justice, and Mr. Justice Crump.

BHUKHANDAS LALLUBHAI

—PLAINTIFF—APPELLANT

versus

THAKORERAM KAPILRAM AND OTHERS

—DEFENDANTS—RESPONDENTS.

Municipality—Power to cut off water supply, limits of—Failure of ratepayer to pay charges other than water rates—Water supply, whether can be cut off—Rules, construction of—Right to present consolidated bill, effect of—Suit for injunction and damages, whether maintainable.

A Municipal Committee presented the plaintiff, a rate-payer, with a consolidated bill for water rate and other charges. The plaintiff paid the water rate but did not pay up the other charges. The Committee declined to accept payment and cut off the water supply to the plaintiff. The bye-laws of the Municipality gave power to the Municipality to cut off water supply for default in paying water charges. In a suit by the plaintiff for a mandatory injunction for restoration of water supply and for damages incurred by him for procuring water from other sources:

Held, (i) that inasmuch as the power to cut off water supply was given by the bye-laws in the limited event of default in payment of water charges, the Municipal-

ity was not entitled to cut off the water supply to the plaintiff; [p. 147, col. 2.]

(ii) that the fact that the Municipality was entitled under the rules to present a consolidated bill for all charges did not entitle them to cut off the water supply. [*ibid.*]

(iii) that the plaintiff was entitled to a mandatory injunction to restore the water supply; [p. 148, col. 1.]

(iv) that the plaintiff was entitled to recover the damages incurred by him, even though he could have prevented the same by paying up the balance due under the bill. [p. 148, col. 2.]

Second appeal from the decision of the District Judge, Surat, in Appeal No. 56 of 1924, confirming the decree passed by the Joint Subordinate Judge at Surat, in Civil Suit No. 256 of 1923.

Mr. R. J. Thakor, for the Appellant.

Messrs. P. B. Shingne, Government Pleader, and **B. D. Mehta**, for the Respondents.

JUDGMENT.—The points involved here really lie in a small compass. The plaintiff was liable to the Committee of Management of the Surat Municipality for various rates, including certain water charges. Under r. 245 of the Surat Municipal Rules the Municipality was entitled to send one consolidated bill for the aggregate dues. The plaintiff refused to pay the consolidated bill. He tendered merely that part of the bill which related to water charges and to one other item. The Municipality declined to allow him to pick and choose in this way, and they next proceeded to cut off his water supply.

Now there is an express power given to the Municipality as regards the water supply. That is bye-law 6 of Chap. XI which provides that "the Municipal Commissioner may, at any time, stop or cut off a private connection in any of the following events, viz., (1) in default of payment of water charges in respect of the private connection, within one month of the date of the presentation of the bill, till all arrears are paid." But there is no bye-law enabling them to cut off the water supply because charges other than water charges are not paid. On the other hand, the general remedy given by the Act in the event of the Municipal dues not being paid is that mentioned in s. 83, viz., a distress warrant.

The Municipality justify their action on the ground that as they were entitled to present this consolidated bill, it followed that they could cut off the water supply if it was not paid. Both Courts below held against them on this point. In our judgment the learned Judges were quite correct. The power to cut off a water sup-

ply is a very serious power, particularly in a tropical country. And where the bye-laws give a specific remedy, viz., to cut off the water supply in certain limited events, in my judgment it necessarily follows that in the absence of any other provisions of the Act, or the bye-laws or the rules, the Municipality is not entitled to cut off the water supply on grounds other than those expressly mentioned and authorised.

The result of their contention put forward before us would entirely alter bye-law 5, and turn it into something quite different from what it really is. It, therefore, follows that in what the Committee of Management did, they were acting illegally as found in the lower Courts.

Next comes the question of what relief should be granted. The trial Court granted a mandatory injunction to restore the water connection. That injunction has been complied with. The only variation made by the lower Appellate Court was to add certain words that, "the decree shall be without prejudice to the future exercise by the defendants of any powers vested in them at any time by Statute or rules thereunder or by contract." This followed the form of injunction in another case in which the Surat Municipality were concerned, viz., *Surat City Municipality v. Tyabali Daudbhai* (1). Under these circumstances we think it is unnecessary to vary the order of the learned District Judge in this respect. It may, however, be pointed out that in the case of *Surat City Municipality v. Tyabali Daudbhai* (1) there was an injunction granted to restrain the cutting off of the supply, whereas here there was a mandatory injunction to restore it. Consequently, it may well be that in the former case some qualifying words had to be inserted because otherwise the injunction might in form operate perpetually. But here there was merely a mandatory injunction to restore the water supply and it ceased when it was complied with, for there is no injunction here to maintain the supply when so restored. In any event it clearly follows that whether or no the above words are inserted the restoration of the supply is without prejudice to future circumstances, e. g., if the plaintiff refused to pay the water charges in future. So there is no substance in the point.

Next coming to the question of damages,

which is perhaps the only substantial point in the case, the learned trial Judge awarded the plaintiff Rs. 135-8-6 because this was the amount spent by him for labour charges to secure water from a particular well after the supply had been cut off. He accepted the plaintiff's evidence on that point, and accordingly awarded him those damages. On appeal this amount has been reduced to a rupee. As I understand the judgment of the lower Appellate Court, this is because the plaintiff could have minimised the damages by paying up the whole amount of the consolidated bill, and then bringing some subsequent proceedings to recover the illegal amount. But that is not the true legal position. The defendants here were making an illegal demand in threatening to cut off the water supply if the consolidated bill was not paid. If then the plaintiff had complied with it, he might have been left without a legal remedy because the remaining dues, besides the water charges were, in fact properly payable by him. The illegal demand would, therefore, have succeeded.

Then, as regards the other suggestion put forward, viz., that the plaintiff was acting contumaciously in refusing to pay what was justly demanded of him, that again seems to me to miss the real point. The defendants were acting in excess of their legal powers, and the plaintiff was entitled to object to their so doing. If in consequence the defendants took the law into their own hands and cut off this man's water supply, I think it only reasonable that they should pay for the consequences. The sum awarded by the lower Court was merely out of pocket expenses. There is nothing here in the way of inflated damages. Accordingly, in our opinion, the judgment of the trial Judge on this point ought to be restored.

Then, as regards the Surat Municipality who have been added since the appeal to us, was presented, I should explain that the events in suit happened at a time when the Municipality had been suspended, and when a Committee of Management had been appointed by Government under the Act. That suspension has now terminated, and the Municipality is once more in possession of its powers and has now been brought on the record. But it was the Committee of Management who were actually the parties concerned when the events in suit happened, and also at the

(1) 10 Bom. L. R. 622; 32 B. 460.

trial and for the matter of that in the lower Appellate Court as well. Accordingly, it must be understood that, while we think the decree must be maintained against the Committee of Management, it will be without prejudice to any right they may have of indemnity or otherwise against the Surat Municipality or the funds of the Municipality.

There was an argument that the Committee ought not to be made liable because they were acting under a *bona fide* belief that they had the requisite powers in cutting off the water supply in respect of other taxes. But, as pointed out by the learned District Judge, that belief is really an untenable one, and *Dhondu Dagdu Patil v. Secretary of State for India* (2) affords no ground for the contention put forward in that respect on behalf of the respondents, even supposing there was an Act which protected acts done under a *bona fide* belief that they were in exercise of statutory powers.

Under these circumstances we think the appeal must be allowed in part. The variation made by the Appellate Court in the decree, *viz.*, that it is to be "without prejudice to the future exercise by the defendants of any powers vested in them at any time by Statute or rules thereunder or by contract" is to stand. But the appellate order as to damages and costs is to be vacated, and the judgment of the trial Judge restored both as to damages and costs. As regards the costs in the lower Appellate Court and in this Court, they must be paid by the respondents other than the Surat Municipality. The Municipality can bear their own costs. Cross-objections dismissed with costs.

A. N. A. *Appeal allowed in part.*
(2) 17 Ind. Cas. 673; 37 B. 101; 14 Bom. L. R. 949.

GUJARATI CHIEF COURT.

SECOND CIVIL APPEAL No. 33 OF 1927.

October 19, 1927.

Present:—Mr. Justice Raza and
Mr. Justice Pullan.

Babu HANUMAN PRASAD—PLAINTIFF—
APPELLANT

versus

Mir IRSHAD ALI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 118, 119

—*Partition by Revenue Court—Party in possession of dwelling house—Right to retain possession on payment of ground rent of land allotted to another—Partition of building and orchards—Civil Court, whether can interfere.*

Under s. 118 of the U. P. Land Revenue Act, the Court is bound to permit the co-sharer who is actually in possession of a dwelling house to retain it on the condition that he pays a reasonable ground rent and under s. 119 the Court may apply the same principle to an orchard. [p. 150, col. 1.]

When the Revenue Court actually makes the partition both of the land on which houses are situated and of orchards, the Civil Court has no right to interfere with the partition made by the Revenue Court in accordance with the aforesaid sections. [*ibid.*]

A Revenue Court has jurisdiction to partition a house site although it cannot divide the house which stands on it. [p. 150, col. 2.]

The Civil Court cannot question the final allotment made at the partition simply because some intermediate orders made in the course of partition have not been properly carried out. [p. 149, col. 2.]

Appeal against a decree of the District Judge, Fyzabad, dated the 22nd October, 1926, setting aside that of the Additional Subordinate Judge, Sultanpur, dated the 20th May, 1926.

Mr. Mohammad Ayub, for the Appellant.

Mr. Ghulam Hasan, for the Respondents.

JUDGMENT.

Raza, J.—This is an appeal from a decree of the District Judge of Fyzabad, dated 22nd October, 1926, setting aside a decree of the Additional Subordinate Judge of Sultanpur, dated the 20th May, 1926. The dispute in this case relates to the partition of certain plots in village Barsanda in the District of Sultanpur. The partition was made by the Revenue Court and the plaintiff has brought the present suit in the Civil Court questioning the jurisdiction of the Revenue Court in making the partition.

It is admitted by the parties that the partition officer did allot the land in suit, which is the subject-matter of the present suit, to defendant No. 1 (Mir Irshad Ali) and that the partition proceedings in Revenue Court were confirmed in June, 1925. It is difficult to understand what does the plaintiff mean by contending that the Revenue Court had no jurisdiction to make the partition. The Civil Court has no jurisdiction to go behind the ultimate allotment of lands at a partition made by the Revenue Courts. The Civil Court cannot question the final allotment made at the partition simply because some intermediate orders made in the course of partition have not been properly carried out: see *Jagan Nath Parshad v. Ram Dutt* (1). As pointed out (1) 11 Ind. Cas. 531; 14 O. C. 153.

in the case of *Sanwal Singh v. Bhikhari* (2), a suit for possession by a declaration that the plaintiff is entitled to a portion of the land wrongly allotted to the defendants in partition by the Revenue Court, does not lie in the Civil Court in view of the exclusive provisions of s. 233 (k) of the U. P. Land Revenue Act. It is clearly a matter relating to the partition of a *mahal*, for the plaintiff's claim cannot be decreed without affecting the partition come to by the Revenue Court.

So far as the orders in question are concerned they were properly passed by the Revenue Court which had full jurisdiction to pass these orders under ss. 118 and 119 of the Oudh Land Revenue Act (Act III of 1901). The Civil Court has no jurisdiction. The plaintiff's suit for a partition of his one-fourth share in the building standing on plot No. 143 is, of course, cognisable by the Civil Court as held by the learned District Judge. The learned Judge has passed proper orders about the partition of the building. No case has been made out to disturb the judgment of the learned District Judge. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs.

Pullan, J.—I agree with the order proposed. It is remarkable that the appellant has sought to rely in this Court on ss. 118 and 119 of the Land Revenue Act. These sections are really fatal to his claim. He seeks actual possession of a one-fourth share of a house, which has never been in his possession, but has always been in the possession of the opposite party, and similarly he seeks actual possession of a one-fourth share in certain orchards which are attached to the house. It is to meet such a case that ss. 118 and 119 were enacted. Under s. 118 the Court is bound to permit the co-sharer, who is actually in possession of a dwelling house, to retain it on the condition that he pays a reasonable ground rent and under s. 119 the Court may apply the same principle to an orchard. These sections clearly contemplate that the Court, that is the Revenue Court, actually makes the partition both of the land on which houses are situated and of orchards, and the Civil Court has, therefore, no right to interfere with a partition made by the Revenue Court in accordance with these sections. When the Court of first instance

criticised the action of the learned Commissioner he seems to have been unaware that the learned Commissioner was exactly following the law as laid down in s. 118 of the Act and the criticism is entirely beside the mark. It is impossible to agree with the learned Counsel for the appellants in his contention that a house is inseparable from the site and that because the Revenue Court cannot divide the buildings it, therefore, cannot divide the site on which the buildings stand. That the contrary is the case is clear both from the Act itself and from numerous rulings of the Judicial Commissioner's Court to which it is not necessary to refer. The lower Court has already given the appellant all that a Civil Court can give, that is a share in the buildings which make up the house in dispute, and the learned District Judge has very properly left the decision of the amount to be paid as compensation to the Court below preparing the final decree. On these grounds I agree with the proposed order.

G. H.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

ORIGINAL SIDE APPEAL No. 16 OF 1925.

September 12, 1927.

Present :—Sir William Watkins Phillips, Kt., Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Ananthakrishna Aiyar.

GANSHAMDOSS NARAYANDOSS—

APPELLANT

versus

GULAB BI BAI—RESPONDENT.

Succession Act (X of 1865), s. 187—Unprobated Will, whether can be pleaded in answer to claim of heir-at-law.

A defendant resisting a claim made by the plaintiff as heir-at-law can rely in defence on a Will executed in his favour at Madras in respect of property situate in Madras when the Will is not pro-

bated and no Letters of Administration with the Will annexed have been granted, provided, however, that he does not do so in order to establish a right under the Will. [p. 155, col. 1; p. 156, col. 2.]

Where in a suit by the heir-at-law, the defendant relies on and pleads a Will, the mere existence of the Will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the Will and this the defendant cannot do by virtue of s. 187 of the Succession Act. [p. 155, col. 2.]

[Case-law considered.]

There is nothing in s. 187 of the Succession Act which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants. [p. 155, col. 1.]

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 29th October, 1924, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 755 of 1920.

This appeal coming on for hearing on the 2nd and 3rd September, 1926, upon perusing the grounds of appeal, the judgment and decree of the High Court, dated the 29th October, 1924, and passed in the exercise of its Ordinary Original Civil Jurisdiction in C. S. No. 755 of 1920, and the material papers in the case, and upon hearing the arguments of Messrs. *K.S. Krishnaswami Ayyangar* and *K. Bhashyam Ayyangar*, for the Appellant, and of Mr. *C. Venkatasubramiah*, for the Respondent, and the case having stood over for consideration till the 1st December, 1926, the Court (The Chief Justice and Curgenven, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Phillips, Offg. C. J.—The plaintiff in this case is one Ganshamdoss Narayandoss, and he sued for the recovery of a house No. 2/100, Perumal Mudali Street, impleading originally one Saraswathi Bai, who is now dead, and subsequently putting on the record Gulab Bi Bai, her legal representative. The property belonged to one Kaveri Bai, and it may be taken for the purposes of this reference that in the absence of a Will, the plaintiff, Ganshamdoss Narayandoss, would be entitled to succeed Kaveri Bai in preference either to Saraswathi Bai or Gulab Bi Bai. The claim is resisted on the ground that Kaveri Bai left a Will in favour of Saraswathi Bai. That Will was not probated, and the question is whether it can be used to defeat the plaintiff's claim.

The plaintiff by para. 5 of his plaint alleges that Kaveri Bai died intestate on the 16th of October, 1908. In my opinion that was an unnecessary allegation. But it re-

sulted in the 1st issue in the suit being framed as follows: "Did Kaveri Bai die intestate as alleged in para. 5 of the plaint or after making her last Will and testament as alleged in para. 3 of the written statement?" The learned Judge obviously attached importance to the form of the pleading and the issue, because he says this: "In the present case the plaintiff comes to Court saying that Kaveri Bai died intestate and that he is the heir under Hindu Law claiming by intestate succession." In my opinion that burden was not one which lay upon him and the allegation in the pleading was an unnecessary averment. I think that all he had to do was to prove that he was the next of kin of the last owner of the property, Kaveri Bai, and thereupon the burden of proof would be cast upon the defence to show that the defendant had a better title. It would be to my mind wholly wrong in this country to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. I am, therefore, of opinion that it would be wrong in determining where the burden of proof lies in this case to rest it upon the form of pleading and the issue and that we ought to consider where the burden lies in law.

The learned Judge held that an unprobated Will could be used to defeat the plaintiff's claim and reiterated the view which he had expressed on the subject in *Shadagopa Naidu v. Thirumalaswami Naidu* (1). The doctrine is alleged to be derived from the case of *Janaki v. Dhanu Lall* (2). I do not wish to embarrass the Full Bench by comments on the cases which will be discussed before them. But I think it is very doubtful whether *Janaki v. Dhanu Lall* (2) really supports the proposition contended for though it was taken to establish that proposition in *Carlapatti Chinna Cunniah v. Cota Wammalivarriah* (3). I confess myself unable to ascertain what exactly was laid down in *Parthasarathy Aiyar v. Subbaroya Gramony* (4). On the other hand, the observations in *Lakshamma v. Ratnamma* (5) seem clearly to tend in the

(1) 30 Ind. Cas 272; 18 M. L. T. 129.

(2) 14 M. 454; 5 Ind. Dec. (N. s.) 317.

(3) 3 Ind. Cas. 475; 33 M. 91.

(4) 72 Ind. Cas 559; 45 M. L. J 175 at p. 181; (1923) M. W. N. 763; A. I. R. 1924 Mad. 67; 17 L. W. 763.

(5) 21 Ind. Cas. 698; 38 M. 474; 25 M. L. J 556.

opposite direction. My own view would be not merely that an unprobated Will could not be used to establish title which is clearly forbidden by s. 187 of the Succession Act but that it could not be used as a weapon of defence when the onus was clearly thrown upon the defence. But I realize the difficulty created by s. 25 of the Succession Act which defines intestacy in the following words: "A man is considered to die intestate in respect of property of which he has not made testamentary disposition which is capable of taking effect." Where the evidence establishes a valid execution of a Will, it is difficult to say that an unprobated Will is not capable of taking effect because it is obvious that as soon as Probate is obtained it can take effect. The position would then be that the burden would be thrown upon the plaintiff by law, and not by the accident of the way in which he framed his pleading, of proving that the testatrix died intestate and that applying the definition of s. 25 this testatrix did not die intestate. The practical inconvenience of putting an executor in the position of being able to refuse to take out Probate and keep the presumptive heir-at-law at arm's length by an unprobated Will requires no comment. In my opinion the matter had better be settled by a reference to a Full Bench and the question referred will be as follows: Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a Will executed in his favour at Madras in respect of property situate in Madras when the Will is not probated and no Letters of Administration with the Will annexed have been granted?

Curgenven, J.—This is an appeal against the judgment of Mr. Justice Kumaraswami Sastri in C. S. No. 755 of 1920 on the file of this Court. The property in suit consists of a house and site in George town Madras, valued in the plaint at Rs. 12,700. It belonged to one Kaveri Bai, sister of the plaintiff's father, and the plaintiff claimed to recover possession of it as her heir. The claim was resisted by a half sister of Kaveri Bai's named Saraswathi Bai, who obtained possession upon Kaveri Bai's death in 1908 and who set up a Will of Kaveri Bai's as the foundation of her title. Saraswathi died during suit, and her sister, Gulab Bi Bai, was brought on the record as her legal representative. The learned Judge has found in favour of the Will and dismissed the suit, and the plaintiff appeals.

The Will was attacked on the grounds (a) that it was not genuine, (b) that it was not executed in accordance with law and (c) that being unprobated the defendant could not rest any claim upon it. Point (a) was given up in appeal. Points (b) and (c) remain for consideration.

The document purports to bear the mark of Kaveri Bai, to which is subscribed a declaration that it was "signed by the testatrix and acknowledged by her to be her last Will and testament in the presence of us present at the same time who at her request and in our presence and in the presence of each other have subscribed our names as witnesses." There follow four signatures, the first in order being that of Mr. Seshacharlu, the Vakil who, as the evidence shows, prepared the Will. Mr. Seshacharlu died not long afterwards, and although the genuineness of his signature is fully proved by his clerk, it cannot, I think, be presumed that it amounted to a valid attestation. Neither of the two reputed attestors who have been examined speaks to his presence at the execution of the document, and one would have expected that, had he been present, the words 'Mark of Kaveri Bai' would have been in his hand. It is not improbable that he signed as the author of the document. Of the other three persons whose signatures appear, two, Rangildoss and Poolji Vias, deposed respectively as defendants Nos. 1st and 2nd witnesses. The learned Judge has alluded to the circumstance of Gulab Bi Bai's conversion to Muhammadanism as a reason for suspecting that any bias which these witnesses may have would be against her, so that if evidence of valid attestation of the Will can be derived from their statements, it may be accepted with little hesitation. Rangildoss stated that he saw Kaveri Bai put her mark, that he was asked to sign below and that he did so. That constitutes a valid attestation under s. 50 of the Succession Act. The account given by the other witness, Poolji Vias, is this: He was called to the house by the executor named in the Will, Rancholedoss. Kaveri Bai was lying in bed ill. Rancholedoss told him that "it was the Will of Kaveri Bai," and asked him to attest it. Kaveri Bai also said that he should sign, and he signed. He does not remember whether the testator's mark was already there, but it may be inferred from an answer which he gives to another question that Rangil-

doss's signature was already on the document, and there is Rangildoss's evidence that Kaveri Bai put the mark in his presence. Thus it is to be gathered from what Poolji Vias says that Kaveri Bai had already executed the Will, that a statement was made to him in her presence that the Will was hers, and that both she and her executor asked the witness to attest it and he attested it. It remains for consideration whether this satisfies the requirement of s. 50 that an attesting witness, where he has not actually seen the testator, either by himself or by another under his direction, sign or affix his mark, must have received from the testator a personal acknowledgment of his signature or mark. A 'personal acknowledgment' of execution need not necessarily, I think, be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. Here we have not only a statement made in Kaveri Bai's presence that the Will was hers, and a request to attest it—which evoked no disclaimer from her—but also her own request to the witness to sign. It appears to me that she thus conveyed to the witness an impression that she avowed execution no less certain than if she had made the avowal in terms. It was thus, by implication, an acknowledgment. It was a personal acknowledgment because the impression was created directly by her own words and conduct. I conclude, therefore, in agreement with the learned Judge, that this witness also validly attested the Will, which has thus, so far as execution and attestation are concerned, been established.

The question now remains whether Saraswathi or her legal representative (she died pending suit) can resist the plaintiff's claim without obtaining Probate of the Will. The plaintiff alleged that Kaveri Bai had died intestate, and it appears to me that such an allegation was necessary, because under Parts IV and V of the Succession Act an heir-at-law can only succeed in the event of an intestacy. But since there is a presumption that a person dies intestate unless a Will be established, it lay upon the defendant to disprove the fact of intestacy by establishing the existence of a Will. That, I think, was the course followed in this suit. The defendant proved that Kaveri Bai had executed a Will, but that proof

was adduced otherwise than by producing Probate, and the question is whether, by such proof, the plaintiff's claim is defeated.

By s. 25 of the Succession Act, a man is considered to die intestate in respect of property "of which he has not made a testamentary disposition which is capable of taking effect." Did Kaveri Bai make such a disposition? The answer, I think, is clearly "yes." She made a valid Will, and even though that Will be still unprobated, it was, and indeed still is, capable of giving effect to her intentions. That proposition has not been disputed. Thus she did not die intestate, and it appears to me to follow that any claim by an heir who would succeed upon an intestacy must necessarily fail.

So far as I can see, the only way in which the plaintiff could surmount this difficulty would be by showing that the Will could not be established against him, in which case the Court would have to infer an intestacy. Recourse for this purpose has been had to s. 187. This section provides that "No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction (in British India) shall have granted Probate of the Will under which the right is claimed." Clearly this does not amount to saying that a Will may not be proved for any purpose otherwise than by producing Probate, but only for the purpose of establishing a right as executor or legatee. But it is argued for the plaintiff that title to the property must vest in some one, that *prima facie* it vests in him, that only by proof of a superior title can his title be displaced, and that this section renders such proof inadmissible. His title must, therefore, prevail.

I would meet this argument by saying that for the defendant to prove title in himself is not indispensable. He may plead, "I may not be able to prove my own title, but it will do if I show that title cannot vest in you, and to do this I have simply to establish the Will." I cannot see that the plaintiff has any answer to this form of defence if, as I am disposed to hold, his claim fails upon an adjudication against him upon the issue of intestacy. Once the intestacy has been found against, the plaintiff has no better claim than anyone else to oust the defendant, however, infirm or incapable of proof may

be her title, and upon this view it would be immaterial whether the defendant was (or represented) an executor or legatee, or was a mere third party or trespasser.

To hold that the intestacy could not be disproved by establishing the unprobated Will would be to give s. 187 an effect similar to that of s. 49 of the Registration Act, according to which a document required to be registered, and which is unregistered, cannot be received in evidence. If that had been intended, I do not see why it was not expressed. It may then be said that the construction which I put upon the Statute would lead to very inconvenient results. The argument, of course, cannot avail if, as I am compelled to find, the Statute is clear. No doubt there may be cases in which an executor who fails to obtain Probate causes loss and trouble to others. There being no period of limitation, it is possible for him to postpone indefinitely the settlement of claims upon the estate. On the other hand, the position would hardly be more satisfactory, if, as in a case like the present, the testator's wishes could be rendered ineffectual by a mere omission to probate a perfectly good Will.

I have not thought it necessary to discuss the case-law, as the learned Judge has already done so, and as we have decided to refer the question to a Full Bench. I agree to the terms of the reference proposed.

The reference was heard by Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Ananthakrishna Aiyar.

OPINION.

Phillips, Offg. C. J.—The question referred to us is: Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a Will executed in his favour at Madras in respect of property situate in Madras when the Will is not probated and no Letters of Administration with the Will annexed have been granted?

This question deals with the provisions of s. 187 of the Indian Succession Act, X of 1865, which is to the effect that no right as legatee can be proved by a Will of which Probate has not been taken. It has been held by this Court in *Carlapatti Chinna Cunniah v. Cota Wammalivarriah* (3) that this objection to proving title by an unprobated Will applies only to a plaintiff

and it was held "that a defendant is not precluded by that section from relying upon a Will as he is not seeking to establish a right as executor or legatee." *Janaki v. Dhanu Lall* (2) was cited as authority for that proposition. On a reference to *Janaki v. Dhanu Lall* (2) with all respect, it seems very doubtful whether any such proposition is there put forward. In that case the 1st defendant had obtained a decree against the personal representatives of the deceased man who was said to have left a Will, and subsequently the deceased's mother, who would have been his representative in the absence of a Will, brought a suit to set aside that decree. It was then held that, "though the executors can establish no right without taking Probate, the existence of the Will cannot be ignored for all purposes whatsoever." It was also observed "that the decision in *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal* (6) is applicable, and that the persons, who took possession of Ghulab's estate upon his death, were liable to be treated by the creditor (1st defendant) as his representatives even though themselves liable to be dispossessed by the executors on taking out Probate." It was, therefore, held that the 1st defendant's decree was not a nullity and it was open to him to prove that Ghulab left a Will and, therefore, the plaintiff was not a person who could claim to set that decree aside. It was clearly in the minds of the Judges that the executors could establish no right without taking Probate, and yet the existence of the Will was in the circumstances allowed to be proved. That is not authority for the proposition that a defendant is not precluded from establishing a right under an unprobated Will, as was held in *Carlapatti Chinna Cunniah v. Cota Wammalivarriah* (3). I am strengthened in this view by the fact that *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal* (6) was relied upon by the learned Judges in *Janaki v. Dhanu Lall* (2). In that case no question was decided under s. 187 of the Succession Act. It was merely held that a decree having been obtained against the *de facto* manager of the deceased's estate, the decree was not a nullity and, even if it cannot be executed against the estate in the hands of the executors when

he has taken out Probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied. In fact, the executor had actually obtained Probate.

There is nothing in s. 187, which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants, and this view has been taken in several cases, in opposition to *Carlapatti Chinna Cunniah v. Cota Wammalivarriah* (3). The first of these is, *Lakshamma v. Ratnamma* (5) where, however, *Carlapatti Chinna Cunniah v. Cota Wammalinarriah* (3) does not appear to have been cited. Again in *Parthasarathy Aiyar v. Subbaroya Gramany* (4), *Chandra Kishore Roy v. Prasanna Kumari Dasi* (7), and *Basunta Kumar Chuckerbutty v. Gopal Chunder Das* (8) no distinction is drawn between a plaintiff and a defendant. There is, however, a remark of Schwabe, C. J., in *Parthasarathy Aiyar v. Subbaroya Gramany* (4) who, after stating "that a person who in Court has to prove title and has to deduce that title from a Will, whether that person is plaintiff or defendant, cannot do so without producing Probate," goes on to remark: "This would not prevent a defendant resisting a claim by an heir-at-law by producing and proving a Will of which Probate had not been granted." This observation must clearly be read as being limited to cases in which the claim could be resisted without establishing a title under the Will. This view has been taken consistently throughout and it is evident that there can be no objection to an unprobated Will being proved for certain limited purposes, provided that it is not sought to prove by the Will a right thereunder; for this is prohibited by s. 187.

The answer, therefore, to the question referred to us must be that a defendant can rely, on an unprobated Will, provided that he does not do so in order to establish a right under the Will.

As this answer will in no wise dispose definitely of the case before the referring Judges, I think I may add a few words on the facts of the case. The plaintiff is suing as heir-at-law, but he was resisted by

the defendants who claim under a Will of which no Probate has been taken. It is argued that it is a sufficient answer to the plaintiff's case to allege and prove the existence of a Will; for in that case the plaintiff, who would be the heir in case of intestacy, would no longer have any right. This rather ignores one point which, I think, is important, namely, that the plaintiff being the heir under intestacy, which must be presumed until a Will is proved, is entitled to succeed to the property, unless it can be shown that his title has been displaced. If the defendant merely proves that a Will is in existence and does not prove the terms of that Will, that is not necessarily inconsistent with the plaintiff's title. In the first place, the Will may not be a valid Will and, in the second place, the plaintiff may be a legatee under the Will. The mere existence, therefore, of a Will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the Will. This he cannot do by virtue of the provisions of s. 187. In the circumstances of the present case, I would, therefore, hold that the defendant cannot use an unprobated Will as a defence.

Beasley, J.—I agree.

Ananthakrishna Aiyar, J.—I agree. An argument based on the principle of the plea of *jus tertii* was advanced on behalf of the respondent on which I should like to say a few words. I find the principle of *jus tertii* referred to in Odgers' Book on Principles of Pleading and Practice, Chap. VIII, page 139, Ninth Edition: "If the plaintiff is in possession of any land or goods or can otherwise make out a *prima facie* title to them, it is not enough for the defendant to show a better title in some third person; he must also show that he acted as agent for such third person at the time he did the act complained of." Thus where a plaintiff makes out a *prima facie* title in him to the property in dispute, the defendant has to show a better title either in himself or in some third person. If what is stated above be the correct principle of pleading applicable to such cases, it follows that when the plaintiff in the present case shows a *prima facie* title in himself to the property in dispute—as the admitted heir-at-law of the last owner—the defendant has to show a better

(7) 9 Ind. Cas. 122; 21 M. L. J. 116; 15 O. W. N. 121; 9 M. L. T. 71; (1911) 2 M. W. N. 30; 13 O. L. J. 58; 8 A. L. J. 96; 13 Bom. L. R. 67; 4 Bar. L. T. 45; 33 O. 327; 33 I. A. 7 (P. C.).

(8) 26 Ind. Cas. 21; 18 O. W. N. 1133.

title either in himself or in some third person (in the words of the learned author quoted above) or "establish a right as legatee" (in the language of s. 213 of the Indian Succession Act, XXXIX of 1925) in himself or in some third person. It seems to me, therefore, that where the plaintiff's *prima facie* title to the property is established, the defendant in order to non-suit the plaintiff should establish the title of the legatee. The general law would seem to be that the defendant's plea of *jus tertii* cannot be entertained when he does not state in whom (such) the right resides. The defendant must trace the title to a third party other than plaintiff. A mere suggestion that there may be a third party with better title is nothing [*Chandra Kanta Pathak v. Bhagjur Bepari* (9)]. It has been held by the Privy Council that "possession is a good title against all the world except the person who can show a better title"—*Sundar v. Parbati* (10), *Narayana Row v. Dharmachar* (11). Similarly a *prima facie* title made out by the plaintiff to the property in suit is, I think, a good title against all the world except against the person who can show a better title. This *prima facie* title of the plaintiff has no doubt to be proved by him if it be not admitted by the defendant; but when once plaintiff's *prima facie* title is admitted or proved, I think it follows that he must succeed unless the defendant is able to displace the plaintiff's *prima facie* title and prove a better title in some person other than the plaintiff. If such person's rights should happen to be as legatee under a Will, since the defendant has to prove such person's right as legatee, he comes within the scope of s. 213 of the Succession Act, XXXIX of 1925 (s. 187 of the old Act X of 1865) under which "No right as legatee can be established in any Court of Justice, unless a Court of competent jurisdiction... shall have granted Probate of the Will under which the right is claimed". We are not here concerned with that class of cases where no direct title to property is claimed under a Will,—the Will being relied on only to prove an authority to adopt or as containing an admission of the status of some other person—*Achyutananda Das v. Jagannath Das* (12), *Manuel Louis Kunha v. Jnana*

(9) 1 Ind. Cas. 525.

(10) 12 A. 51 at p. 56; 16 I. A. 186; 5 Sar. P. O. J. 448; 6 Ind. Dec. (N. S.) 782 (P. O.).

(11) 26 M. 514 at p. 517.

(12) 27 Ind. Cas. 739; 21 C. L. J. 96; 20 C. W. N. 122.

Coelho (13), *Basunta Kumar Chuckerbutty v. Gopal Chunder Das* (8).

My Lord, the learned Officiating Chief Justice, has in his judgment discussed the trend of decisions in this Court on the construction of the section. I think that the respondent in the present case has to establish the right of the deceased Sarawathi Bai as legatee of the suit property to displace the *prima facie* title of the appellant and under s. 213 of the present Act (s. 187 of old Act) she is not entitled to do so unless a Court of competent jurisdiction has granted Probate of the Will under which the right is claimed. I would accordingly answer the question referred to us in the negative, and hold that the defendant in the present case cannot use the unprobated Will as a defence to the suit.

V. N. V. Question answered in the negative.
A. N. A.

(13) 31 M. 187; 18 M. L. J. 158.

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

July 26, 1927.

Present:—Lord Sinha, Lord Blanesburgh and Sir John Wallis.

DELHI CLOTH AND GENERAL MILLS
Co., LTD.—PETITIONERS
versus

INCOME-TAX COMMISSIONER, DELHI,
AND ANOTHER—RESPONDENTS.

Income Tax (Amendment) Act (XXIV of 1926), s. 66A—Income-tax matters—Appeal to His Majesty in Council, when lies—S. 66A, whether retrospective—Interpretation of Statutes—Retrospective operation.

The right of appeal to His Majesty in Council under s. 66A of the Income Tax Act is confined to cases falling within sub-s. (2) of the said section, namely, to cases which are certified by the High Court to be fit for appeal to His Majesty in Council. [p. 157, col. 2.]

While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. [p. 158, col. 1.]

Provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the Statute came into force, were final, are provisions which touch existing rights [*ibid.*]

Section 66A of the Income Tax Act does not, therefore, give a right of appeal to His Majesty in Council from orders passed before the coming into force of the enactment of the said section. [p. 158, col. 2.]

Petition for special leave to appeal from the order of the Lahore High Court (Mr.

Justice Broadway and Mr. Justice Zafar Ali), in C. M. P. No. 551 of 1926, dated the 18th December, 1926, and reported as 100 Ind. Cas. 97.

Messrs. G. R. Lowndes and E. B. Raikes, for the Petitioners.

Messrs. A. M. Dunne and K. Brown, for the Respondents.

JUDGMENT.

Blanesburgh.—These petitions are each of them for special leave to appeal from orders made by the High Court of Judicature at Lahore on references to that Court under s. 66 (2), Indian Income Tax Act, 1922. In each case the sum in dispute exceeds Rs. 10,000. In each the order in question was made before the 1st April, 1926, that in the first of the two cases being of date the 12th January, 1926, and that in the second having been made on the 6th January, 1926. In each case, also, the High Court refused to certify that the case was a fit one for appeal to His Majesty in Council. With these facts for its foundation, an interesting argument was addressed to the Board upon the nature of the statutory appeal in such cases as these, and upon the question whether in the present instances there is any such appeal at all.

The learned Judges of the High Court were of opinion that the petitioners had a right of appeal to His Majesty in Council provided they could, in effect, bring their cases within the requirements of s. 109 (c), Civil Procedure Code, but not otherwise. They dealt with the applications for certificates on that footing, and they dismissed them. Hence the present petitions.

At the hearing before the Board, the view of the High Court was resolutely challenged by the petitioners. It sufficed, it was contended, that the cases should fall within the requirements of s. 110 of the Code: the petitioners' right of appeal was in no way conditional on compliance with the requirements of s. 109 (c). The respondents, on the other hand, supported, as applied to the general case, the view of the High Court, but, contended that, for the petitioners here, there was, for reasons which will appear in the sequel, no statutory right of appeal at all.

These rival contentions raise questions of great general importance. It has seemed to their Lordships to be convenient that they should definitely pronounce upon them.

The legislative history of the subject

is a short one. No express provision for appeals to His Majesty in Council from orders of a High Court in India made upon references either under s. 51, Indian Income Tax Act, 1918, or under s. 66 of the Act of 1922, is to be found in either Statute, but until the case of *Radhakrishna Ayyar v. Sundaraswamier* (1) was decided by the Board, it was apparently generally supposed in India that appeals from such orders were regulated by ss. 109 and 110, Civil Procedure Code, to which reference has already been made. The effect of the judgment in the case cited was, however, definitely to lay it down that from these orders there was, in fact, no statutory right of appeal at all. And such was the position until the 1st April, 1926, when the Indian Income Tax (Amendment) Act, 1926, came into force, by s. 8 of which it is provided that immediately after s. 66, Indian Income Tax Act, 1922, a section should be inserted, of which it is convenient to transcribe the first three sub-sections:

"66A. (1) When any case has been referred to the High Court under s. 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of s. 98, Civil Procedure Code, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force.

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under s. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Civil Procedure Code, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court."

It is upon these sub-sections that the question now under discussion depends, and as to them it will be noticed that the appeal thereby given is by sub-s. (2) confined to a case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(1) 74 Ind. Cas. 584; 45 M. 475; 49 I. A. 211; 36 C. L. J. 450; 16 L. W. 18; 31 M. L. T. 31; 43 M. L. J. 323; 27 O. W. N. 1; A. I. R. 1922 P. C. 257; 20 A. L. J. 937 (P. C.).

These words are textually the same as the concluding words of sub-s. (c), s. 109, Civil Procedure Code., and, coupled with the carefully limited referential words to the Civil Procedure Code in sub-s. (3) suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requirements of s. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. It was conceded in argument that if sub-s. (2) of the section had stood alone, it would be difficult to escape from the construction of it which has just been indicated. It was contended, however, that the reference to the Code in sub-s. (3) was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. Their Lordships cannot agree with this contention. The words of qualification, "so far as may be," in sub-s. (3) are, in their judgment, apt to confine the statutory right of appeal to the cases described in sub-s. (2). To this extent, therefore, their Lordships are in agreement with the High Court.

But a further point remains. Is there under this section any appeal at all from an order of the High Court made before the Act of 1926 came into force?

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in *Colonial Sugar Refining Co., Ltd. v. Irving* (2), where it is in effect laid down that, while provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the Statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect.

(2) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

On the contrary, they think there is a clear suggestion that a judgment of the High Court referred to in sub-s. (2) is one which under sub-s. (1) has been pronounced by "not less than two Judges of the High Court," a condition which was not itself operative until the entire section came into force. In their Lordships' judgment, therefore, the petitioners in these cases have no statutory right of appeal to His Majesty in Council. Only by an exercise of the prerogative is either appeal admissible.

Both petitions their Lordships have, from this point of view, carefully considered. They have not forgotten that the circumstances are somewhat special: that the right of appeal introduced by the Act of 1926 is very probably conceded in order to rectify an omission inadvertently made from previous legislation, and is not one thought of for the first time. Even so, however, their Lordships are unable to find in the circumstances of either case sufficient ground for any exercise of the prerogative in favour of the petitioners.

Their Lordships will accordingly humbly advise His Majesty that both petitions should be dismissed with costs.

A. N. A.

Petitions dismissed.

Solicitors for the Appellants:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondents:—The Solicitor, India Office.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1150 OF 1924.

August 10, 1927.

Present:—Mr. Justice Srinivasa Aiyangar and Mr. Justice Reilly.

PADMANABHA AYYAR AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

SITARAMA AYYAR AND OTHERS—

DEFENDANTS NOS. 1, 2, 4 AND 5 TO 7 AND
LEGAL REPRESENTATIVES OF DEFENDANT NO. 2
—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Mortgage by conditional sale—Construction—Apparent sale-deed with proviso for redemption whenever executant pays, effect of—Time for payment, whether essential to constitute mortgage by conditional sale—Expressions 'such payment' and 'on a certain date' in s. 58 (c), scope of.

A document which was for the greater part of its length an out-and-out sale-deed, contained a proviso at the end "provided that whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned herein, you should

receive it then, execute duly a sale-deed on a stamp-paper with regard to these lands in favour of the individual No. 1, get it registered, give possession of the lands, etc., and return all the documents relating hereto."

Held, that the document was clearly an ostensible sale with a condition that on payment being made, the buyer shall transfer the property to the seller and was, therefore, a mortgage by conditional sale within s. 58 (c) of the Transfer of Property Act. [p. 162 col. 1; p. 165, col. 2.]

The fixing of a certain date for payment is not an essential feature of a mortgage by conditional sale. [p. 163, col. 1.]

The expression 'such payment' in s. 58 (c), Transfer of Property Act, refers only to the payment of the mortgage amount and the expression 'on a certain date' must be construed as referring to the default and not to the payment. [*ibid.*]

Dicta of Maclean, C. J., in *Kinuram Mondol v. Nitye Chand Sirdar* (1) and *Mahomed Mozaffer Ali v. Asraf Ali* (2), not followed.

Second appeal against the decree of the District Court, Salem, in A. S. No. 127 of 1922, preferred against that of the Court of the District Munsif, Dharmapuri, in O. S. No. 826 of 1920.

Mr. A. Krishnaswami Iyer, for the Appellants.

Mr. B. Somayya, for the Respondents.

JUDGMENT.

Srinivasa Aiyangar, J.—My learned brother and myself have recently had quite a number of cases in which the question that arose for determination was the same as in this second appeal, namely, whether on a proper construction of certain documents read in the light of surrounding circumstances the transaction between the parties should be held to be a mortgage by conditional sale or merely a sale with an agreement to re-sell. We may observe with regret in passing that in spite of the differences and variety of judicial opinion with regard to such cases, the Legislature, which is clearly in a position to set at rest such questions being raised, has not yet thought fit to do so. Though the question that has arisen in this case is the same as in several other cases, there is at least one distinguishing feature in this case and that is that the transaction has been brought about not as in nearly all other cases by two documents, one of sale and the other an agreement of re-sale, but that the whole of the contract between the parties is contained in one and the same document.

The facts necessary for appreciating the bearing of the questions that arise may be briefly set out. The document in question

was executed by the father of the plaintiffs and the 5th defendant in favour of the father of defendants Nos. 2, 3 and 4, one Kamakshi Iyer. The property, however, was sometime afterwards sold by defendants Nos. 2, 3 and 4 to the 1st defendant. The 1st defendant, therefore, is the person at present in possession of the property and claiming title thereto. The suit was for redemption on the ground that the document in question was one that effected a mortgage by conditional sale. The defence set up was that on a proper construction, the transaction was not a mortgage by conditional sale but was merely a sale with an agreement for a re-sale, that the condition for re-sale was not specifically performed and further that the claim for specific performance is barred by the Law of Limitation. Both the lower Courts have found on a construction of the document against the plaintiffs' claim and dismissed their action. Reference may in this connection also be made to an application for amendment of the plaint that was made on behalf of the plaintiffs even in the Court of first instance when probably it was perceived that the chances were little of the plaintiffs succeeding in their contention on the footing of the transaction having been a mortgage by conditional sale. It was sought by that application to amend the plaint by setting up in the alternative the agreement to re-sell and praying on that footing for specific performance of such agreement. The application for amendment was refused not only by the Court of first instance, but, when it was repeated, also by the lower Appellate Court. Curiously enough, Mr. Alladi Krishnaswami Iyer, the learned Vakil for the appellants in this second appeal wished to argue mainly the question of leave to amend the plaint, though he also indicated the other question with regard to the nature of the transaction on a proper construction of the document. If it should have become necessary for us to deal with and dispose of this question of the amendment of the plaint, we might have had a great deal of difficulty in the matter. Without discussing the question whether the amendment was in substance within the scope of the cause of action laid in the plaint or not, it is clear that if such an amendment should be allowed the defendant should be accorded another opportunity of pleading to the amended claim or cause of action and the result would practically be allowing the plaintiff to begin a fresh suit.

de novo. But in the view we have taken of the case on the construction of the document, it seems to us unnecessary to discuss this question with regard to the application for amendment.

It is, no doubt, true that all such questions which have to be solved on a reading of the document, considering the language employed in the light of surrounding circumstances, and so forth, are generally fraught with great difficulty and we have after giving the matter our earnest and serious consideration, come to the conclusion that on a proper construction of the document before us it is a mortgage by conditional sale. We have already adverted to the fact that this is not a case in which the transaction was brought about, as in most cases it is, by two documents either contemporaneous or, though not contemporaneous, as really parts of the same transaction. When parties to a transaction deliberately choose to conclude the transaction and embody it in writing not in one document but in two separate documents, there is always considerable room for the contention that the intention of the parties as disclosed by the fact that they required two documents to embody the transaction is indicated to be that they wished the sale and the re-sale to be separate legal transactions. Such consideration, however, is not available in the present case, because the parties have deliberately put in all the terms of the contract in the same document. It is unfortunate that there has been no satisfactory evidence of the surrounding circumstances, including the value of the property at the time of the transaction, which might be looked at for the purpose of helping the Court in coming to a conclusion as to the real intention of the parties as disclosed in the language employed. We, therefore, begin this case with the fact that the parties really regarded it as not only a single transaction but as one that was fit and proper to be concluded by the instrument. The clause relating to the agreement for re-sale comes after the clauses effecting the conveyance and that clause begins with the *tamil* word (Anal). The expression (Anal) clearly indicates that what follows is or should be regarded as a detraction or subtraction from the absoluteness of the sale previously in the document stated to have been made and effected. It may in this connection be noticed that in form and apart from any personal covenants to pay a mortgage by con-

ditional sale is effected in all well-established English precedents of conveyancing first by what is purported to be an absolute conveyance of the property with a *habendum* that the purchasers should have and hold the premises absolutely for himself and his heirs, executors, administrators and assigns, subject, however, to the equity of redemption. The clause relating to the equity of redemption always begins with some such expression as 'provided, however, that' or 'provided always'. Now in the *tamil* language in which this document is drawn up it is impossible to conceive of a word more apt for the purpose of conveying the connotation and significance of a proviso of that character than the word (Anal). No doubt, it might at first sight shock certain susceptibilities that the decision of such question should be made to depend upon the use of a single word like that. But after all the expression itself must be regarded as clearly indicating the intention and meaning of the parties, and if they did not contemplate by the use of that word to delimit in some manner the absoluteness of the sale therein before in the document stated to have been effected, there is no purpose in the use of the word. The whole of the document must be regarded in construing documents and no single word should be left out of consideration. Giving, therefore, its true and proper weight to the expression, the only conclusion that is possible to arrive at is that the estate granted by the previous clause, namely, an absolute sale, is qualified by the conditions or provisos in this clause. The result then is that this *tamil* document has somehow or other come to be framed and worded exactly in the same manner as a document of mortgage by conditional sale in English precedents of conveyancing. I shall later on have occasion to refer to the definition in the Transfer of Property Act of a mortgage by conditional sale with special reference to this document, and also deal with the contention of Mr. B. Somayya for the respondents with regard thereto.

The next point to be considered in determining the question whether it was a mortgage or an absolute sale, is the fact that in the document the consideration for the re-sale is stated to be the same amount that is specified as the sale price in the document. If the sale and the re-sale should be two different legal transactions, the consideration for the re-sale is not the amount origin-

ally advanced on the sale but some amount which the parties agree to as the consideration for the re-sale. But when the document states that what has to be re-paid is not the consideration agreed to for the re-sale but the amount originally advanced on the sale, the reference to such amount makes the transaction more consistent with its being a mortgage than an agreement of re-sale. There is in this document one other somewhat curious provision and that is as follows:—"This sum you should pay to the said A. Subba Chettiar out of the same amount, get the payments endorsed on the bonds, get them back with his signature and keep them in support of the sale-deed." The direction and the requirement that the purchaser under this document should obtain these debt-bonds with an endorsement of discharge on them and that he should further keep them with him as vouchers in support of the sale-deed would seem rather to indicate that what was intended by the parties was not an outright sale but only a security and the language employed is certainly more consistent with a mortgagee paying the amount of the mortgage for the purpose of discharging the debts of the mortgagor and being required to retain them as vouchers in his hands. If it was an outright sale, it seems difficult to understand why the transferor should have required that the transferee should obtain those bonds and keep them in support of the deed. Reference may also be made to another provision in the document providing for the return of all the connected documents on payment of the money. That clause is also calculated to throw some light on the true meaning and the intention of the parties and is certainly more consistent with the transaction being a mortgage than any other. There is, however, one other and, to my mind, a very conclusive indication in the document that what the parties really intended must have been only a mortgage and not a re-sale. Though the Law Reports are full of cases of this kind and we have had also occasion to come across numerous documents of this nature, still in a proper agreement of re-sale we have not come across a single case in which there was not some time fixed on or before which date it was required that the other party should complete the transaction. The provision in this case is as follows:—"But whenever the first individual among us pays you the sum of Rs. 500 which is the

sale price mentioned herein, you should receive it then, execute duly a sale-deed on stamp paper with regard to these lands in favour of the individual No. 1, give it registered, give possession of the lands, etc., and return all the documents relating thereto." If it was a mortgage, one can easily understand the clause being so worded and leaving it to the option of the mortgagor to pay up the amount at any time and require conveyance of the property. Till that is done, the property is in the possession and enjoyment of the mortgagee in lieu of interest. There is nothing more to be done. But if it should be an outright sale, then according to this clause whenever the other party chose to offer this Rs. 500 the purchaser would be under an obligation to re-convey the property. To begin with, it is difficult to understand that parties to an outright sale should have really contemplated entering into such a contract. It is conceivable that between the date of the sale and the time when the seller or his legal representatives may elect to exercise the option and demand re-conveyance of the property on payment of the money considerable time might have elapsed and the price of the property might have become doubled or trebled. If the conveyance was not regarded merely as security for the money, it would be very strange to suppose that without any regard whatever to the possible and probable changes in the price of property the parties agreed to grant a re-sale and effect re-conveyance whenever the other party might wish to demand the same. This provision, therefore, which fixes no time whatever for the purpose of the re-sale seems to me almost conclusive on the question now under consideration. For all these reasons and others which it is unnecessary to refer to in detail I have come to the conclusion that on a proper construction of the language employed in Ex. A the transaction embodied in Ex. A was really a mortgage by conditional sale.

Mr. Somayya for the respondents strenuously contended that even if we should on a construction of the document itself come to the conclusion that it was a mortgage by conditional sale, it was not a valid mortgage having regard to the definition of a mortgage by conditional sale as set out in the Transfer of Property Act, Section 58 of the Transfer of Property Act at first defines a mortgage and then proceeds in the other clauses to define what a simple mortgage is.

what a mortgage by conditional sale is, and so on. A mortgage is defined as "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." Therefore with regard to this definition the essential element in a mortgage is the transfer of property by way of security, and that is the question we have been considering with reference to the language employed, and that has already been dealt with. The definition of a mortgage by conditional sale, however, is contained in cl. (c) and is as follows:—"Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale." Taking the terms as they are, the necessary element in a mortgage by conditional sale is that there should be an ostensible sale of the mortgaged property. We have it here. Then having reference to the third sub-clause in this clause which is the sub-clause which applies to this case, there should be a condition that 'on such payment being made, the buyer shall transfer the property to the seller.' Here undoubtedly there is a condition, and it is truly a condition because it is introduced by the word (Anal). There is the condition that on payment being made, the buyer shall transfer the property to the seller. Now what Mr. Somayya contended was that the expression 'on such payment' in this sub-clause must be read as referring to the payment referred to in the first sub-clause and on such reference must be construed as a payment of the mortgage-money on a certain date. The first sub-clause, no doubt, refers to the condition being that on default of payment of the money on a certain date the sale shall become absolute. It will be convenient, before referring to or dealing with the cases cited by Mr. Somayya in support of his contention, to examine this contention on its own merits. The contention comes to this, that there can be no mortgage by conditional

sale at all, unless, whichever may be the sub-clause there is a certain date fixed as the date on which the payment of the mortgage-money should be made. The expression 'on a certain date' should be taken in terms as merely pointing to the certain date as the date on which the payment should be made, not any date either before or after and no doubt Mr. Somayya had, as Holmwood, J., in a case which I shall presently refer to, when pressed, by this consideration, was forced, to construe the expression 'on a certain date' as meaning 'on or before a certain date.' What warrant is there in the language of the Statute for importing words into it which are not there and construing it in the manner suggested, I really fail to see. It is the *reductio ad absurdum* to which a reading of the Statute in that manner leads that has induced Mr. Somayya to contend for the construction, that 'on a certain date' should be taken to mean 'on or before a certain date.' It seems to me that such a construction of the clear terms of the section cannot possibly be accepted. Now going back to the first sub-clause in cl. (c), what the clause speaks of is, 'on default of payment of the mortgage-money on a certain date.' No doubt, grammatically 'a certain date' may be related either to the payment or to the default and, having regard perhaps to the genius of the English language, either grammatical construction may possibly be accepted. But if we take it to mean that the condition that should happen on a certain date is not the payment but default in payment, then it is clear that if payment of the mortgage-money should come to be made on or before the date fixed there is no default on the certain date which has been fixed and the absurd result which was sought to be avoided by practically importing into the Statute words which were not there is steered clear of. Further, if the Legislature intended to attach to the expression 'such payment' the requisite, namely, that the payment should be on or before a certain date, it is likely that much clearer terms would have been employed to indicate it. It may also be observed that if the contention put forward by Mr. Somayya with regard to the construction of the expression 'such payment' should be accepted, it follows that most documents which have been regarded and adjudicated by Courts of Law to be proper

deeds of conditional mortgage could not be so regarded at all or could not have been properly so adjudged. The expression 'such payment' clearly refers only to the payment of the mortgage amount and if the expression 'on a certain date' is construed as referring to the default and not to the payment there is no difficulty whatever in construing the section or any of the clauses there.

Mr. Somayya, however, has been able by his industry to produce before us two decisions of the Calcutta High Court in which the view contended for by him has found considerable support. The first case cited by him was *Kinuram Mondol v. Nitye Chand Sirdar* (1). In his judgment in that case no doubt Maclean, C. J., says this: "It is not necessary to decide it finally, but I do not think there was any 'certain date' of payment within the meaning of sub-s. (c) of s. 58 of the Transfer of Property Act, and that is an essential element of a mortgage by conditional sale." This observation was not necessary for the decision of the case and must be regarded merely as an *obiter dictum*. No doubt, in that sentence the learned Chief Justice considers that the provision with regard to the certain date must be taken to be present not only in the sub-clause where the words occur but also in the other sub-clauses by the use of the expression 'such payment.' For the reasons already given it seems difficult to accept this expression of opinion of the learned Chief Justice in the case. In a later case *Mahomed Mozaffer Ali v. Asraf Ali* (2) Holmwood and Chapman, J.J., held that a certain date of payment within the meaning of sub-s. (c) of s. 58 of the Transfer of Property Act is an essential element of a mortgage by conditional sale. Then the learned Judges go on to observe as follows regarding the Calcutta case already cited: "The Chief Justice says in that case that in the particular case before the Court he did not think that there was any certain date of payment within the meaning of the section, but he does not lay down that 'on a certain date' means that the tender cannot be made before that date. The certain date which is laid down must according to all rules of interpretation be the last date and it

would be both inequitable and impossible to hold that in this country of long distances and poor means of communication a man must go travelling all over the country on the particular day on the chance of finding his creditor and tendering the money to him, and that he could not go on any previous day." The difficulty, nay the absurdity, of construing the expression 'on a certain date' according to the language employed was really felt by the learned Judges and that seems to be the reason why they were at pains to explain it away by stating that according to all rules of interpretation 'on a certain date' means 'on or before a certain date.' But apparently it was overlooked by the learned Judges that if the first sub-clause in that sub-section should be construed as referring 'the certain date' not to the payment but to the default, the whole of this difficulty which they were obsessed with might be avoided altogether. Thus it is clear that there is nothing in the terms of this mortgage which has the effect of not bringing it under the terms of a conditional mortgage as defined by s. 58 of the Transfer of Property Act.

If on a proper construction the transaction was a mortgage no other question really arises.

Mr. Somayya, no doubt, took the alternative case of the clause being regarded as a mere agreement to re-sell the property and launched on a learned disquisition with regard to such a clause offending against the rule against perpetuity. But in the view we have taken that the transaction was a mortgage, no question at all arises because the rule against perpetuity can apply only to cases where there is a new interest in immoveable property contemplated to be created after the expiry of the time prescribed by the rule, namely, the lifetime of a person living and the minority of one who may be in existence then. In the case of a mortgage, however, there is no such future interest in property contemplated to be created because it is of the very essence of the mortgage that the equity of redemption is a present interest in property in exercise of which alone the property is sought to be redeemed. There is also no question of the clause being regarded as a mere personal contract and for that reason held to be invalid, as also

(1) 6 C. L. J. 208; 11 C. W. N. 400.

(2) 25 Ind. Cas. 92.

of its being void for remoteness. No question arises in this case on the plaint as laid and on the cases of any personal covenant and the enforcement thereof. It seems to me, therefore, unnecessary to discuss the cases, both English and Indian, that have been cited by Mr. Somayya for this purpose. He has frankly conceded that if the correct view should be that it is a mortgage, no such question can possibly arise.

Both the lower Courts, therefore, were wrong in the view taken by them of Ex. A. I have come to the conclusion that on a proper construction it is a deed of mortgage by conditional sale and that the plaintiffs as the mortgagors are entitled to redeem the property within the time prescribed by the Law of Limitation, namely, sixty years from the date on which they are entitled to redeem. In this case the clause is, 'whenever the party likes he has the right to redeem' and, therefore, the right to redeem accrued to him from the very date of the execution of the mortgage because there is no other term fixed within which the mortgagor is prevented from claiming redemption. No question of limitation, therefore, can possibly arise. The appeal is allowed and the decrees of both the lower Courts are set aside. Instead there will be an ordinary preliminary decree for redemption by the plaintiffs of the suit property. But the case, however, cannot be finally disposed of here because Mr. Somayya states that issue No. VII in the case which relates to the improvements, if any, made by the defendants in respect of the suit property and their right to claim the same from the plaintiffs would have to be gone into and decided before a final decree for redemption is made. The case will have, therefore, to be sent to the Court of first instance for the determination of that issue both on the facts and on the law. It is stated by the learned Vakil for the appellants that at some stage of this litigation the 1st defendant had given a statement to the effect that he did not wish to let in any evidence with regard to that issue. If the Court of first instance should find that there was any such statement given, effect will be given by the Court to such statement in coming to a conclusion with regard to this issue. The Court of first instance will after determining that issue make a final decree for redemption for the proper amount. Except as to the costs which are

awarded to the 1st defendant during the trial in the Court of first instance that he should have the costs up to such stage irrespective of the result of the suit, the appellant will be entitled to all the other costs in all the Courts from the 1st defendant. The costs hereafter to be incurred will be provided for by the Court of first instance. The Court-fee paid by the appellants in this Court will be refunded to them.

Reilly, J.—I agree that on the face of Ex. A the transaction represented by it was a mortgage by conditional sale. Here we have a document which for the greater part of its length is an out-and-out sale-deed, and then at the end comes a provision "Anal (provided that) whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on a stamp-paper with regard to these lands in favour of the individual No. 1, give it registered, give possession of the lands, etc., and return all the documents relating hereto." That, in the language of s. 58 (c) of the Transfer of Property Act, appears to me to be clearly an ostensible sale on condition that on payment being made the buyer shall transfer the property to the seller. But Mr. Somayya has contended that there can be no valid mortgage here because no date for payment has been fixed. There is nothing in the idea of a mortgage generally which makes the fixing of a date for payment or a date before which there can be no redemption essential. In usufructuary mortgages it is not unusual that no time for payment should be fixed; and I believe that in equitable mortgages by deposit of title-deeds it is generally the case that no time for payment is fixed. And s. 60 of the Transfer of Property Act itself recognises that no fixed time for payment is an essential characteristic of a mortgage. But Mr. Somayya has contended that a mortgage by conditional sale is one of the kinds of mortgage for which a fixed time for payment is essential, and he bases that contention primarily on the wording of s. 58 (c). In s. 58 (c) three conditions are set out which when attached to an ostensible sale make the transaction a mortgage by conditional sale. In sub-cl. (1) which deals with the first condition, we find the words "payment of the mortgage money on a certain date." In sub-cl. (2) and (3) we find only the words "such payment". Mr. Somayya contends that

we must read the words 'such payment' in sub-cl. (2) and (3) as equivalent to 'payment of the mortgage money on a certain date,' the words used in sub-cl. (1). Grammatically, in my opinion, the words 'such payment' in sub-cl. (2) and (3) refer to the payment of the mortgage-money in sub-cl. (1) without the addition of the words 'on a certain date'. 'Such' means 'of the like kind'; but in Statutes the word is often used as equivalent to 'of that kind' or even loosely as equivalent to 'that'. If we take it that in sub-cl. (2) and (3) 'such payment' means 'payment of that kind' or even 'that payment', we shall be giving full meaning to the expression by reading it as equivalent to 'payment of the mortgage-money' without bringing in the additional words 'on a certain date', which convey an additional idea not really connected with 'payment of that kind'. But, even if it were possible to read the words 'such payment' in sub-cl. (2) and (3) in two alternative senses, either as equivalent to 'payment of the mortgage-money on a certain date or to payment of the mortgage-money alone, I think we should be bound to adopt the latter construction. We are considering a condition set out in a Statute, and we must be careful not to widen the scope of that condition further than the words compel us to go. If two interpretations are possible, we ought to accept the less onerous one. And, if we look at the sense of these sub clauses, it is clear that in sub-cl. (1) the words 'on a certain date' are necessary to the meaning. That is a default clause, and for the purpose of a default clause it is necessary that a date should be fixed or fixable, as otherwise no one will know when the default has occurred. But there is no such necessity in the meaning of sub-cl. (2) and (3) to mention any date. On the mere interpretation of s. 58 (c) as it stands, speaking for myself I should think it is clear that we have no right to introduce into sub-cl. (2) and (3) the words 'on a certain date'. Mr. Somayya has drawn our attention to *Kinuram Mandol v. Nitye Chand Sirdar* (1) in which Maclean, C. J., clearly stated that a certain date was an essential feature of a mortgage by conditional sale. But that was only an *obiter dictum*, and there is no discussion of the matter in the judgment. In *Mahomed Mozaffer Ali v. Asraf Ali* (2) two learned Judges of the same Court assumed that that *dictum* was correct. But again they did not discuss it, though they

used it as the basis of their discussion on a further point. With great respect, I do not think that we can take either of those cases as an authority for the position that the fixing of a certain date for payment is an essential feature of a mortgage by conditional sale.

Mr. Somayya spent a good deal of time in his argument on a contention that anyhow the proviso to Ex. A offended against the rule against perpetuities, or more specifically against the provisions of s. 14 of the Transfer of Property Act. I certainly understood him to be using that contention as an attack upon the theory that Ex. A represented a mortgage by conditional sale; and, if that was not his intention at the time, I hardly think he was justified in occupying us for so long on the point at that stage of the case. However, eventually he has admitted that, if Ex. A represents a mortgage by conditional sale, then the proviso does not offend against the provisions of s. 14 of the Transfer of Property Act. And it is clear that that is so. The proviso does not create any interest after a life or at any future time at all. It merely reserves the right to redeem from the very moment of the document.

I agree that this appeal must be allowed and that the suit should go back to the District Munsif for him to make a decree for redemption subject to the directions indicated by my learned brother.

V. N. V.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1925.

July 26, 1927.

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

NATHU RAM—DEFENDANT—APPELLANT

versus

Musammatt CHAND KUAR—PLAINTIFF—RESPONDENT.

Fatal Accidents Act (XIII of 1855), s. 1—Damages, assessment of—Elements to be considered—Fine paid to plaintiff in criminal case—Probable duration of life of deceased—Sentimental considerations, whether relevant.

In awarding damages under the Fatal Accidents Act, the Court should take into account the amount of fine realised from the defendant and paid to the plaintiff in criminal proceedings instituted by the latter against the defendant. [p. 166, col. 1.]

In estimating damages under the Act it is settled law that no sentimental considerations are relevant. A plaintiff cannot get higher damages when the deceased had been brutally murdered than where the death had been due to mere error of judgment. [p. 166, cols. 1 & 2.]

In assessing such damages it is necessary to take into account the probable duration of the life of the deceased. [p. 166, col. 2; p. 167, col. 1.]

Rowley v. L. & N. W. Railway (1), relied on.

First appeal from the decree of the Sub-Judge, Agra, dated the 26th January, 1925.

Mr. Baleshwari Prasad, for the Appellant.

JUDGMENT.

Ashworth, J.—This appeal arises out of a suit brought by the widow of a deceased man against the defendant, a *zemindar* who caused his death by shooting him. The suit is for damages under the Fatal Accidents Act (XIII of 1855). The *zemindar* was convicted of an offence under s. 304 and sentenced to imprisonment and to a fine of Rs. 1,000. The fine was realised and was paid over to the present plaintiff. Not being satisfied with the amount she has brought this suit and has obtained a decree for the further sum of Rs. 1,500. The defendant appeals. The respondent is not represented. The lower Court awarded the further sum of Rs. 1,500 taking into consideration the fact that Rs. 1,000 had already been awarded.

The first question that arises in this appeal is whether the Rs. 1,000 fine paid over to the plaintiff should be taken into account in the present suit. No authority, one way or the other, has been cited but the Act empowers the Civil Court to give such damages as it may think proportionate to the loss resulting from such death to the party for whom and for whose benefit the action shall be brought.

These words appear to me to require that the fine already realised should be taken into account. The death of the husband was the cause of the fine being realised and given to the plaintiff. Any damages given to the plaintiff by reason of loss must take into account any pecuniary advantage obtained by the plaintiff by reason of the death.

The remaining question is whether the lower Court has over estimated the damages. It is clear and settled by authority that no

sentimental considerations are relevant. The plaintiff cannot get higher damages even if her husband was brutally murdered by the defendant than if the death of her husband had been due merely to an error of judgment, such as may, on the part of the driver of a vehicle, cause the death of a person.

The method adopted by the trial Court for assessing the damages is as follows: The sole source of income of the deceased appears to have been the cultivation of an occupancy holding, which he cultivated by his own personal labour. The lower Appellate Court has held that the damages should be assessed according to the sum required to furnish the widow with substituted labour for working the holding. The appellant does not complain as to this method, and the respondent not being present must also be held to acquiesce in this method. What the appellant complains of is that an error has been committed by the lower Court in working out the method. The Court has estimated the monthly expenditure required to furnish the labour for working the holding at from Rs. 10 to Rs. 12 a month and has awarded a sum which, if invested in Government securities, would produce Rs. 10 a month. It is objected that the deceased was 56 years old at the time of his death and would not have been capable of working the holding for more than, at the very utmost, ten years. This appears to me to be a just contention. The sum awarded by the lower Court, however, not only will enable the widow to hire the necessary labour for ten years but will leave her at the end of that time with a sum of Rs. 1,500, which she would not have possessed at the end of ten years if her husband had survived. This objection is, in my opinion, obviously common sense. The principle underlying the objection has been approved by an English decision under Lord Campbell's Act (which is practically the same as the Indian Act). In *Rowley v. L. & N. W. Railway* (1) it was held that a Jury might estimate the damages to an annuitant of the deceased by calculating what sum would buy him an equally good annuity but it was added that it was material to know the average duration of the life of the annuitant. Similarly, in this case where we know the probable duration of the capacity of the deceased to supply the

(1) (1873) 42 L. J. Ex. 153; 29 L. T. 180; 8 Ex. 221; 21 W. R. 869.

labour for the occupancy holding we must take that duration into consideration.

I am not disposed to hold that the method employed by the lower Court, if properly applied, was an incorrect method. There is no contention in this appeal before us that it is incorrect. There are no facts clearly set forth in the judgment of the lower Appellate Court which would enable this Court in appeal to assess the damages under any alternative method. It appears, therefore, that we should accept this method but correct the application of it. Rs. 12 a month comes to Rs. 144 per year. Assuming that the deceased might have worked for ten years (an exceedingly favourable estimate to the plaintiff), a total sum of Rs. 1,440 would supply that labour. But this sum would not have to be expended at once. It would only be expended at the rate of Rs. 12 per month. All the ten years the widow would be enjoying interest on the diminishing capital sum. If, therefore, we substitute, for a sum required when invested in Government securities to bring in Rs. 10 per month a capital sum of Rs. 1,440, the decision will err, if at all, in being too generous to the widow. The appellant, however, has not suggested what deduction should be made as a set-off as against this interest, and it is not necessary in a case of this nature to calculate the damages with meticulous accuracy. I am of the opinion that a sum of Rs. 1,500 will be amply sufficient to make the damages proportionate to the loss resulting in the death of the plaintiff's husband, Rs. 1,000 as already stated must be deducted and this will leave a sum of Rs. 500. I would, therefore, vary the finding of the lower Court by reducing the sum of Rs. 1,500 to one of Rs. 500. The parties in both Courts will get proportionate costs according to their success and failure.

Mukerji, J.—I agree.

A.N.A.

Appeal allowed in part.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEALS NOS. 4, 5, 10
AND 11 OF 1927.

April 28, 1927.

Present:—Mr. Justice Wallace and Mr. Justice Jackson.

R. E. MUHAMMAD QASIM RAVUTHAR
BY HIS AGENT UNDER GENERAL POWER-OF-
ATTORNEY, **ABDUL KARIM SAHIB**—
APPELLANT

versus

R. C. NAGARAJA MOOPANAR AND
OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XL, r. 1—
Appointment of Receiver pending suit.*

On an application for the appointment of a Receiver pending the suit, the essential point for the Court to consider is whether the plaintiff has shown *prima facie* that he has a strong case and a good title to the property. [p. 169, col. 1.]

Appeals against the order of the Court of the Subordinate Judge, Tanjore, dated the 23rd December, 1926, in I. A. No. 481 of 1926 in O. S. No. 81 of 1926.

Messrs. T. R. Venkatarama Sastri, (Advocate-General), A. Krishnaswami Iyer, E. Vinayaka Rao, T. R. Ramachandra Iyer, for the Appellant.

Messrs. T. Rangachari, B. C. Sankaranarayanan, S. Varadachari, A. Srirangachariar and K. Narasimha Iyengar, for the Respondents.

JUDGMENT.—These appeals are against the order of the Subordinate Judge of Tanjore in the matter of appointment of a Receiver in O. S. No. 81 of 1926 on his file. That suit was filed by the plaintiff to declare that he is the reversionary heir of the Kapistalam Estate. The last male owner was one Chandrapakasa Moopanar who died in 1869 leaving a widow who died in 1884. On her death their daughter Seethalakshmi Ammal succeeded. She died on 9th March, 1926. Her husband Krishnaswami Moopanar died on 29th April, 1926. On Seethalakshmi Ammal's death there were three sets of claimants, first the plaintiff who claims as the son of Seethalakshmi Ammal's daughter, second the 1st defendant, who claims as the adopted son of Seethalakshmi Ammal's husband and third, defendants Nos. 2 to 5 who claim as *dayadies* of the last male owner. Defendant No. 1 and defendants Nos. 2 to 5 have compromised between themselves and now present a united front to the plaintiff who is suing for a declaration.

of his title and for possession of so much of the estate as is not now in his possession.

While Seethalakshmi Ammal was alive, the estate was being managed, latterly at least, by a power-of-attorney agent, who is the 6th defendant, and was largely in the actual possession of lessees, the periods of, whose leases have yet a considerable time to run. Thus the plaintiff is holding a lease, Ex. E, dated 23rd September, 1925, of 50 or 60 *velies* in Satyamangalam village, current for 9 years and the 2nd defendant holds a lease, Ex. VII, dated 14th October, 1922, of 170 or 180 *velies*, current for 10 years. Under Ex. A a document dated 4th February, 1926, the 2nd defendant is *prima facie* entitled to the rents of practically the whole estate. This Ex. A was given by the power-of-attorney agent while Seethalakshmi Ammal was still alive, and it must for purposes of these appeals be accepted as made under authority and, therefore, valid. Criticism such as the Subordinate Judge makes on its terms appears to us here beside the point.

The plaintiff applied to the lower Court for the appointment of a Receiver to take over the management and collection of rents of the estate, to look after the charities, to lease out the properties on proper rents, to recover moveables secreted by the defendants and prevent waste and injury. The lower Court, after an elaborate enquiry has in a lengthy order directed the appointment of a Receiver who shall take over the management of the estate, collect rents from the lessees, take possession of such of the estate as is not in possession of lessees, conduct charities and preserve the property. Against this order the defendants have come up in appeal.

We are of opinion that the lower Court has not viewed the matter from the right point of view. The essential point for it to consider was whether the plaintiff has shown *prima facie* that he has a strong case and a good title to the property. Instead of considering this it puts that altogether aside with the remark that the plaintiff's title is a matter for decision in the suit. Such a comment might be made in every application for a Receiver, and if, endorsed would render the appointment of a Receiver, almost automatic. On the other hand, the learned Judge discusses the strength and the weakness of the 1st defendant's case but refuses to discuss the

case of defendants Nos. 2 to 5, and nevertheless finally concludes (para. 21) that "this is not a case where it can be said at this stage and on the present materials that any party has established a clear and strong *prima facie* title which is beyond dispute." Such being his conclusion, namely, that the plaintiff has not established a clear and strong *prima facie* title, the correct order for him was to refuse his application. But, influenced by what he regards as sinister conduct on the part of defendants Nos. 2 and 6 with reference to Ex. A and the idea that there has been a scramble for possession after the death of the lady, the learned Judge has seen fit to appoint a Receiver. It did not appear in the course of arguments before us that the possession of any lessee has been disturbed. What has been the subject of scramble, if the word may be used, was the right to collect the rents from the lessees. No one is at present threatening to oust the plaintiff from his leasehold of 50 *velies*, and that is the whole extent to which, assuming him to be the reversionary heir, he is entitled to present possession. As regards the scramble for the right to collect the rents, as the defendant-claimants have settled their differences and are in possession of a major portion of the estate, the only scramble is by the plaintiff, and the question which the lower Court should have addressed itself to was, as we have said, has the plaintiff such a strong *prima facie* case that the Court was justified in directing that the existing state of things at the death of the lady should be interfered with?

The plaintiff can succeed only if he is able to defeat both sets of defendants. He must first of all establish that there was no adoption of the 1st defendant or that that adoption was under such conditions that 1st defendant does not succeed to the Kapistalam Estate, and secondly that defendants Nos. 2 to 5 are not *dayadies* of the last male owner, or that, if they are, he, as daughter's daughter's son of the last male owner, has by force of some special custom a title to preference over them. *Prima facie* the facts are at present against him. As to the first point 1st defendant's adoption has been held good in a suit by him against Seethalakshmi Ammal both in the original Court and on appeal: see Exs. I (a) and I (b). If there are any circumstances connected with the adoption which

would preclude the 1st defendant from succeeding to Seethalakshmi Ammal these have still to be proved. As to the second point the early documents, not so far discredited—see Ex. XIV of the year 1831, which the Judge wrongly ascribes to the year 1868, Ex. XV of 1868 and Ex. XVII, a judgment of the High Court indicate that the genealogy put forward by these defendants is correct, and its incorrectness has still to be proved by the plaintiff. Plaintiff has so far produced no document to negative the correctness of this genealogy.

He has also waited a very considerable time before making his move. The suit was filed on 9th September, 1926, six months after the death of Seethalakshmi Ammal. In the interval there were curator proceedings in the District Court in which the plaintiff took no open part and certainly did not there press openly any claim on the estate. That petition was disposed of on 30th March, 1926. The present contention of a special custom was not put forward in any shape or form in the curator proceedings and only appears for the first time in his present plaint. He has still to go the whole way in proof of his case and *prima facie* at present it does not appear to be a strong one. We are clear in these circumstances that the lower Court was not justified in appointing a Receiver at the present stage. If subsequently the plaintiff makes out a strong case or the defendants fall out amongst themselves, it may be necessary to re-consider the matter. We reverse the order of the lower Court and dismiss the plaintiff's petition with costs to the defendants in both Courts. Appellants in each appeal will have their costs here from plaintiff.

V. N. V.

A. N. A.

*Appeal allowed.***MADRAS HIGH COURT.**

CIVIL REVISION PETITION No. 218 OF 1926.

May 1, 1927.

Present:—Justice Sir William Watkins
(Phillips, Kt.)

VADDIRAJU VENKATA JEGGA RAO

—PETITIONER

versus

PILLAI RANGANAYAKULU—

RESPONDENT.

Agency Rules (Vizagapatam), r. 55—Appeal against

order refusing to set aside dismissal of suit for default, whether lies—Improper exercise of discretion—Power of agent to act under r. 55.

Though the Vizagapatam Agency Rules do not provide for an appeal from an order refusing to set aside an order dismissing a suit for default, the agent has power under s. 55 of the Agency Rules, to set aside an order of a special assistant refusing to set aside the dismissal of a suit for default, where the latter has not exercised a judicial discretion in the matter.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Agent to the Governor, Vizagapatam, dated the 23rd December, 1925, in O. M. P. No. 25 of 1925 (Application under r. 55 of the Agency Rules against the order of the Court of the Special Assistant Agent, Koraput Division, dated the 21st April, 1925, in O. S. No. 22 of 1922.)

Mr. P. Somasundaram, for the Petitioner.

Mr. Y. Suryanarayana, for the Respondents.

JUDGMENT.—The petitioner seeks to revise an order passed by the Agent to the Governor at Vizagapatam setting aside the dismissal of a suit for default and ordering its restoration to file. It is here contended that the power under Agency Rule 55 given to the Agent to the Governor can only be exercised if he is satisfied that the order of the lower Court is not according to law. It is significant that the Agency Rules do not provide for any appeal against an order refusing to set aside a dismissal. Therefore, the exercise of discretion by the first Court becomes final and is not subject to alteration by the Appellate Court. If the Agent to the Governor was satisfied that this discretion had not been properly exercised by the first Court he would be justified in acting under r. 55. In the present case, on the merits, his order is certainly right for I am of opinion that the Special Assistant Agent omitted to take into consideration many circumstances which might probably would have induced him to re-consider his order. If, therefore, the Governor's Agent thought that the Assistant Agent had not exercised his discretion judicially, as he evidently did, he was justified in taking action under r. 55.

The petition is dismissed with costs.

V. N. V.

A. N. A.

Petition dismissed.

**NAGPUR JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.**

CIVIL REVISION No. 183 OF 1926.

July 11, 1927.

Present:—Mr. Hallifax, A. J. C., Mr. Kinkhede, A. J. C., and Mr. Macnair, A. J. C.
GOVINDA AND OTHERS—APPLICANTS

versus

MURLIDHAR AND OTHERS—NON-APPLICANTS.

C. P. Land Revenue Act (II of 1917), ss. 151, 152—Pre-emption, claim to, enforceability of, in execution proceedings.

A claim to pre-emption under s. 151 of the C. P. Land Revenue Act is enforceable in execution proceedings and not by a separate suit. [p. 172, col. 1.]

Sitaram v. Kaniram (1), overruled.

Revision against an order of the Sub-Judge, First Class, Ohanda, dated the 16th April, 1926, in Execution Case No. 7 of 1924.

**ORDER OF REFERENCE TO A
FULL BENCH.**

Hallifax, A. J. C.—(November 13, 1926).

—The applicants for revision are recorded co-sharers in the village of Bormala and Saotala in the Ohanda District. They say their share is four annas in each village, but even if that was so they have lost five pies out of each four annas by the proceedings in this case, and each share now is three annas seven pies only. All that matters in this case, however, is that they still have a share in each village; with the extent of the share we are not concerned.

The opposite party in these proceedings held a decree against the owners of the whole of the rest of both villages and attached a twelve annas five pies share in each village, in execution of it. These shares were put to auction on the 26th of March, 1926, and knocked down for Rs. 1,000 and Rs. 500 to the decree-holders, who had the permission of the Court to bid. The date fixed for the confirmation of the sale was the 19th of June, the long adjournment being due to the vacation intervening. On the 12th of April, the present applicants for revision put in a petition claiming, under s. 151 of the Land Revenue Act, 1917, to take both shares at the sums last bid.

The learned Judge of the lower Court followed the ruling in *Sitaram v. Kaniram* (1) as he was bound to do, and rejected the petition on the 16th of April. With most unusual promptitude, the petitioners applied to this Court on the 29th

of the same month for revision of that order. That saves them from being barred from getting revision by the consideration mentioned at the end of the judgment cited, that an appeal would lie from the order confirming the sale, as that order was not passed till the 19th of June. It is also open to question whether an appeal by them would lie against the order confirming the sale, as they were not interested in it except as claimants of a right of pre-emption.

The effect of the judgment in *Sitaram v. Kaniram* (1) is this. A Collector acting in execution of a decree, with the powers granted to him under s. 68 of the Civil Procedure Code, could in those execution proceedings enquire into a claim to pre-emption made under s. 151 of the Land Revenue Act, 1917, and could grant it, but in doing so he was acting as a Revenue Officer. A Civil Court, as such, never had that power, and as it ceased to exist in the Collector in April, 1923, there is no way of enforcing that right now except by suit; it cannot be enforced in execution proceedings.

It can hardly be correct to say that a Collector acting under the rules in Sch. III or any part of the Civil Procedure Code was acting as a Revenue Officer, and that when the powers he held were taken from him they ceased to exist. The powers he held were those of a Civil Court, which were transferred to him, and when they were taken from him they reverted to the Civil Court.

But anyhow it was always the Civil Court itself which dealt with an application under s. 151 of the Land Revenue Act, even before April, 1923. The powers conferred on the Collector by the Local Government were only those which the Civil Court had "in execution of the decree", and under cl. (b) of s. 70 (1) of the Civil Procedure Code no wider powers could be conferred on him. The Collector had no power to enquire into objections to the execution or claims to the property, and a claim such as one under s. 151 of the Land Revenue Act was made to the Civil Court itself, which disposed of it. It would probably be presented in the first place to the Collector, but he could do nothing with it but forward it to the Civil Court which would deal with it, the execution proceedings being transferred back from the Collector till it was decided.

(1) 91 Ind. Cas. 962; 21 N. L. R. 157; A. I. R. 1926 Nag. 193.

There is no necessity to translate s. 151 of the Land Revenue Act from its surroundings to make it applicable to a Civil Court, because it has always been so applicable, but I can see no difficulty in doing so if it were necessary. Nor is there anything to prevent an Act of the Imperial Legislature being modified by a local Act; instances of this being done directly are common.

With all due respect, I am of opinion, that the application made to the Executing Court in this case ought to have been accepted by that Court and granted, unless any reason to the contrary appeared, and none has ever been alleged. Accordingly I refer to a Bench the question whether the decision in *Sitaram v. Kaniram* (1) is correct or not.

Messrs. *Atmaram Bhagwant and S. A. Ghadgay*, for the Applicants.

Messrs. *A. V. Khare and W. B. Pendhar-kar*, for the Non-Applicants.

OPINION.—In the officially published judgment of this Court in *Sitaram v. Kaniram* (1) it was held that the right of pre-emption created by s. 151 of the Land Revenue Act, 1917, could not be enforced by a Civil Court in the execution of a decree; it could be enforced only by a Collector exercising powers conferred on him under s. 70 of the Civil Procedure Code, and as there are now no such Collectors that can no longer be done; the claimant must file a regular suit. The correctness of this decision has been doubted in three cases, of which this is one, and they have come before a Full Bench.

From that view we feel bound, with all respect, to dissent. It seems mainly based on a misconception of the position of a Collector in the execution of a decree. In such a proceeding he did not act as a Revenue Officer but as a Judge of a Civil Court to which execution of the decree had been transferred, and any powers he had were the powers of the Civil Court primarily executing the decree, which were delegated to him. They could not be delegated unless the Civil Court had them, and now that they are not delegated they still remain in the Civil Court and are not extinguished.

But, as a matter of fact, the particular power in question here was never delegated at all; it remained all the time in the Civil Court which transferred the decree to

the Civil Court of the Collector. It was always the Civil Court itself which dealt with an application under s. 151 of the Land Revenue Act, even before April, 1923. The powers conferred on the Collector by the Local Government were only those which the Civil Court had "in execution of the decree", and under cl. (b) of s. 70 (1) of the Civil Procedure Code no wider powers could be conferred on him.

The Collector, therefore, had no power to enquire into objections to the execution or claims to the property, and a claim such as one under s. 151 of the Land Revenue Act was made to the Civil Court itself, which disposed of it. It would probably be presented in the first place to the Collector, but he could do nothing with it but forward it to the Civil Court, which would deal with it, the execution proceedings being transferred back from the Collector till it was decided.

The learned Judicial Commissioner was unable to hold that "the provision under s. 151 of the Land Revenue Act can, so to speak, be translated from its surroundings and made automatically applicable to a Civil Court executing a decree under the provisions of the Civil Procedure Code." It is true that Chap. X of the Land Revenue Act, 1917, is headed 'Collection of Land Revenue' and the provisions contained in that Chapter except the one under consideration dealt with matters connected with recovery of land revenue. But this provision refers in specific terms to the execution of a decree of a Civil Court, a matter which has nothing to do with the collection of land revenue. It was as foreign to its surroundings when a Collector acting as a Judge of a Civil Court possessed certain powers relating to the execution of a decree as it is at present.

The learned Judge's own difficulty in this matter seems to have arisen out of the view that "so to hold would be, in effect, to allow an Act of the Imperial Legislature like the Civil Procedure Code to be modified by a local Act like the C. P. Land Revenue Act of 1917." This at one stage of the present case was regarded as raising "an important question of constitutional law." The question is answered by the preamble to the Land Revenue Act, 1917, and sub ss (2) and (5) of s. 79 of the Government of India Act, 1915.

As this is an application in revision it is necessary to mention also the additional reason stated at the end of the judgment under consideration for rejecting the similar application in that case. It is that an appeal would lie against the order confirming the sale and, therefore, no application for revision could be entertained. An appeal would certainly lie against an order of confirmation, but not by a claimant of pre-emption under s. 151 of the Land Revenue Act.

There are further matters which make the enforcement of such a claim by a separate suit practically impossible. Section 151 provides that the claim is to be made before the sale is confirmed and the claimant must undertake to fulfil all the conditions of the sale binding on the purchaser. In the view taken, that would fix a period of limitation for the suit of thirty days from the date of the sale, and the undertaking would have to be made, presumably, in the plaint. Further s. 152, the next following section, says that "if a right of pre-emption is exercised under s. 151, any amount deposited by the original purchaser shall be re-paid to him." That could not be done till after the decision of the separate suit, which would be long after the sale had been confirmed and the money had been taken out of deposit and given to the decree-holder.

The finding of the Bench is that a claim to pre-empt under s. 151 of the Land Revenue Act is enforceable in execution proceedings, and not by separate suit. With this answer the records will be returned to the Court that made the reference.

JUDGMENT.

Hallifax, A. J. C.—(July 21, 1927).—A Full Bench of the Court has now decided that the claim to pre-emption must be decided in execution proceedings, not in a separate suit. The order confirming the sale is, therefore, set aside, and the claim to pre-empt is allowed. The lower Court will now proceed in accordance with s. 152 of the Land Revenue Act. The applicants' costs in both Courts will be paid by the opposite party. The Pleader's fee in this Court will be one hundred rupees.

G. R. D.

A. N. A. Reference answered accordingly.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 11 of 1927.

March 16, 1927.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Ramesam.

T. R. GOVINDA CHETTY—APPELLANT
versus

RANGAMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4, 7—Letters Patent (Madras), cl. 15—Order granting review and amending decree, whether judgment—Appeal against decree passed on review—Party aggrieved whether confined to grounds mentioned in r. 7—Right to go into merits.

An order of a Judge on the Original Side of the High Court granting a review and directing the decree to be amended is appealable under cl. 15 of the Letters Patent. [p. 175, col. 1.]

Although when a review is granted, and the case is re-opened for consideration, it is open to the party aggrieved to appeal against that order only on grounds which fall under O. XLVII, r. 7, Civil Procedure Code, yet when that stage has passed and on re-hearing, a fresh decree is passed and the final decree or order is appealed against, the Court is not confined to the grounds mentioned in r. 7 but has full power to go into the whole case on the merits and see whether on the evidence the decree passed on review is proper. [p. 175, cols. 1 & 2.]

Nundo Lal Mullick v. Panchanon Mukherjee (1), *Venkata Seetharamayya v. Veena Tulasi Tulasi Babu* (2) and *Oravukundiyl Parkum Elavan Tholan v. Palankundy Kunhi Kutty* (3), followed.

Per *Ramesam, J.*—An appeal against an order granting a review can be filed only on the grounds mentioned in O. XLVII, r. 7. If an appeal is filed against the final judgment and decree after the review, even then if one of the grounds of appeal is that the order granting the review was an erroneous order, it should be attacked only on the same grounds and no other. But this does not mean that the judgment after review cannot be attacked on the merits, while submitting to the order granting the review. [p. 176, col. 1.]

Appeal against the judgment and order of Mr. Justice Srinivasa Iyengar, dated the 12th November, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in O. S. No. 860 of 1924.

Mr. *Srinivasa Raghavan*, for the Appellant.

Mr. *K. S. Krishnaswami Iyengar*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the learned Judge on the Original Side granting a review of the judgment and amending the decree. The order appealed against is printed on page 14 of the printed papers. It runs as follows:—

"1. That the said decree dated the 3rd day of February, 1926, be amended by including therein the following clauses, viz.

(a) That the 6th defendant is entitled to provision for residence in house and premises No. 41, Badrian Street.

(b) That the room marked A in red pencil in the plan attached here to and situate between the 1st and the 2nd compartments of the said house be allotted for use of the 6th defendant as a kitchen, eating room, store room, etc., and that the room marked B in the said plan and situate in front adjoining the street verandah be allotted for living, sleeping, etc.

(c) That the 6th defendant be also entitled to the use of the common passages, pipes, lavatory, washing places, etc.

(d) That the 6th defendant shall have no right to let or sub-let the portion allotted to her as aforesaid and that she is allowed to entertain guests or relations in the portion allotted to her so long as he or they do not encroach upon or occupy any other portion of the house.

I mention this *in extenso* as a preliminary objection has been raised that no appeal lies from this order. It is conceded that the original decree does not contain these provisions. The plaintiff and the 1st defendant are brothers. The 3rd defendant is the step-brother of the 1st defendant. The 6th defendant is the mother of the 3rd defendant and step-mother of the plaintiff and the 1st defendant. The suit was for partition and in the plaint a maintenance of Rs. 35 was offered. Defendants Nos. 1 to 5 filed a joint written statement stating that the maintenance ought to be Rs. 50. The 6th defendant filed a written statement adopting the written statement of defendants Nos. 1 to 5. When the case came on for trial, the parties wanted to compromise. They adjourned to the Chambers of Srinivasa Iyengar, J., and certain terms were discussed and agreed to. There were other terms which had to be arranged and so the matter was adjourned. But in the Chambers of Srinivasa Iyengar, J., all the parties agreed that the 6th defendant should have maintenance at Rs. 60 a month and residence in house and premises No. 41, Badrian Street, some other matters were left over. Ultimately there was a *razinama* agreement signed by all the parties including the 6th defendant. The *razinama* petition gave maintenance at Rs. 60 but there was no provision for residence. This petition was explained to the 6th defendant and the other parties by the interpreter of this Court. When the case came on before the Court as some minors were concerned and the consent of the Court was necessary it was mentioned that there was a slight variation

in the *razinama* though the nature of the variation was not stated, and the learned Judge sanctioned the compromise on behalf of the minors and directed a decree to be passed in terms of the *razinama*. The decree in terms was passed on 3rd February, 1926. On the 30th of April, 1926, an application was made by the 6th defendant to review the compromise decree and to have the decree amended by including therein a provision for the residence of the 6th defendant in house No. 41, Badrian Street, Madras and for staying the 1st defendant from ejecting the 6th defendant and for fixing the portion in which the 6th defendant was to reside. The only affidavit in support of this application was that of the 6th defendant in which after stating that there was a compromise at the time of the hearing of the suit she states that one of the terms was that house and ground No. 41, Badrian Street, Madras, was to be allotted to the share of the 1st defendant at a valuation of Rs. 12,000 and that she should have a right of residence in the said house and that she agreed to the compromise since according to it she was entitled to Rs. 60 a month for maintenance and a right of residence. She then says that when she signed the *razinama* she took it for granted that all the terms agreed to would naturally have found a place in the *razinama* and so she readily put her signature to the *razinama*. Paragraph 6 of the affidavit is as follows:—"I am now informed and believe the same to be true that the provision for my residence in the family house has been either accidentally or designedly omitted in the *razinama* though my right of residence was particularly mentioned and provided for at the time of the compromise."

She then says that the 1st defendant wants to turn her out of the house in contravention of the terms agreed to. I may state that this is the only affidavit in support of the application and the only evidence when the matter came on for disposal before the Judge on her behalf was her own evidence. The 1st defendant filed a counter-affidavit in which he states that the *razinama* signed and filed in Court was explained to her and she was informed of the change in the original terms proposed and that she agreed to it and signed the *razinama*. He denies that any terms were omitted accidentally or designedly. According to the 1st defendant, the matters

which were not agreed to in Srinivasa Iyengar's Chambers were subsequently discussed and the 6th defendant said that she was willing to give up her claim to residence if the claim made by any of the parties to the jewels in her possession of the value of Rs. 2,000 were abandoned and this was agreed to by all the parties. The 1st plaintiff filed an affidavit supporting the affidavit of the 1st defendant. When the matter came on for trial, the 6th defendant was examined in support of the application, and on behalf of the 1st defendant the Vakil for the 1st defendant, Mr. Srinivasa Raghavan and the Vakil for the 6th defendant, Mr. Thiagaraja Iyer were both examined. The 6th defendant in her evidence states that she was never informed of any change in the terms first proposed and ultimately omitted in the *razinama* and that she signed it before the interpreter in ignorance of any such change. She denies that either Mr. Thiagaraja Iyer or Mr. Srinivasa Raghavan informed her of the omission of the right of residence. She admits that the *razinama* was explained to her in the interpreter's office. She admits that she signed the document in the interpreter's office. The learned Judge does not believe her evidence when she states that she was never informed that there was any change in the *razinama*. The other two witnesses are Mr. Srinivasa Raghavan and Mr. Thiagaraja Iyer; Mr. Srinivasa Raghavan states in his evidence that he never told her that she had a right of residence in the house and that there were two rooms in which she could live. This is what he says: "I told her, 'The right of residence clause is deleted and if the 1st defendant wants you to go out of the house, you have to go out.' She said 'We have agreed and there is no difficulty.' So I asked Mr. Thiagaraja Iyer to attend to it, because I was busy." Mr. Thiagaraja Iyer who was her Vakil states in his evidence that, before the *razinama* was taken to Court and explained to her he sent for her in order to satisfy himself whether she had consented to the omission and that she came to his office and said that she had consented. This is what he says as regards what happened in his office:

Q. Did you send for the lady?

A. Yes. On the morning on which this document was executed at 10 o'clock she came to my office.

Q. What did you do?

A. I read to her the *razinama* and drew her attention to the alteration.

Q. You read the whole of it?

A. Not the whole. I said "You get maintenance at this rate, and the right of residence does not find a place as consented to originally. Do you consent?" She said "Yes." It was on the faith of that—and then, I sent her to the interpreter's office. What happened there I do not know.

The learned Judge who states in his judgment that he accepts every word of Mr. Srinivasa Raghavan and Mr. Thiagaraja Iyer, does not believe the evidence of the 6th defendant when she says that she signed the *razinama* in ignorance of the fact that the right of residence which was agreed to in Srinivasa Iyengar, J.'s Chambers was deleted. There can be no doubt that the *razinama* was explained to her by the interpreter. It bears her signature and a certificate of the interpreter that it was read out and explained to her. These are the facts. The learned Judge while disbelieving the truth of the story of the 6th defendant that she signed without knowing that there was an omission and accepting the evidence of both the Vakils who state in the clearest possible terms that the omission was pointed out to her and her attention drawn to it and there is also the fact that one of the Vakils says that he told her that she could be ejected at any time on the *razinama* as it stood, granted a review of the judgment on the ground that he suspected that the 1st defendant would have induced the 6th defendant to sign the *razinama* on representing to her that the omission would make no difference as to her rights. In fact the whole of the learned Judge's judgment is based upon suspicion of what he thinks would have happened and not upon evidence which was adduced before him. In more than one place the learned Judge says that there is a strong suspicion that fraud was practised by the 1st defendant on the 6th defendant and she was induced to sign the *razinama*. We may state at once that there is no evidence that the 1st defendant made any representation to the 6th defendant or that she was misled into signing the *razinama* by reason of any representation which the 1st defendant made. The 6th defendant does not say a word about it. The 1st defendant in his affidavit denies that the change was not mentioned to her and both the Vakils state clearly—and their evidence is believed—that

she was informed of the change. Suspicion, though it may be a ground for scrutiny, cannot form the basis of a decision; and we find it difficult to see how on the evidence it can be said that the 1st defendant fraudulently induced the 6th defendant to sign the *razinama* without the clause of residence on any representation that it would not matter or affect her right. On the merits there can be little doubt that the amendment could not be granted giving her the right of residence.

Two grounds are taken by Mr. K. S. Krishnaswami Iyengar for the respondent. One is that no appeal would lie from this order of Srinivasa Iyengar, J., amending the decree and that even if an appeal lies the grounds must be confined to the grounds mentioned in O. XLVII, r. 7. I have set out the terms of the order and it is clear that this appeal is not from an order granting review but it is from an order which not only grants a review but also amends the decree; and the order, as it stands which amounts to a decree also is clearly, in my opinion, a judgment under s. 15 of the Letters Patent, whatever the case may be, if review alone had been granted and nothing done so as to affect the original decree and the appeal was only from the order granting the review. If that stage has passed and the case re-heard and the order of the learned Judge amounts to a decree, as in this case, it is impossible to see how such an order allowing an amendment which is a clear and final adjudication on the rights of the parties as regards the right of residence of the 6th defendant, inasmuch as it gives the 6th defendant the right of residence, and to that extent affects the rights of the appellant, is not a judgment within s. 15 of the Letters Patent. I am clearly of opinion that the order appealed against, as it stands, is a judgment satisfying the requirements of cl. 15 of the Letters Patent.

As regards the contention that O. XLVII, r. 7 precludes us from going into the matter and holding that the amendment ought not to be allowed, I think that the moment the review is granted the whole case is re-opened for consideration and where a final decree or order is passed after the review is granted, the final decree or order can be appealed against and in such an appeal what we have to see is whether on the materials before the Court such a decree or order as was ultimately passed could have

been passed. All that is done when a review is granted is that the case is re-opened for consideration and it is open to the parties to appeal against that order on grounds which fall under O. XLVII, r. 7. The authorities are that on such an appeal the Court is confined to the grounds set out in r. 7; when that stage has passed and on re-hearing, a fresh decree is passed, the Court, on appeal from the decree or order, has full power to go into the whole case on the merits and see whether on the evidence the decree passed is proper. In this case, it is clear from the proceedings before the learned Judge that the case was adjourned twice after the review was granted and ultimately the decree was modified. The question now is not limited to the propriety of the order granting review so as to confine us to limitations imposed by r. 7. What we have to see is whether the decree which was ultimately passed is correct having regard to the evidence in the case and it is difficult to see how we can on hearing the appeal confine ourselves to considerations based upon O. XLVII, r. 7, and refuse to grant the merits of the appeal against the amended decree. It is open to the plaintiff to attack the decree ultimately passed with reference to the materials before the Court at the time of the amended or revised decree and what the Appellate Court has to see is whether the evidence is sufficient to support the decree or order appealed against. The question, therefore, before us is whether on the materials before the Court, when the Court amended the final decree there were sufficient grounds to alter the compromise decree originally passed in the way in which it has done. There is no question of *res judicata*. All that was decided on the application for review was that the case was a fit one for reviewing judgment. We are not concerned with the question whether the learned Judge was right in granting the prayer to review judgment on the materials before him. If the appeal is merely an appeal against the order granting review, it is clear that O. XLVII, r. 7 will effectively prevent us from going into the propriety of the order unless the case falls within rr. 2 and 4. What we now have to consider is whether after the case was re-opened there were sufficient materials for amending the decree which was passed by consent. The fact that the Appellate Court cannot interfere with the order granting review does not prevent the Court from

considering the appeal from the ultimate decree passed after review on the merits and seeing whether the evidence supports the decree or order passed. I need only refer to *Nundo Lal Mullick v. Punchanon Mukherjee* (1), *Venkata Seetharamayya v. Veena Tulasi Tulasi Babu* (2), *Oravukundiyl Parkum Slavana Tholan v. Palankundy Kunhi Kutty* (3). I do not think *Gopala Aiyar v. Ramasami Sastrial* (4) lays down a different rule or supports the contention of the respondent's Advocate that if a Judge grants a review on grounds which give no right of appeal any decree he may finally pass cannot be questioned on the merits. The appeal is allowed with costs throughout.

Ramesam, J.—I entirely agree. I do not propose to add to that portion of my learned brother's judgment which deals with the facts of the case. But I wish to add a few words with reference to the technical part of the argument of the learned Counsel for the respondent in this case based on the ground that we cannot consider the validity of the order granting review.

It is true that an appeal against an order granting a review can be filed only on the grounds mentioned in O. XLVII, r. 7. One of the grounds is not that the order was granted without sufficient cause. If a Judge grants a review without sufficient cause, the order cannot be attacked in appeal. [See *Gopala Aiyar v. Ramasami Sastrial* (4), and the cases referred to therein]. It is also true that, if an appeal is filed against the final judgment and decree after the review, even then if one of the grounds of appeal is that the order granting the review was an erroneous order, it should be attacked only on the same grounds and no other. But this does not mean that the judgment after review cannot be attacked on the merits, while submitting to the order granting the review.

In the present case the appeal is not merely against the order granting the review but against the final judgment and order in the suit. That appeal has to be disposed of on the merits.

Now, what are the merits of this appeal?

(1) 42 Ind. Cas. 484; 45 C. 60; 21 C. W. N. 1076; 26 C. L. J. 187.

(2) 83 Ind. Cas. 548; (1924) M. W. N. 355; 46 M. L. J. 463; 34 M. L. T. 224; 19 L. W. 649; A. I. R. 1924 Mad. 602.

(3) 18 Ind. Cas. 519; (1913) M. W. N. 52 at. p. 54; 24 M. L. J. 93.

(4) 31 M. 49; 17 M. L. J. 603; 2 M. L. T. 519.

A compromise petition was filed by all the parties. There is no term in it relating to the residence of the 6th defendant. The evidence of the two Vakils shows that she agreed to that compromise. The learned Judge has believed their evidence. On these materials there is only one decree that can be passed in the case, namely, one in accordance with the *razinama*.

Mr. K. S. Krishnaswami Iyengar argues that this conclusion is inconsistent with the grounds on which the review has been granted. It may be so or it may not be so. It is immaterial for the disposal of the suit. All we have got is an order granting a review—an order the correctness of which we are precluded from considering. We start with it. The result of the order is the whole case is re-opened for disposal by the learned Judge and for disposal by us in appeal. We are not and cannot be bound by the finding of the learned Judge in granting the review. There is no section or decision which lays down that such findings are binding on us. We can differ from his findings in disposing of the case on the merits. I agree with my learned brother in holding that the *razinama* as finally reduced to writing is binding on the 6th defendant, and agree to the order proposed by him.

V. N. V.

A. N. A.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 718 OF 1922.

February 25, 1927.

Present :—Mr. Justice Fforde and
Mr. Justice Campbell.

ULFAT RAI—DEFENDANT—APPELLANT

versus

TEJ NARAIN—PLAINTIFF AND ANOTHER

—DEFENDANT—RESPONDENTS.

Hindu Law—Debts—Antecedent debt, meaning of—Hindu son's liability for father's debt—Immoral nature of debt, necessity of proving—Sale of ancestral property for antecedent debts—Application of surplus money not accounted for, effect of.

A debt is an antecedent debt if it is antecedent in fact as well as in time, i. e., truly independent and not a part of the transaction impeached. [p. 178, col. 2.]
Brij Narain Rai v. Mangla Prasad Rai (2), followed.

A Hindu son cannot escape liability to pay his father's debt by showing that his father led an immoral life but to avoid liability it must be shown that the debt was incurred for an immoral purpose. [p. 180, col. 1.]

A sale of ancestral property by a Hindu father for discharge of his antecedent debts cannot be avoided.

on the ground that the application of the surplus money, i. e. money in excess of debts has not been accounted for. [p 180, col. 2]

Sri Krishn Das v. Nathu Ram (6), followed.

First appeal from the decree of the Subordinate Judge, First Class, Delhi, dated the 28th February, 1922.

Lala Moti Sagar, R. B., and Mr. Mehr Chand Mahajan, for the Appellants.

Mr. Kishan Dayal, Pandit Sheo Narain, R. B., and Shiv Narain, for the Respondents.

JUDGMENT.

Campbell, J.—This litigation involves four buildings which may conveniently be termed as A, B, C and D ones the property of Maharaj Narain. On 11th February, 1905, A, B and C were mortgaged to one Mul Chand for Rs. 3,000 and on 25th February, 1907, A, B, C and D were mortgaged to Ishri Parshad for Rs. 6,000 of which Rs. 3,000 was the redemption price of Mul Chand's mortgage.

On 11th February, 1911, Maharaj Narain sold B to Lal Muhammad for Rs. 3,500 out of which Rs. 2,600 were left with the purchaser for payment to Ishri Parshad the mortgagee and the balance Rs. 890 was paid in cash. Lal Muhammad subsequently re-sold B to Ulfat Rai in 1917.

On the same date, 11th February, 1911, Maharaj Narain sold to Lal Muhammad C for Rs. 1,500 (left with purchaser for Ishri Parshad Rs. 790 and cash Rs. 710) and D for Rs. 2,000 the whole of which price was left with the purchaser for payment to Ishri Parshad.

On 21st March, 1911, Maharaj Narain sold A to Joti Parshad for Rs. 3,000 cash.

In 1918, Tej Narain, son of Maharaj Narain brought three suits based on the three sales, for possession in each case of the property sold, on the ground that the property was ancestral Hindu family property and that its alienation was a nullity as regards him. The trial Court has decreed all three suits with the condition that before obtaining possession the plaintiff must pay Rs. 2,000 to Lal Muhammad and Rs. 500 to Joti Parshad. These sums apparently represent the estimated value of the improvements carried out by the vendees.

The result has been three appeals one by Lal Muhammad, one by Ulfat Rai and Lal Muhammad and one by Joti Parshad. Since the suits were consolidated by the trial Court and a single argument on all three

has been addressed to us, I shall deal with all three appeals in one judgment.

There is now no dispute on the following points :—

1. All the property was ancestral in the eye of the Hindu Law.

2. Unless the mortgage debt of Ishri Parshad was incurred by Maharaj Narain for immoral purposes as understood by the Hindu Law, the ancestral family estate in the hands of the son is liable for it.

3. The onus of proving that the debt was immoral is on the plaintiff and is not discharged by merely proving that Maharaj Narain was a man of immoral character. Direct connection between the debt and the immorality must be shown.

4. No proof has been given by the appellant-defendants that the cash portions of the sale prices were required for or applied to family necessities, beyond the statement of Ishri Parshad that after the sale to Joti Parshad, the deed of which he attested he received Rs. 2,000 out of the price towards his mortgage charge.

5. The antecedent debt due to Ishri Parshad on the mortgage of 1907 amounted to Rs. 7,400 principal and interest at the time of the sale to Lal Muhammad.

The issues framed by the trial Court were as follows :—

1. Whether the property in the three suits was ancestral or joint family property in the hands of Maharaj Narain?

2. Whether the properties in question being ancestral in the hands of Maharaj Narain their alienation to the respective vendees in the three suits was for consideration and necessity?

3. Whether the vendees have effected any improvements in the property, and if so, of what value?

4. Whether the vendees are entitled to any compensation for improvements if the sales are held invalid? If so, what?

5. Whether the consideration of the alienations was used for or applied to immoral purposes and consequently the sales are invalid?

6. Whether the plaintiff is entitled to any mesne profits realised by the vendees alienees? If so, what?

The findings of the trial Court are not very lucidly expressed, but they appear to have been as follows :—

Issue No. 1. The properties were ancestral. This is not now contested.

Issue No. 2. There was no necessity for the sales. Maharaj Narain had ample income for all the legitimate purposes and the mortgage-debt was not an antecedent debt in the light of what was ruled by the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1), because it was not incurred irrespective of the credit obtainable from immoveable assets not belonging personally to the vendor alienor but being joint family property. Consideration was paid in full.

Issue No. 3. Rs. 2,000 and Rs. 500 were the amounts spent on improvements to the properties.

Issue No. 4. The vendees are entitled to these amounts because had it not been for the decision in *Sabhu Ram Chandra v. Bhup Singh* (1), the debt due to Ishri Parshad would have been an antecedent debt and the vendees would have only been bound to see that the debt was due. At the time of the mortgage to Mul Chand in 1905 Maharaj Narain's immorality was not notorious and Mul Chand could have had no suspicion that Maharaj Narain was a man of that character. Lal Muhammad, when he bought the property, had reason to believe that up to the limit of the previous mortgage-debt the transfer would be valid. In equity, therefore, he is entitled to receive the value of the improvements.

(This is the best that I can make out of the cryptic language used by the learned Subordinate Judge in recording his decision on Issue No. 4. It may not be a correct interpretation of what he has written and there is much to be said in favour of regarding this part of his judgment as absolutely meaningless.)

Issue No. 5. When Maharaj Narain contracted the debts in question he had given himself up to a life of luxury and licentiousness and was wasting money in entertaining prostitutes and in riotous living. "There is no clear evidence on the record that any portion of these debts was intended to be spent or was as a matter of fact expended on litigation or in meeting the legitimate expenses of any domestic ceremonies. The alienees were neighbours and were aware of the mode of deceased's life. The plaintiff

is, therefore, under no obligation to discharge the said debts."

I confess I am not clear whether the learned Subordinate Judge when speaking of debts meant the antecedent mortgage-debts of the prices paid by the subsequent vendees at the sales which are now in dispute. The obscurity of the finding on Issue No. 4 deepens the mystery.

Issue No. 6. There is a confused and involved decision about mesne profits which in view of my conclusions on the other points in issue, it is unnecessary to attempt to disentangle.

Sahu Ram's case (1) was subsequently considered by their Lordships of the Privy Council in *Brij Narain Rai v. Mangla Prasad Rai* (2), and it was there made clear that any debt is an antecedent debt if it is antecedent in fact as well as in time, i.e., truly independent and not a part of the transaction impeached. This decision affirmed the view taken by the Full Bench in *Arumugham Chetty v. Muthu Koundan* (3), that an independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate antecedent to a mortgage sued on, is an antecedent debt so as to support a charge on the son's share to the extent of the sum secured on the prior mortgage. There are passages in the learned Subordinate Judge's judgment which indicate the possibility that had the later pronouncement of their Lordships of the Judicial Committee been before him he might have held that the plaintiff was liable for either part or perhaps for the whole of the antecedent mortgage-debts to Ishri Parshad, but I cannot be sure.

The two main questions for our decision are:—

1. Whether at the time when the mortgage-debt to Ishri Prashad was incurred Maharaj Narain was leading an immoral life?

2. If so, whether the plaintiff has succeeded in giving direct connection between the debt and the immorality?

If the plaintiff succeeded on these two points it is obvious that the decision by the

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 468; 26 O. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 212; 44 I. A. 126 (P. O.).

(2) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; A. I. R. 1924 P. C. 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. O.).

(3) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

trial Court that he is entitled to decree for possession of the properties in dispute is correct. If the plaintiff fails on these two points a third question arises, whether the plaintiff is still entitled to avoid the sale by reason of there being no necessity established for the balance of the price over and above the amount due on the former mortgage-debt?

Several witnesses have described the debauchery of Maharaj Narain in violently extravagant terms. The learned Subordinate Judge appears to have been influenced by a decision of the Chief Court in a similar suit between the present plaintiff and another alienee from Maharaj Narain which is reported as 10 P. R. 1918 [*Jaswanti v. Tej Narain* (4)] and more fully as 41 Ind. Cas. 192. In that case the learned Judge of the Chief Court found apparently that Maharaj Narain was a man of most conspicuously dissolute mode of life, but the finding is not evidence in this case and cannot be allowed to influence its decision. On the evidence of the present record I consider it to be established that Maharaj Narain neglected his wife for women of ill fame, that he kept a succession of mistresses and that he drank heavily. The most reliable witness on the point is *Musammatt Maharaj Rani* his own wife, and allowing for exaggeration this is the purport of what she deposed. This lady most naturally wishes to support her son in the present case and I do not look upon her account of the late Maharaj Narain's daily life as altogether unprejudiced. At the same time she is the person who was in the best position of knowing his habits and conduct. But the numerous other witnesses who say that day and night all the year round Maharaj Narain was engaged in the ceaseless round of drunken and disrespectful orgies I do not believe.

There has been a tendency in this case to confuse the immorality with ordinary extravagance. Mr. Bose who was for some time acting as Maharaj Narain's legal adviser has stated that Maharaj Narain was extravagant in an innocent manner by living beyond his means in the matter of food, servants, furniture etc. It is also clear that he gave frequent and expensive musical parties and the money expended upon them although the performers may have been persons of loose morals, could not with certainty

on the evidence before us be brought within the category of debts contracted "under the influence of lust or wrath or of debts repugnant to good morals." It is proved that Maharaj Narain was maintaining a house in which he kept his wife and son. The evidence as regards his ordinary income is very vague. The learned Subordinate Judge after considering a mass of conflicting evidence, has estimated it at Rs. 7,900 a year or a little over Rs. 650 a month. He had house property which brought him Rs. 60 or Rs. 70 per mensem and had two villages in the Gurgaon District one Gopalpura which he owned and the other Bopas which he held in mortgage. The Patwari of Gopalpura as a witness for the plaintiff stated that the net amount which Maharaj Narain took annually from Gopalpura was not more than Rs. 1,300 or Rs. 1,400 and if this be accepted the annual income was not as much as Rs. 7,900. However that may be, it is clear that Maharaj Narain was not a rich man. It has been established that he was engaged from time to time in expensive litigation. One of the cases was against Kailash Narain a suit for Rs. 1,11,750. The learned Subordinate Judge mentioned this case in his judgment and thought that about Rs. 1,500 may have been spent on it by Maharaj Narain. At the request of the parties we have referred to the Paper Book of that suit, which came to Chief Court on appeal and this makes it clear that the litigation must have cost Maharaj Narain, who was unsuccessful throughout, a sum not less than Rs. 6,500 and probably more. The suit was instituted in 1904, was dismissed by the trial Court in December, 1904 and Maharaj Narain's appeal was dismissed with costs by the Chief Court in 1911. The Court-fee alone was Rs. 1,500 in each Court, the amount which the learned Subordinate Judge thinks might have been spent on the whole litigation. There was another case with one *Musammatt Banoji* the ultimate result of which is reported as *Maharaj Narain v. Banoji* (5), and it must have cost more than the learned Subordinate Judge has estimated.

Bopas village was redeemed from Maharaj Narain and he received Rs. 7,000 on the 24th April, 1904, Rs. 1,000 sometime before 16th November, 1905 and Rs. 21,000 in 1908. It has been suggested that Maharaj

(4) 41 Ind. Cas. 192; 10 P. R. 1918; 120 P. W. R. 1917.

(5) 34 P. R. 1907; 112 P. W. R. 1907.

Narain's ordinary expenditure and his expenses on litigation up to the time of the mortgage to Ishri Parshad in 1907 could have been defrayed from the annual income money of Rs. 7,900 and the redemption money of Rs. 8,000 and that the money raised by the mortgage must inevitably be presumed to have been spent on dissipation. This is as far as the plaintiff has been able to go to connect the mortgage-debt with Maharaj Narain's immorality, and, in my opinion, he has not been successful in discharging the onus upon him. The facts are that Maharaj Narain was not a rich man, that his ordinary income cannot be estimated with any attempt at certainty, that he involved himself in expensive litigation that he lived beyond his means and that he was given to drink and prostitutes. It is possible that the mortgage-money may have been spent on immoral pursuits; it is equally possible that the redemption money and an undue proportion of the ordinary annual income was expended on dissipation and it became necessary to mortgage the house property in order to obtain money for the support of Maharaj Narain's wife and child and for carrying on litigation. It is not the law that a Hindu son can escape liability to pay any debt which is contracted by an immoral father. The mortgage-debt due to Ishri Parshad was an antecedent debt binding upon the plaintiff and he has not succeeded in proving that it was incurred for immoral purposes.

I hold that the mortgage charge of Rs. 7,400 was an antecedent debt not proved to have been tainted with immorality for the discharge of which the joint family property including the plaintiff's share was liable. It remains to consider whether the plaintiff can have the sales set aside by the reason of the properties in suit having been alienated for prices which left a surplus over the amount of that debt.

What the situation was, I think, is perfectly clear. There was a mortgage charge upon the four properties and they were sold primarily in order to clear off this charge on which interest was accumulating. Three of the properties were first disposed of to Lal Muhammad, Rs. 5,400 was taken to be the proportion of the mortgage charge due on them. Lal Muhammad was aware of this charge, took the precaution of retaining in his own hands the sum of Rs. 5,400 and paid off the mortgagee. The vendor succeeded in obtaining a higher price than the mort-

gage charge and the balance Rs. 1,600 was paid over to him. There is no evidence of what he did with the money. I see no reason why Lal Muhammed should not be believed when he deposed that he did not know Maharaj Narain before he entered into negotiations for the sales, and that he made enquiries and was told that Maharaj Narain was engaged in litigation and required money for prosecuting the cases. Lal Muhammad is a Christian and it is not proved that he had any previous acquaintanceship with Maharaj Narain or any reason for having it. He came to Delhi in 1908.

When the fourth house was sold two months later to Joti Parshad Rs. 2,000 remained due on the mortgage. Joti Parshad had paid the whole price of Rs. 3,000 to Maharaj Narain but he has proved that Rs. 2,000 were immediately paid to Ishri Parshad the mortgagee.

Thus it has been established that the sales were made for a necessary purpose, i. e., in order to pay off an antecedent debt which was binding upon the plaintiff and recoverable from the joint family property and there is no evidence of how the vendor has applied Rs. 2,600 out of the total proceeds of Rs. 10,000. I consider that there is no reliable evidence either that the vendees knew Maharaj Narain to be an immoral man or that the immorality was so gross and so notorious that they must be presumed to have known of it.

In these circumstances the vendees were duly bound to show that they acted in good faith and that the sales were made for a necessary purpose and for a fair price. Having done this they were under no obligation to enquire into the application of any surplus over the sum required to carry out the necessary purpose.

This is how the law has been interpreted by their Lordships of the Judicial Committee in a very recent case, *Sri Krishn Das v. Nathu Ram* (6). The suit was by sons to recover from the vendee ancestral property purchased from their father for Rs. 3,500. The facts found were that the vendor had incurred debt in setting aside the auction-sale of the same property and in celebrating his sister's marriage that in order to meet part of his indebtedness he had bor-

(6) 100 Ind. Cas. 130; 25 A. L. J. 80; A. I. R. 1927 P. C. 37; (1927) M. W. N. 89; 38 M. L. T. 48; 4 O. W. N. 184; 8 P. L. T. 210; 31 C. W. N. 462; 54 I. A. 79; 49 A. 149 (P. C.).

rowed from a money-lender Rs. 2,600 which had been increased by interest to Rs. 3,000, that this amount was discharged out of the consideration paid by the vendee, that before purchasing the property, the vendee had ascertained these facts, and that there was no evidence of how the vendor had applied the balance of Rs. 500. The High Court of Allahabad on second appeal had reversed the District Judge's order dismissing the suit and had given the plaintiff a decree setting aside the same on condition of the plaintiff paying the vendee Rs. 3,000 within six months. Their Lordships of the Privy Council referred to a number of their previous decisions and delivered their conclusions as follows:—

"Applying the principles laid down in the above series of cases by this Board, and consistently followed in other Courts in India, except in Allahabad, their Lordships have reached the conclusion that the judgment of the High Court cannot be sustained. On the facts found by the District Judge it must be taken that the sale challenged was made after due enquiry as to legal necessity by the vendee; that such necessity has been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500; that the sale was for an adequate consideration, and the mere fact that, after a long interval of time, the appellants have not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale. They will, therefore, humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and the plaintiff's suit dismissed with costs in all the Courts, including the costs of the present appeal."

The proper manner in which such cases are to be treated by the Courts was stated in an earlier passage in the judgment which runs as follows:

"In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lal v. Kantoo Lal* (7) and especially on the head-note which contains the passage:

"Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale."

(7) 1 I. A. 321; 22 W. R. 56; 14 B. L. J. R. 187; 3 Sar. P. C. J. 380 (P. C.).

"While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought that it is a complete statement of the law or that same will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation and opinions would necessarily vary as to what constituted the 'bulk of the proceeds' or 'a small part' of the same in each particular case. The learned Judges seem to have lost sight of the true question which falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity."

The following previous decisions of the Allahabad High Court in which conditional decree had been passed setting aside similar sale or directing the surplus not covered by legal necessity to be returned, were overruled; *Gobind Singh v. Baldev Singh* (8), *Ram Dai Kunwar v. Abu Jafar* (9) *Dawarka Ram v. Jhulai Pande* (10) and *Daulat v. Sankatha Parsad* (11).

For these reasons I would accept all the three appeals and in each case would enter judgment for the defendant, dismissing the plaintiff's suit with costs throughout.

Fforde, J.—I agree.

R. L.

Appeal accepted.

(8) 25 A. 330; A. W. N. (1903) 57.

(9) 27 A. 494; A. W. N. (1905) 68.

(10) 72 Ind. Cas. 134; 45 A. 429; A. I. R. 1923 All. 248; 9 O. & A. L. R. 494.

(11) 86 Ind. Cas. 91; 47 A. 355; 23 A. L. J. 55; L. R. 6 A. 167 Oiv.; 1 A. I. R. 1925 All. 324.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 299 OF 1926.

July 4, 1927.

Present:—Justice Sir Benjamin Herbert Heald, Kt., and Mr. Justice Mya Ba.

NABIN CHANDRA DEB—APPELLANTS
versus

MI ROBEYA AND ANOTHER—RESPONDENTS.

Usury Laws Repeal Act (XXVIII of 1855), s. 2—Interest—Power of Court to reduce interest on equitable grounds.

A Muhammadan woman and her son who was 45 years of age executed a mortgage to the plaintiff for Rs. 827 agreeing to pay interest thereon at 25 per cent. per annum and with a further stipulation that if the

debt was not paid within one year the interest should be compounded yearly. The plaintiff giving credit for Rs. 1,600 received as interest sued for Rs. 4,224 further interest and Rs. 827, the principal. The trial Court allowed simple interest alone on equitable grounds:

Held, that the circumstances of the case did not warrant the inference of any undue influence, that the plaintiff was entitled to compound interest as agreed upon and that the Court had no power to reduce the same. [p. 183, col. 1.]

Mr. Banerjee for the Appellant.

Mr. K. C. Bose, for the Respondents.

JUDGMENT.

Heald, J.—The respondents Mi Robeya and Abdul Hakim are an elderly Muhammadan woman and her son, the son being 45 years of age.

In 1916 they owed to appellant Rs. 596 under a decree and Rs. 231 on a promissory note and in order to secure payment of those debts they executed a mortgage-bond in appellant's favour for Rs. 827. The bond recited the details of the debt and contained an undertaking on the part of respondents to pay the debt within a year, with interest at 25 per cent. per annum, and a stipulation that if the debt was not paid within the year, interest should be compounded yearly.

The debt was not paid within the year and has admittedly not yet been paid in full, and appellant sues respondents on the bond. He gives credit for Rs. 1,600 received as interest and sues for Rs. 4,224-4 further interest as well as Rs. 827 the original principal.

Respondents plead that the transaction was unusual and usurious and that they are entitled to the benefit of the Usurious Loans Act.

The learned Judge held that the suit was not a suit to which the Usurious Loans Act applied, but he was nevertheless of opinion that he had a discretion to give equitable relief, and he allowed simple interest only.

Appellant alleges in appeal that in the absence of any pleading of undue influence the Court was not entitled to allow interest otherwise than in accordance with the terms of the bond.

Section 2 of the Usury Laws Repeal Act (XXVIII of 1855) says expressly that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate agreed upon by the parties. Unless, therefore, the terms of the agreement between the parties were so harsh and unconscionable as to show that consent to them must have been

induced by undue influence, the Court was bound to decree interest at the contract rate.

The circumstances which, it is suggested, indicate undue influence are—

(1) that one of the parties to the contract was an elderly Muhammadan woman;

(2) that the value of the property given as security was out of proportion to the amount of the debt;

(3) that in view of the value of the security the interest was unduly high and

(4) that the result of the transaction is that for a debt of Rs. 827 respondents have to pay Rs. 6,651-4-0.

It seems to me that these considerations, even taken together, are not sufficient to warrant an inference that the relations subsisting between the parties were such that appellant was in a position to dominate the will of the respondents. The debtors were mother and son, and the son was some 45 years of age. There is nothing to suggest that the son was not then in a position to assist and advise his mother in the management of her affairs, as he is admittedly assisting and advising her now. The debt, in comparison with the value of their property, was very small, the property which they gave as security being according to the lower Court, worth about Rs. 9,000 while the debt was only Rs. 827. Respondents could, therefore, have rid themselves of the debt forthwith by selling a mere fraction of the property which they admittedly possessed. It is true that the security given was unnecessarily large, but they need never have given security at all, and the only presumption which can be drawn from their giving it is that they desired to keep their property and had no doubt that they would be in a position to pay off the debt without selling any of their lands. If they had paid the debt within a reasonable time they would not have been adversely affected by the fact that they had given as security more property than was necessary, and I do not think that the fact that they gave so large a security for so small a debt indicates in the circumstances of the case that appellant was in a dominant position and used that position to obtain an unfair advantage. The unfairness of the advantage which appellant actually gained was due not to appellant's being in a position to dominate the

will of respondents but to respondents' disregard of their own interests, and is, therefore, no indication of undue influence. As for the rate of interest, which works out for the first year at slightly over Rs. 2 per cent, per mensem, it is certainly not unusually high for this country even when the security is good, and respondents doubtless thought that the stipulation that interest should be compounded yearly would not affect them as they intended to re-pay the debt within the first year.

I am of opinion that the transaction was not in itself harsh or unconscionable and that its terms are not such as to indicate that it was induced by undue influence. Its operation has become harsh by reason merely of the foolishness of the debtors who when they could have paid off the debt by the sacrifice of a small portion of their property preferred to pay interest on it and to give security which was unnecessary, and who in spite of the fact that they had agreed to pay compound interest neglected to pay the debt, for many years, with the result that after some years the amount due as interest yearly was more than the amount of the original debt. It is, of course, a hard case, but I think that the learned Judge in the lower Court forgot that it is hard cases that make bad law, and that his reasons for giving relief were sentimental rather than judicial.

I would, therefore, set aside the judgment and decree of the lower Court and give appellant a decree for the full amount claimed with costs.

Mya Bu, J.—I concur.

A. N. A.

Decree set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2205 OF 1926.

January 8, 1927.

Present:—Mr. Justice Addison.

MAULUK CHAND KISHANJI, THROUGH
GAURI SHANKAR, *Mukhtar-i-*
khas—DEFENDANT—APPELLANT

versus

DAYA KISHAN AND ANOTHER—PLAINTIFFS
AND DULI CHAND—DEFENDANT—

RESPONDENTS.

Hindu Law—Joint family—Family business—Speculative transaction, debts incurred for—Liability of one.

In the case of the members of a Hindu family there is a presumption of jointness not only of their properties but even as regards the business which they carry on and the burden lies upon the person who alleges that the business is a separate business and not a family business to prove his allegation. [p. 184, col. 1.]

The manager of a joint Hindu family has an implied authority to contract debts for the ordinary purposes of the business carried on by the family. He has power to incur debts for the business in speculative transactions as such debts cannot be said to be immoral. [*ibid.*]

The pious obligation of Hindu sons to pay off their father's debts extends to commercial debts. [p. 184, col. 2.]

Second appeal from the decree of the District Judge, Hissar, dated the 31st March, 1926, reversing that of the Senior Subordinate Judge, Gurgaon, dated the 7th January, 1926.

Mr. Mahesh Das, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—A joint Hindu family consisted of the father, Prabhu Dial, his eldest son, Duli Chand, and two other sons Daya Kishan and Narinjan Lal. In this family there was a Firm, Prabhu Dial-Duli Chand, styled after the father and the eldest son. It had dealings in Bombay. In 1923 the father Prabhu Dial died and a Bombay firm obtained a decree against the Firm, Prabhu Dial-Duli Chand, on the 21st May, 1924. This decree was being executed in the Gurgaon District. Two properties were attached. The two plaintiffs, who are the two sons whose names are not in the firm name, objected that the two properties attached belonged to them. Their objections were dismissed. They then filed a suit for a declaration that they could not be attached and sold in execution of the decree in question. According to the plaintiff one plaintiff was the sole owner of one of the houses, and the other plaintiff of the other. It was verbally stated that there was a private partition in the family shortly before the father's death. The only other point taken in the plaint which it is necessary to give was that it was alleged that the decree against the firm was for *badni* transactions that the plaintiffs were not parties to the decree, and that all the three brothers worked separately. The trial Court dismissed the suit, holding that there was no proof of any partition and that the family continued joint. It also held that the firm must be presumed to be a joint family business carried on by the father in his own name and that of his eldest son.

The District Judge on appeal decreed the claim. He too held that it was a joint family throughout but on his further finding that the firm had not been proved to be a joint family business he held that the plaintiffs could not be liable. Even on this finding it is clear that he should have allowed the one-third share of the eldest son Duli Chand to be attached and sold, and this was admitted before me during the hearing of this appeal.

It has been held in *Koondan v. Ram Dyal* (1) that the legal presumption is that a Hindu family is joint and undivided in business as well as in other respects. The same view has been taken in *Grey v. Walker, Goward & Co.* (2). In that case there was a joint Hindu family of a grandfather and his grandsons. The business was carried on in the name of the grandfather and the eldest grandson, just as here it was carried on, in the name of the father and the eldest son. It was there laid down that there was no doubt in cases of families of this nature that there was a presumption of jointness not only of their properties but even as regards the business which they carried on, and that if any member set up that a particular portion of the property formed his separate property the onus of proving that lay on the member who so claimed. It was, therefore, held that it was for the person alleging it to prove that in fact the business was the separate business of the grandfather. Nothing could be clearer than this finding.

Paragraph 198 (1) of Mulla's Hindu law also is to the effect that the manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business. It must be presumed that this was a family business and it was for the plaintiffs to prove that they had no concern with it. They did allege that the debts were contracted on account of *badni* transactions, but, even if this were the case, the sons would still be liable, for the father could incur debts for the business in speculative transactions as they cannot be said to be immoral. In this connection see *Khem Chand v. Narain Das Sethi* (3). This same ruling lays down further that where mortgages were effected by a Hindu father of joint family property for debts incurred in the ordinary course of

business the whole co-parcenary property was available for such debts. Similarly, in *Nidavolu Atchutan v. Ratnaji* (4) it was held that the pious obligation of sons to pay their father's debts extends to commercial debts.

As, therefore, the deceased father was the manager of the family and of the business, the plaintiffs who are two of his sons would also be liable for the business debts as they have not proved that they were tainted with immorality. Both for this reason and for the reason that it was for them to establish that they had nothing to do with the business, I accept this appeal and dismiss the plaintiffs' suit with costs throughout.

Z. K.

Appeal accepted.

(4) 92 Ind. Cas. 977; A. I. R. 1926 Mad. 323; 23 L. W. 193; 50 M. M. J. 208; (1926) M. W. N. 258; 49 M. 211.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 613
OF 1925.

January 11, 1927.

Present:—Mr Justice Mirza.

NENSUKHGAVRI AND OTHERS—PLAINTIFFS
versus

RAJABALLY MULLA ABDUL KADAR

AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 52—Partnership action—Assets, distribution of—Procedure—Charging orders, validity of—Rateable distribution.

In the case of a partnership the liability of the partners is unlimited. It cannot be restricted to the partnership assets and there is no reason why in a suit for dissolution of partnership, creditors of the firm should be compelled to await the result of a partnership account between the partners before they are allowed to obtain satisfaction of their decree out of the partnership assets. [p. 186, col 2.]

In a suit for dissolution of partnership all the liabilities of the partnership should be first paid off in full, the costs of all parties should next be paid off in full and the balance of the assets, if any, should be divided between the partners. [*ibid.*]

Where notices under O. XXI, r. 52 of the Civil Procedure Code, are served on the Receiver in a partnership action and in pursuance of a garnishee or other order of the Court he pays in the amount in respect of any such notice into the Sheriff's office, all execution creditors whose attachments are registered in the Negative Book of the Prothonotary before the realization of the assets by the Sheriff would be entitled to *pro rata* distribution. In case the property in the custody Court has been attached at the instance of different Courts the custody Court would seek to satisfy such attachments not *pro rata*, but in order of

(1) 33 P. R. 1870.

(2) 18 Ind. Cas. 753; 40 C. 523 at p. 529.

(3) 98 Ind. Cas. 1022; A. I. R. 1926 Lah 41; 6 Lah. 493.

time, sending the moneys to the first attaching Court first, the balance to the second and so on. [p. 188, col. 1.]

There is no warrant in the Code of Civil Procedure for the practice introduced in the Bombay High Court of making charging orders at the instance of creditors in a partnership action. The charging orders obtained in these proceedings are not equivalent to notices under O. XXI, r. 52 of the Civil Procedure Code. In such cases the provisions of O. XXI, r. 52, should be given effect to. [p. 189, col. 1.]

[Case-law referred to.]

FACTS.—Rajabally and Damodar were partners of the Firm of Mulla Abdul Kadir-Mulla Ebrahim Kachwalla. Nensukhgavri and others sued these partners and obtained a money-decree against them on 30th June, 1925, in Suit No. 613 of 1925. Before the passing of the decree in this suit these partners filed Suit No. 440 of 1925 for dissolution of the partnership and an *interim* Receiver was appointed in that suit. On the 10th July, 1925, the decree-holders applied for execution of their decree against the assets of the partnership in the Receiver's hands, and a charging order was made on the assets of the firm on the 16th July, 1925. The Receiver on receipt of notice of the order replied that the partnership suit had been referred to a Commissioner for taking accounts and referred the decree-holders to the Commissioner. The decree-holders did not accede to this step but applied in Chambers for an order on the Receiver to pay their amount. The application was adjourned till the completion of the examination of the accounts. The Commissioner was subsequently directed by the Court to call in the claims of creditors of the firm and to investigate and make a report on the same. The Commissioner acted accordingly and made report of the claims of all the creditors investigated including the decree-holders in Suit No. 613 of 1925. These decree-holders applied to the Chamber Judge again for an order of payment and his Lordship, Mirza, J., before whom the application was made, directed them to take out a summons. The decree-holders took out summons accordingly.

Mr. Mulla, for the Plaintiffs.

Mr. Kanga, Advocate General, for Defendant No. 2.

JUDGMENT.—[His Lordship stated the facts and continued as follows :—] This is a Chamber summon taken out by the plaintiff in Suit No. 613 of 1925 for an order that the Receiver appointed in Suit No. 440 of 1925 do pay to the plaintiffs the sum of Rs. 23,406-3-0 and costs of the suit when

taxed and further interest on judgment till payment out of the funds in the hands of the Receiver belonging to the partnership firm of Mulla Abdulla Kadar Mulla Ebrahim Kachwalla in priority to the claims of the other creditors of the said partnership firm and for costs of the summons.

It appears that the charging order in favour of the plaintiffs is prior in date to the other charging orders obtained herein. In the course of these proceedings the plaintiffs, after they had proved their claim before the Commissioner, seem to have acted on the assumption that in respect of their claim they were entitled to rank *pro rata* only along with the other creditors of the partnership. The change in their attitude was probably due to the fact that recently I have had to consider the nature and effect of such charging orders against partnership assets, and have held, in my judgment, that such charging orders were not justified, but could only be regarded as substitutes for notices under O. XXI, r. 52, and that if they came under that description the first attaching creditor of the assets in the hands of the Receiver would have priority against the subsequent attaching creditors.

The summons is opposed by the remaining creditors of the partnership—both those who have obtained charging orders or notices under O. XXI, r. 52, and those who have not obtained any such as well as those who have not yet obtained any decrees in respect of their claims. They all contend that in the events that have happened the Court should distribute the assets of the partnership among the creditors rateably.

In *Kahn v Alli Mahomed Haji Umer* (1), Farran, J., laid down a proposition the application of which in matters subsequent to it has led to some difficulty. The principle there enunciated was that, where a fund, such as the assets of a partnership, is in the hands of the Court through its officer, the Receiver, one out of the whole body of creditors against the fund will not be allowed to gain priority over the rest by the expedient of attaching the moneys in the hands of the Receiver. Such an attachment would be an interference with the Court's possession through its officer, the Receiver, and may not, therefore, be made without the Court's leave first obtained; which leave will not be granted except on such terms as will ensure equality between the creditors.

(1) 19 B. 577; 8 Ind. Dec. (N. S.) 863.

The plaintiffs, in that case, had obtained a decree against the defendant and had attached moneys in the hands of the Receiver appointed in a suit which was filed in the High Court by certain creditors of the defendant, who were Receivers of his share in a certain partnership business against the partners of the defendant in that business for dissolution and winding up of the partnership. The decree in that suit dissolved the partnership, appointed a Receiver, and referred the suit to the Commissioner for taking accounts of the partnership and to ascertain the share due to the plaintiffs. The plaintiffs in the partnership action before Farran, J., were probably the Receivers in execution proceedings against the share of the defendant in the partnership business. Such assets, when realised, would be realised in execution and the principle of the *pro rata* distribution would apply to them in so far as the then pending attachments were concerned. The creditor in the suit before Farran, J., had sought to attach the assets realised by the exertion of the Receivers in execution to the detriment of the attaching creditors on whose behalf the Receivers were acting. The attaching creditor had not obtained leave of the Court before attaching the assets and the attachment was clearly on that account wrong. The remarks of the learned Judge regarding the principle to be applied, in my opinion, are only *obiter dicta* and do not form the *ratio decidendi* of his decision. The learned Judge remarks (page 579*):—

"No Court of Equity would render any assistance to a creditor seeking by a side wind, such as this, to gain an advantage over his fellow creditors. *A fortiori* must that be the case where, as here, the creditor has obtained no leave before he took steps to interfere with the Receiver's possession, for such an interference the taking out of a prohibitory order clearly amounted to."

The decree with which Farran, J., was dealing contained no direction to take the accounts of the debts and liabilities of the partnership. The learned Judge remarked that if it were an ordinary partnership decree for winding up the partnership it would contain such a direction, and that although in form it did not contain that direction, it was probably intended to contain it, and for the purposes of the application before him, he must treat it as such. He, therefore, treated the decree

as one under which the Commissioner would ascertain the debts due by the partnership and pay them rateably. With great respect it seems to me that the opinion expressed by the learned Judge on this point is not correct. Form 22, Appendix D, to the First Schedule of the Code provides the form in which a final decree in a suit for dissolution of partnership and the taking of partnership accounts is drawn up. The form is as follows:—

"It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the (Commissioner) amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership assets..."

It is clear from this form that what is contemplated is not a payment by the Commissioner *pro rata* to the creditors of the partnership, but what is contemplated is that in order to enable the partners to obtain the fruit of the dissolution of the partnership, all its liabilities should be first paid off in full, secondly, costs of all parties should be paid off in full and then the division should take place. The form in an administration suit is necessarily different. In an administration suit, the Court is invited to administer the estate of the deceased and is in possession of all the assets of the deceased. In the case of a partnership the liability of the partners is unlimited. It cannot be restricted to the partnership assets and there is no reason why creditors should be compelled to await the result of a partnership account between the partners before they are allowed to obtain satisfaction of their decree out of the partnership assets.

In *Sidlingappa v. Shankarappa* (2), our Appeal Court, consisting of Candy, Ag. C. J., and Chandavarkar, J., have referred to *Kahn v. Alli Mahomed Haji Umer* (1), with approval. They state (page 559*):—

"We think, having regard to the principle

(2) 27 B. 556; 5 Bom. L. R. 529.

*Page of 27 B.—[Ed.]

*Page of 16 B.—[Ed.]

laid down by Mr. Justice Farran in the case of *Kahn v. Alli Mahomed Haji Umer* (1), followed in the case of *Mahommed Zohuruddeen v. Mahommed Noorooddeen* (3), it is very doubtful whether such an execution can be allowed. An officer of the Court is now executing that decree, and collecting the assets of the late firm and paying the debts of the firm, the decree-holders in the latter suit ranking as creditors of that firm."

I had occasion to point out in *Kesserbai v. Kaku* (4), that the statement made by the Appeal Court as above quoted was not necessary for the decision of the appeal which was before them, and is only in the nature of *obiter dicta*.

In *Visvanadhan Chetti v. Arunachalam Chetti* (5), a Full Bench of the Madras High Court considered the effect of O. XXI, r. 52, and held that where the property attached was in the custody of the Court, it was the duty of such Court to hold it at the disposal of the attaching Court and it was the duty of the attaching Court, if the property attached was money, to call upon the custody Court to pay it into the attaching Court and, in other cases, to provide for the realization of the property, and to divide the money or proceeds rateably between the attaching decree-holder and the other decree-holders who are entitled to distribution under s. 73, Civil Procedure Code, *viz*, those who have applied to it for execution before the receipt of such assets. Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateable distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to O. XXI, r. 52, Civil Procedure Code, to determine claims to priority, etc., does not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders. Where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of s. 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the

decree-holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor's suit. Order XXI, r. 52, requires that, where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property may be held subject to the further orders of the Court from which the notice is issued: provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court. Wallis, C. J., commenting on the proviso to O. XXI, r. 52, says (page 107*):—

"This will include claims questioning the title of the judgment-debtor and other cases, but taking the present case of the property in the custody Court being made the subject of several attachments in execution of several decrees, the custody Court is then in my opinion required by the proviso to determine which of these attachments is entitled to priority, and in the absence of any legislative provision...to award such priority to the first attachment in date because that attachment became complete on the service of the notice on the custody Court and subsequent attachments cannot, in the absence of express legislative provision, affect the right of the first attaching creditor to have the attached property realised in execution of his decree and distributed rateably among the decree-holders entitled under s. 295, now s. 73, in satisfaction of their decrees. If the other decree-holders want to share in the rateable distribution, their proper course is to apply in time, if they can, to the attaching or executing Court; and if, instead of doing so, they choose to attach the property in the custody Court, the result will be that the attaching decree-holder who is second in point of time will be entitled to proceed in execution against any balance that may be left in the hands of the custody Court after the full satisfaction of the decree of the first attaching decree holder and of the other decree-holders who have entitled themselves to rateable distribution under s. 295, now s. 73, in executing his decree."

This Full Bench judgment is referred to

*Page of 44 M.—[*Ed.*]

(3) 21 C. 85; 10 Ind. Dec. (N. S.) 689.

(4) 106 Ind. Cas. 113; 29 Bom. L. R. 665.

(5) 60 Ind. Cas. 302; 44 M. 100; 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14 (F. B.).

in *Nachiappa Chettiar v. Subbier* (6), Schwabe, C. J. thus summarizes the effect of the Full Bench decision (page 513*) :—

"The whole matter was, however, reconsidered in *Visvanadhan Chetti v. Arunachelam Chetti* (5) by a Full Bench of this Court and the proper interpretation of s. 73 was laid down. The Court was unanimous. It was held that 'assets held by a Court' did not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and that there is no receipt of assets within the meaning of s. 73 until the Court holding the money comes to the conclusion that no objection exists, and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing."

It is clear from O. XXI, r. 52, that the moneys in the hands of the custody Court are not moneys which are realised within the meaning of s. 73 and, therefore, no *pro rata* distribution of such moneys can take place among the attaching creditors at that stage. Rule 307 of our High Court Rules would enable the judgment-creditor who has obtained an order under O. XXI, r. 52, to have a garnishee notice issued to the Receiver.

Where notices under O. XXI, r. 52, are served on the Receiver and in pursuance of a garnishee or other order of the Court he pays in the amount in respect of any such notice into the Sheriff's office, all execution creditors whose attachments are registered in the Negative Book of the Prothonotary before the realization of the assets by the Sheriff would be entitled to *pro rata* distribution. In case the property in the custody Court has been attached at the instance of different Courts the custody Court would seek to satisfy such attachments not *pro rata*, but in order of time, sending the moneys to the first attaching Court first the balance to the second and so on.

I must now consider whether the charging orders obtained by the plaintiffs and other decree-holders amount to attachment proceedings. The Prothonotary has not recognized them as such. They are not entered in his Negative Book. The history

(6) 72 Ind. Cas. 820; 46 M. 506; 44 M. L. J. 413; 17 L. W. 390; 32 M. L. T. 198; A. I. R. 1923 Mad. 505.

*Page of 46 M.—[Ed.]

of these charging orders in our Courts shows that they are a misapplication of a certain practice, which prevails on the point in England. Macleod, J., is said to have started the practice and his judgment in *Haji Ismail & Co. v. Rabiabi* (7) is generally relied upon. Prior to this case a mention of the practice is to be found in the Appeal Court judgment in *Shidlingappa v. Shankarappa* (8). The judgment of Macleod, J., was based upon certain remarks contained in *Kewney v. Attrill* (9). The effect of such charging orders in England on assets of a partnership in a partnership suit, where the assets are held by the Court, through its Receiver is that the charging order gives priority to the person who obtains it as against every subsequent creditor as well as the trustee in bankruptcy of the debtor. An exception is made in favour of the attorneys' lien for costs under the Solicitors' Act, 1860. The charging order under the Solicitors' Act is held in England to have a retrospective effect and whether that charging order is obtained by the Solicitors in England prior to or subsequent to the charging order contemplated in *Kewney v. Attrill* (9) the Solicitor's charging order will prevail. That was recognized in *Ridd v. Thorne* (10). The Annual Practice for 1926, at page 807, in considering this matter states that orders similar to the one made in *Kewney v. Attrill* (9) are frequently made being substitutes for leave to issue execution notwithstanding the possession of a Receiver, though they are not, strictly speaking, charging orders; they are valid against the trustee in bankruptcy of the partners but do not override the right of the Solicitor for the plaintiff to a charging order for costs under s. 28 of the Solicitors' Act, 1860.

In *Shidlingappa v. Shankarappa* (8) Chandavarkar, J., refers to *Kewney v. Attrill* (9) with approval. The remarks made by the learned Judge, however do not form the *ratio decidendi* of the Appeal Court's decision and must be regarded as *obiter dicta*. The learned Judge states (page 179*) :—

(7) 4 Ind. Cas. 125; 34 B. 484; 11 Bom. L. R. 1062.

(8) 28 B. 176; 5 Bom. L. R. 912.

(9) (1886) 34 Ch. D. 345, 56 L. J. Ch. 448; 35 W. R. 191; 55 L. T. 805.

(10) (1902) 2 Ch. 344; 71 L. J. Ch. 624; 50 W. R. 542; 86 L. T. 655.

*Page of 28 B.—[Ed.]

"By the appointment of a Receiver the Court must be taken to have aimed at equality amongst the creditors. It was open, of course, to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt; but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that appointment, to the prejudice of other creditors of the partnership. To obtain satisfaction of it he was bound to go to the Court which had appointed the Receiver and take its directions. That was recognized as the law in such cases in *Kewney v. Attrill* (9)."

In *Haji Ismail & Co. v. Rabiabai* (7) Macleod, J., gave priority to the attorneys' lien, for costs against the claims of attaching creditors on partnership assets in the hands of a Receiver. The learned Judge also remarked that in a case relating to partnership assets in the hands of a Receiver appointed by the Court judgment-creditors of the partnership should not attach the assets but obtain charging orders in the form proposed in *Kewney v. Attrill* (9). The remarks in *Shidlingappa v. Shankarappa* (8) were, however, understood to mean that what *Kewney v. Attrill* (9) decided was that in spite of the charging order in favour of the judgment-creditor all creditors of the partnership irrespective of their being attaching creditors or having obtained charging orders were to share rateably if the assets of the partnership were held by a Receiver. A somewhat anomalous position was created by the practice whereby charging orders were made for the asking but were valueless to give priority against any class of creditors. That practice led to a great deal of difficulty and hardship in the case of genuine judgment-creditors, anxious to have their decrees satisfied out of the partnership assets of their judgment-debtors. Collusive partnership suits were filed and bogus Receivers appointed in them in order to delay and defeat the creditors. I see no warrant in the Code of Civil Procedure for the practice introduced in the form of these charging orders. In my judgment the provisions of O. XXI, r. 52, should be given effect to. I am not prepared to regard the charging orders obtained in these proceedings as equivalent to notices under O. XXI, r. 52. Those charging orders will be discharged. To serve the ends of justice I shall, however, give

a direction to the Receiver not to pay any moneys into the Sheriff's office in pursuance of any garnishee notice served upon him or otherwise, for one month from to day. It is open to all decree-holders who may so wish it in the meanwhile to obtain leave to attach the moneys in the hands of the Receiver and to have their claims in attachment registered with the Prothonotary under O. XXI, r. 52. When these moneys are paid into the Sheriff's office such creditors, in my opinion, will be entitled to rank *pro rata*. All creditors, who have not obtained decrees and have been misled by the notice of the Commissioner in inviting them to prove their claims before him, may, if so advised, file their suits, obtain decrees and attach. It may be open to them in case the partners have committed any act of insolvency to have them adjudicated insolvents and then all creditors will share rateably in the insolvency proceedings. I think this is a fit matter in which I should allow every creditor appearing before me to tack on the costs of the summons to his claim. Counsel certified. The directions I have already given on the priority of certain claims relating to the payment of taxes etc. will stand.

Z. K.

Order accordingly.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1349 OF 1924.

June 21, 1927.

Present:—Sir B. K. Mullick, Kt., Acting Chief Justice, and Mr. Justice Wort.

JOKHU GOSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GANESH SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Joint family—Alienation by father—Suit by alienee for possession—Burden of proof—Absence of legal necessity or antecedent debt—Purchaser's right to recover money enjoyed by son—Laches, effect of.

In a suit by a purchaser of joint family property from a Hindu father to recover possession of such property the onus is upon the purchaser to show in the first instance that there was either necessity or benefit or proper inquiry or an antecedent debt. It is only when the burden has been shifted by some *prima facie* evidence, that the sons can be called upon to show that the transaction was illegal or immoral or otherwise not binding on them, [p. 110, col. 2.]

In such a suit the purchaser will ordinarily be entitled to recover such part of the consideration as has been enjoyed by the sons, even though he is not able to prove legal necessity or antecedent-debt in the absence of any special reason disentitling him from such relief. [p. 191, col. 2.]

Modhoo Dyal Singh v. Golbur Singh (3), followed.

But the Court will refuse to grant him this equitable relief where he is clearly guilty of laches. [p. 192, col. 1.]

Appeal against a decision of the District Judge, Patna, dated the 11th July, 1924, reversing that of the Munsif, Patna, dated the 24th September, 1923.

Messrs. A. B. Mukharji, Upendra Nath Banerji and Ajodhya Prasad, for the Appellants.

Mr. S. N. Roy, for the Respondents.

JUDGMENT.

Mullick, A. C. J.—The plaintiffs sue for declaration of title to and confirmation of possession or, in the alternative, recovery of possession in respect of $4\frac{1}{2}$ bighas of land. This land is half of an area of 9 bighas which was purchased by the plaintiffs on the one hand and Gambhir Singh and Baldeo Singh on the other by a registered sale-deed, dated the 26th November, 1910, from the father of the defendants for a price of Rs. 1,500. By a private partition the plaintiffs claim to be in separate possession of $4\frac{1}{2}$ bighas.

An attempt was made to show that the plaintiffs are in direct possession; but the finding of both the Courts below is that the vendors of the plaintiff were in possession by receipt of rent from tenants.

The cause of action against the defendants is said to have arisen on the 30th July, 1921, when notwithstanding the sale to the plaintiffs, the defendants succeeded in getting their names recorded as proprietors in the registers of the Collector.

The trial Court found that the plaintiffs had not been able to show that there was necessity for the sale or that the plaintiffs were *bona fide* purchasers after inquiry. He also found that the plaintiffs had never got possession either direct or by collection of rents and he, therefore, dismissed the suit.

In appeal the District Judge found that the land was in the possession of *rai-yats* and that the plaintiffs were entitled to be entered in the Collector's registers as proprietors. He was of opinion that "when a father, as the head of a joint family, alienates joint family property, *prima facie* there is a presumption as against his sons that the alienation was for

the benefit of the family, and the sons cannot repudiate the alienation unless they can show that it was for an illegal or immoral purpose."

As there was no evidence to prove that the sale was made for an illegal or immoral purpose, the learned Judge held that the plaintiffs' title was good.

It seems to me that the learned Judge is in error in his statement of the law. The plaintiffs must prove their title. The property is ancestral and the father had no right to sell either his share or the share of his sons except for necessity or for the benefit of the joint family. Evidence was given before the Munsif that the property was distant from the family homestead and was difficult to manage; but the learned Munsif found that this was not proved. The learned District Judge has thrown the onus upon the defendants to prove that the sale was made for an illegal or immoral purpose whereas he ought to have held that the onus was upon the purchaser to show in the first instance that there was either necessity or benefit or proper inquiry or an antecedent debt. It is only when the burden has been shifted by some *prima facie* evidence that the sons can be called upon to show that the transaction was illegal or immoral or otherwise not binding on them.

The appeal must, therefore, be re-heard by the learned District Judge and disposed of according to law.

The learned Vakil for the respondents, however, makes an offer. He says that he is willing to give up his title to the property on receiving his half share of the consideration money and that in any event he is entitled in equity to compensation of some kind. The appellants decline to settle on these terms and they contended that there is no equity in the plaintiffs' favour. They cite *Badam v. Modho Ram* (1) and *Madho Parshad v. Mehrban Singh* (2).

In *Modhoo Dyal Singh v. Golbur Singh* (3) it was held that it was proved that the purchase money was carried to the assets of the joint estate and that the son had had the benefit of his share of it, he could not re-

(1) 66 Ind. Cas. 19; 2 Lah. 338; A. I. R. 1922 Lah. 241.

(2) 18 C. 157; 17 I. A. 194; 5 Sar. P. O. J. 586; Rafique and Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 105 (P. C.).

(3) 9 W. R. 511; B. L. R. Sup. Vol. 1016 (F. B.).

cover his share of the estate without refunding his share of the purchase-money. This view was affirmed in *Honooman Dutt Roy v. Bhagbut Kishen* (4) although it was observed in that case that it would depend on the facts of each case upon what terms the sons would be entitled to recover their share. The liability of the sons to refund the purchase-money was again affirmed in *Koer Hasmat Rai v. Sunder Das* (5). That was a suit for partition by the sons against the purchaser and also the father, and it was held that the sons would be entitled to recover their share of the property on refunding the whole of the purchase-money. The case was decided not on the equity arising out of their enjoyment of a part of the purchase-money (even though there was no proof of legal necessity) but on their liability to pay their father's debt. The Court was of opinion that the sons might have recovered the whole of the property if they had so framed their plaint; but that as they had only asked for the recovery of their fractional interest they would be limited to that relief, notwithstanding their liability for the whole of the purchase-money. This result was the natural consequence of the view that as soon as a decree for partition was made, a debt was created against the father which the sons were liable to pay. The correctness of this view, however, has been recently criticised in *Greenivasa Aiyangar v. Kuppuswami Aiyangar* (6), and it has been pointed out that the partition decree dated back to the date on which the plaint for partition was filed and that it could not be said that on that date there was any debt due by the father by reason of his having made a sale in respect of which there was a total failure of consideration. It was further pointed out that at most the father incurred a liability for damages, contingent on the event of the sale being set aside which could in no sense be called a debt incurred on the date of the sale.

It does not seem that in the above case there was any evidence that any portion of the purchase-money had been spent for the benefit of the sons and, therefore, the equity arising against the sons was not considered; but I think it is clear that where

there is such evidence the son would not be permitted to recover his share of the property without doing equity by refunding his share of the purchase-money.

In the present case the plaintiffs purchasers might have sued the father for damages for failure of title and if they had obtained a decree, they would have been entitled to enforce it against the sons either on the footing that they were under a pious obligation or on the footing that they were in possession of the father's share of the assets of the family.

The purchasers might also have sued the sons as the heirs of their father for damages arising out of the contract of sale, but they have not done so.

The only question is whether, in the event of failing to show that the sale was for legal necessity or for the benefit of the joint family or for an antecedent debt or after proper inquiry, the purchaser in a suit for the possession of the land can enforce an equity against the son arising out of his enjoyment of a part of the purchase-money.

In *Moyna Bibi v. Banku Behari Behari Biswas* (7) the mother of a Muhammadan minor had mortgaged the minor's land to the plaintiff and the plaintiff sued to enforce that mortgage. It was held that as the mother was not the legal guardian the transaction was void and even though the minor had been benefited by the transaction the mortgagee could neither enforce his mortgage nor recover the consideration money which had been applied for the minor's benefit.

I think, however, that the decision of the Full Bench in *Modhoo Dyal Singh's case* (3) authoritatively lays down the principle of a Mitakshara son's liability for money of which he has had the enjoyment even though it was not borrowed for legal necessity. That case has not been overruled and I see no difference in the application of the principle whether the son is a defendant or a plaintiff.

I think, therefore, that the plaintiffs in the present case would have been entitled to recover such part of the consideration as had been enjoyed by the sons in the absence of any special reason disentitling them from such relief.

But here upon the findings there is such special reason. It has been found by the Munsif and also, though not very clearly,

(4) 15 W. R. F. B. 6; 8 B. L. R. 358.

(5) 11 O. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.

(6) 64 Ind. Cas. 698; 41 M. 801; 14 L. W. 78; (1921) M. W. N. 630.

(7) 20 O. 473; 6 O. W. N. 667.

by the District Judge in appeal that the plaintiffs have not at any time been in possession since the date of the sale, that is to say, for nearly twelve years. It also appears to be a fact that the plaintiffs have never attempted to recover possession during this time. This is clearly a case of laches which debar the plaintiffs from any equitable relief.

Therefore, it will not be necessary for the District Judge to consider whether the plaintiffs are entitled to recover any part of the purchase-money.

All that the District Judge will have to determine when he re-hears the appeal is whether the plaintiffs have proved legal necessity or benefit to the joint family or inquiry or an antecedent debt. If they fail to justify the sale on any of these grounds, the decree of the learned Munsif will be affirmed. If they succeed, they are entitled to recovery of possession.

The decree of the District Judge is, therefore, set aside, and the case is remanded for disposal according to law. Costs will abide the result.

Wort, J.—I concur.

A. N. A.

Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 434 OF 1926.

May 27, 1927.

Present :—Mr. Justice Sulaiman and Mr. Justice Banerji.

BOHRA SRI RAM—PLAINTIFF—

APPELLANT

versus

JWALA SHANKER SAHAI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), ss. 1 (3), 3—Customary right of pre-emption in Municipal area, whether abrogated.

The Agra Pre-emption Act of 1922 has not abolished the customary right of pre-emption in Municipal areas to which the Act is not applicable.

Second appeal from a decree of the Third Additional Subordinate Judge, Aligarh, reversing that of the Munsif, Jalesar.

Messrs. Girdhari Lal Agarwala and J. S. Gupta, for the Appellant.

Mr. Peary Lal Banerji, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption

of property situated within the Municipal limits of the town of Jalesar. There were many points in dispute and the Court of first instance framed no less than four issues. One of the points was whether in view of the passing of the Agra Pre-emption Act, this suit was not maintainable. The Court of first instance in a clear judgment held that the Agra Pre-emption Act was not applicable to the suit and the case was governed by the old law. It then proceeded to consider the other issues and ultimately passed a decree in favour of the plaintiff. The lower Appellate Court has reversed that decree on the sole finding that under the Agra Pre-emption Act, all other rights of pre-emption have been abrogated.

We are of opinion that the lower Appellate Court has erred in this conclusion. Section 1, sub-cl. (3) of the Act clearly provides that it does not apply to any area included within the limits of a Municipality, Cantonment, Notified area or Town area. Then s. 3 provides that no right of pre-emption shall be enforced in respect of a transfer made after the commencement of this Act of an interest in relation to any area to which this Act applies except in accordance with the provisions of this Act. It then proceeds to make a special exception in favour of the Muhammadan Law. On the wording of these two sections it is quite clear that the customary right of pre-emption has been abolished only in areas to which this Act applies. Section 3 contains no other prohibition. It is not wide enough to abolish pre-emption even in areas to which the Act does not apply. Section 1, sub-cl. (3) clearly makes the Act inapplicable to a Municipality. In our opinion it follows that the Act has not abolished a customary right of pre-emption within a Municipal area to which the Act is not applicable.

The present case must, therefore, be governed by any custom that may prevail in the town.

We accordingly allow this appeal and setting aside the decree of the lower Appellate Court, send the case back to that Court for disposal of the remaining points in dispute. The plaintiff appellant will have his costs of this appeal from the defendants-respondents.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.MISCELLANEOUS JUDICIAL CASE No. 137
OF 1926.

August 11, 1927.

Present:—Sir B. K. Mullick, Kt., Acting
Chief Justice, and Mr. Justice Sen.

BRIJ RAJ-RANG LAL—APPELLANT

versus

COMMISSIONER OF INCOME TAX

—RESPONDENT.

*Income Tax Act (XI of 1922), ss. 22 (4), 23 (4), 66**—Failure to comply with notice after filing of return**—Summary assessment under s. 23 (4); legality of—
Reference—Duty of Commissioner.*

Failure of a person to comply with notices issued by an Income Tax Officer under s. 23 or s. 37 of the Income Tax Act, 1922, after the filing of a return does not authorise the officer to make a summary assessment to the best of his judgment under cl. (4) of s. 23 of the Act.

A notice under s. 22 (4) contemplated by s. 23 (4) of the Act concerns only the stage before the filing of a return.

In a reference under the Income Tax Act it is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires the opinion of the High Court.

Appeal from an order of the Commissioner, Income Tax, Bihar and Orissa, dated the 16th March, 1926.

Messrs. K. P. Jayaswal and S. P. Asthana, for the Appellant.

Mr. C. M. Agarwalla, for the Respondent.

JUDGMENT.

Mullick, A. C. J.—It is difficult to understand what is the special question of law upon which the Commissioner of Income Tax is asking for an opinion. It is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires our opinion. He may then, if he likes, give his own opinion on the case.

Both parties, however, have agreed before us to ask our opinion on the following question of law:

“Is an assessment under s. 23, cl. (4) of the Indian Income Tax valid in this case?”

The answer depends upon whether or not a breach of s. 22 (4) was committed.

Accounts or documents can be called for by the Income Tax Officer under s. 22 (4) after issue of notice and before the filing of the return.

After the filing of the return ss. 23 (2), 23 (3) and 37 give ample powers to the Income Tax Officer to call for whatever

documents he requires. The failure to comply with any of the notices under these sections does not authorise the Income Tax Officer to make a summary assessment to the best of his judgment under cl. (4) of s. 23.

This last mentioned clause runs as follows:—

“If the principal officer of any company or any other person fails to make a return under sub-s. (1) or sub-s. (2) of s. 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-s. (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-s. (2) of this section, the Income Tax Officer shall make the assessment to the best of the judgment.

The words “or having made a return” would be quite unnecessary if they were not intended to be in sharp antithesis to the preceding words and to show that in the view of the Legislature a notice under s. 22 (4) concerns only the stage before the filing of a return. *Duni Chand Dhani Ram v. Commissioner of Income Tax, Punjab* (1) and *Pitta Ramaswamiiah v. Commissioner of Income Tax, Madras* (2) were cited but it does not appear that the point was clearly raised and decided in these cases.

If then notice under s. 22 (4) can only be issued before the filing of a return, there could have been no breach of a notice under this clause in the present case and the summary assessment was illegal.

This assumes that there was in fact a notice issued under s. 22 (4) but the finding of the Income Tax Commissioner on this point is not clear.

He thinks that the order entered on the order-sheet of the 18th December, 1925, was sufficient to constitute a notice under s. 22 (4). But what is there to show that the notice was under this section? The notice might have been one under s. 37 or 23 (3).

Therefore, even if we assume that notice under s. 22 (4) can be issued after a return has been filed, such notice not having been issued in this case the summary assessment was illegal.

The assessee succeeds and will get the costs of this proceeding. Hearing fee five

(1) 94 Ind. Cas. 614; 7 Lah. 201; 8 Lah. L. J. 106; A. I. R. 1926 Lah. 161; 27 P. L. R. 836.

(2) 98 Ind. Cas. 1067; 49 M. 831; 24 L. W. 771; A. I. R. 1927 Mad. 49 (F. B.).

gold mohurs. He will be entitled to include in his costs his deposit of Rs. 100 but not for the printing of the paper-book.

Sen, J.—I agree.

A. N. A.

Revision allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 27 OF 1927.

July 15, 1927.

Present :—Justice Sir B. K. Mullick, Kt.,
Acting Chief Justice, and Mr. Justice Wort.

NARAYAN SAHU AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Sri THAKURJI RAMJI AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Appeal—Application for stay of delivery dismissed as premature on respondent's objection—Respondent taking out execution by surprise—Overreaching of Court—Appellate Court's power to order re-delivery.

The appellant applied for stay of delivery of possession pending the disposal of the appeal. The respondent contended that the application was premature as he had taken no steps for delivery of possession, and the application for stay was consequently rejected. The respondent straightway applied for execution and took delivery of possession:

Held, that there was something in the nature of an overreaching of the Court on the part of the respondent and the delivery of possession could not be allowed to stand.

Messrs. S. M. Mullick and S. K. Mitra,
for the Appellants.

Mr. L. K. Jha, for the Respondents.

JUDGMENT.

Mullick, A. C. J.—This is an application for stay under somewhat peculiar circumstances.

A Mahant named Damodar Das who was the trustee of the properties in suit borrowed money on a mortgage from the appellant Narain Sahu. The appellant got a decree on the mortgage and took possession of the mortgaged properties on the 17th December, 1908. Next Damodar Das was ejected from the office of Mahant by a decree of the Court under s. 92 of the Code of Civil Procedure and one Rajkumar Das was installed in his place. Rajkumar then brought a suit against the appellant for a declaration that the mortgage was without necessity and for recovery of possession. His suit was dismissed.

Next Rajkumar was dislodged from the Mahantship on appeal and Damodar Das

got back to his office. After his death his successor the respondent Ram Kirpal Das brings another suit on the same cause of action as Rajkumar for a declaration and for recovery of the mortgaged properties from the appellant.

This time the attempt has been successful and the Subordinate Judge of Darbhanga has decreed the claim on condition that the plaintiff Ram Kirpal deposits on or before the 30th April, 1927, a sum of Rs. 11,000 odd for the benefit of the appellant.

The appellant has preferred an appeal to this Court and he has also applied to the Registrar for a stay of execution. The Registrar issued an *interim* order for stay of execution, but on the 6th June, 1927, when the matter came up for hearing before him the respondent represented that the application was premature inasmuch as he had taken no steps whatever for delivery of possession. This argument prevailed with the Registrar and he dismissed the application for stay on the ground that there was no necessity for considering it at the moment.

At this point the respondent adopted what appears to me to be a very questionable move. He went straightway to the Execution Court and on the 10th June put in an application for delivery of possession and obtained delivery of possession on the 13th June.

The appellant having been taken by surprise then hurried to this Court and made an application on the 15th June, for the hearing of his application for stay of execution on the merits and for the cancellation of the order of delivery of possession and for restitution of the property.

We have heard the learned Vakils for the respondents on the circumstances under which he induced the Registrar to dismiss the application for stay on the 6th June, 1927. It is quite clear that if the Registrar had had any suspicion that the respondent was going straightway to the Execution Court to make an application and to take delivery of possession he would not have dismissed the application, but would have disposed of it on its merits. There has, in my opinion, been something in the nature of an overreaching of the Court on the part of the respondent and delivery of possession cannot be allowed to stand.

The next question is whether there should be a stay pending the hearing of this appeal. It is unnecessary for us to express any opinion as to the merits of the appeal but having heard the learned Vakil for the respondent fully we think that on the whole it is desirable that the appellant should not be compelled to give up the property till the appeal is disposed of. He has been in possession for nearly nineteen years and to say the least the fortunes of litigation in regard to the subject-matter of the suit are uncertain. The interests of the parties will be best served by directing that the order for delivery of possession be set aside and possession be re-delivered to the appellant upon his depositing on or before the 15th August next the sum of Rs. 6,000 as security for the mesne profits of the property pending the hearing of the appeal. The respondent will be permitted to withdraw at the end of each year a sum of Rs. 1,500 on account of the mesne profits which have been accrued during the year, on giving security of the same to the satisfaction of the Execution Court.

With regard to the sum of Rs. 11,000 odd already deposited by the respondent under the orders of the Subordinate Judge we direct that the respondent be permitted to withdraw this sum on condition that in the event of the appeal being dismissed he will within four months from the judgment of the Appeal Court bring back the money into Court.

The application is, therefore, allowed with costs. Hearing fee two gold mohurs.

Wort, J.—I agree.

A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL SUIT No. 27 OF 1924.

February 16, 1927.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

TIRUVADIPURAM LAKSHMI KUMARA
AKKULNAYANIM VARU—PLAINTIFF—
APPELLANT

versus

PALLETICHINNA NARAYANAPPA
NAIDU AND OTHERS—DEFENDANTS NOS. 1 TO
13 AND 15 TO 26—RESPONDENTS.

Encumbrance Act (V of 1882), s. 13—Right of tenants

to graze cattle on landlord's kancha lands—Customary right, evidence of.

A customary right of pasture on landlord's lands can be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right and if from the circumstances it could be gathered that the right was enjoyed by them customarily or might be due to a lost grant. But such a right cannot be held to exist where the tenants used to apply to the landlord formally for permission to graze and the landlord used to give them permission on terms agreed to between him and the tenants. [p. 196, col. 1.]

Appeal against the decree of the Court of the Additional Subordinate Judge, Nellore, in O. S. No. 43 of 1922 (O. S. No. 97 of 1921, District Court, Nellore).

Mr. S. Varadachariar, for the Appellant.

Mr. B. Somayya, for the Respondents.

JUDGMENT.—The plaintiff the Poligar of Chettedu is the appellant before us. His claim in this suit was for a declaration that the *kancha* lands described in the plaint belong to him and for a perpetual injunction restraining the defendants from grazing cattle or trespassing thereon or in the alternative for possession in case the defendants or any of them should claim to be in possession of the lands. The defendants set up in defence that they had an occupancy right in respect of the lands, that it was a customary right that was possessed by them of grazing cattle there on payment of Rs. 170 per *fasli* and that they further had the right of taking brushwood, etc., from the lands and also of cultivating portions of the lands. It must be observed that the judgment of the learned Subordinate Judge is very unsatisfactory. He held that there was a customary right in the defendants to graze the cattle there on payment of Rs. 170 per annum and awarding to the plaintiff the rent in respect of two *faslis* dismissed the plaintiff's suit in other respects. The so-called customary right set up by the defendants appears on examination to be based merely on user the lands for purposes of grazing from the year 1912, paying to the plaintiff a sum of Rs. 170 per annum. Before that it is clear that the rent collected by the plaintiff from the tenants for purposes of pasture was about Rs. 114. It is difficult to imagine how any customary right or even a prescriptive right came to be acquired or established by the use of these lands for purposes of pasture with the permission of the plaintiff during the years since 1912. The documents that have been filed in the case have no doubt whatever as to the

real rights of the parties. In Ex. V (a) which is an account kept by the plaintiff in respect of these pasture lands it is clear that small-sums of money at so much per head of cattle appear to have been collected by the landlord for the grant of permission to the tenants to graze their cattle there. In Ex. N, the written statement filed by these very tenants in O.S. No. 825 of 1911 the tenants admitted that the cultivation of the small pieces of land comprised within the *kancha* lands was discontinued for 45 years or so. Exhibit Q is a sample of the *kararnama* entered into between the plaintiff and the defendants from the year 1912. We find there that such *kararnamas* were entered into between the tenants and the landlord and for the purpose of getting the permission of the landlord for grazing cattle, applications, it is clear, were made by tenants and *darkhasts* were issued. In Ex. B, for instance, we find that the tenants "pray that the landlord may grant the said field to the tenants for *fasli* 1326 for a reasonable amount after inspecting the grass now grown and obtaining a *kararnama*."

Exhibit C is another *kararnama* and there is a provision there for delivery of possession of the *kanchas* being given to the landlord at the end of the *fasli*. All these documents clearly show that during the whole period under reference the tenants used always to apply to the landlord formally for permission to graze the cattle and such permission was granted on terms agreed to between the landlord and the tenants. How in these circumstances any right in the defendants would come to be recognised or how any customary right to graze cattle in these *kancha* lands on payment of a customary rent of Rs. 170 can be established it is impossible to conceive. No doubt such a right can be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right and if from the circumstances it could be gathered that the right was enjoyed by them customarily or might be due to a lost grant. But in a case of this sort where the rent has been increased with living memory, really within a few years, and where on every occasion on which the landlord grants permission to the tenants to graze the cattle they have had to apply for it and obtain such permission. It is impossible to find any right in the

defendants as established. The learned Subordinate Judge has found that the land belongs to the plaintiff. If so, the burden of establishing that the defendants have any right of easement or any other right in respect of the lands lies heavily on them and on the materials before us it is impossible to hold that they have made out any such right. The lower Court was, therefore, clearly wrong in dismissing the plaintiff's action.

It is unfortunate that the proposals for compromising the differences in this litigation should have fallen through. But as the parties have not been able to settle there seems to be no other course open than to declare that the plaintiff is entitled to the perpetual injunction asked for. The dismissal of the plaintiff's suit must be set aside and a perpetual injunction granted against the defendants restraining them from grazing cattle, cultivating or taking brushwood, etc., without the permission of the landlord. If, however, the defendants or any of them should set up any claim to be in possession of any portion of the land which is the subject-matter of this suit, the plaintiff would also be entitled to have them ejected from such portions there in execution of the decree. The money-decree granted by the lower Court to the plaintiff will stand and Mr. Varadachariar on behalf of the plaintiff-appellant has not argued that it should be increased.

The order for costs made by the lower Court is also set aside and the plaintiff will have his costs throughout.

V. N. V.

A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1400 of 1924.

April 26, 1927.

Present:—Mr. Justice Devadoss and
Mr. Justice Jackson.

KANIYUR GANAPATHI BHATTA—
PLAINTIFF—APPELLANT

—versus—

BEERU BHANDARY AND OTHERS
—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 60—
Usufructuary mortgage by members of joint family—

Suit for redemption by purchaser of equity of redemption from one brother against purchaser of equity of redemption from other brother—Partial redemption, whether permissible—Consolidation of mortgages—Mortgagor and mortgaged properties, identity of.

Two brothers who were members of a joint Hindu family executed a mortgage of certain specific items of family property to the defendants. The plaintiff who had purchased a half share in the equity of redemption from one of the brothers brought a suit for redemption against the defendants who had purchased the share of the other brother :

Held, that it was open to the Court to allow the defendants to retain one-half of the property and decree redemption of the other half. [p. 199, col. 2.]

Velayadain Chetty v. Alangaran Chetty (2), followed.

Mirza Yadalli Beg v. Tukaram (1), considered.

There can be no consolidation of mortgages unless the properties mortgaged are the same and the mortgagor is also the same. [p. 199, col. 2.]

Second appeal against the decree of the District Court, South Kanara, in A. S. Nos. 380 and 385 of 1922, preferred against that of the Court of the Subordinate Judge, South Kanara, in O. S. No. 70 of 1920.

Mr. B. Sitarama Rao, for the Appellant.
Mr. K. Y. Adiga, for the Respondents.

JUDGMENT.—The plaintiff's suit is for the redemption of a usufructuary mortgage executed by two brothers, Kesava and Krishna, on 2nd February, 1883, for Rs. 5,000. The plaintiff has purchased the equity of redemption from Kesava. The defendants have purchased from Krishna his share of the equity of redemption in the suit properties. The District Judge has given a decree to the plaintiff for the redemption of half the property and has allowed the defendants to consolidate the mortgage with a simple mortgage by Kesava. The plaintiff has preferred this second appeal.

The first point raised by Mr. Sitarama Rao for the appellant is that the District Judge should have allowed redemption of the whole of the property as a partial redemption is opposed to the provisions of the Transfer of Property Act. The finding is that the defendants have acquired the interest of Krishna in the equity of redemption. This finding is challenged by Mr. Sitarama Rao on the ground that defendants Nos. 1 to 3 have acquired the equity of redemption in respect of one of the properties and defendants Nos. 4 to 6 have acquired the equity of redemption in respect of the other item. The mort-

gage was with regard to two items of property only.

The question is whether the defendants have acquired the right of one of the mortgagors in all the properties mortgaged. It is immaterial whether the acquisition of the mortgagor's right was piecemeal or whether the acquisition was under one document.

If the mortgagee or mortgagees has or have acquired in whole or in part the share of the mortgagor the provisions of the exception to the last clause of s. 60, Transfer of Property Act, will apply. The clause is in the following terms :

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired in whole or in part the share of the mortgagor."

Defendants Nos. 1 to 6 have acquired the interest of the mortgagees. They have also acquired the interest of one of the mortgagors, that is, the interest of Krishna. The plaintiff is not, therefore, entitled to ask for the redemption of the whole of the mortgaged property seeing that he has acquired only the interest of Kesava. The facts of this case bring it within the exception already mentioned. But it is urged that the law is against a partial redemption and, therefore, the plaintiff should be allowed to redeem the whole of the property and the defendants should bring a suit for their half share of the property. This contention is based on the ground that Krishna could not under the Hindu Law alienate any specific portion of the joint family properties and, therefore, those who have acquired the right to his share could only bring a suit for partition of the whole of the family property and in that partition their rights should be worked out. If it were a mere alienation of the family property by one of the members of a joint Hindu family, no doubt, the alienee would not be able to get possession of the specific items alienated to him. But here the question is complicated by the fact that both the members of the joint family made an alienation by way of mortgage of specific items and one of them sold his share of the equity of redemption. In these

circumstances, the question is whether the Court would not be justified in allowing the defendants to retain one-half of the property and in decreeing the plaintiff only partial redemption of the half share of Kesava. The plaintiff acquired the right to the equity of redemption of Kesava knowing full well the facts of the case. There is evidence to show that Kesava knew that the defendants had acquired the rights of the mortgagee and also the share of Krishna to the equity of redemption. Could the plaintiff, who has only acquired the interest of one of the members of the joint family have insisted upon being given possession of the specific items? It is difficult to see how the plaintiff stands in a better position than the alienee from the other brother. If the strict rule of Hindu Law is to be applied the plaintiff would have to sue for partition of the property and in the partition the equities between the parties will have to be adjusted. This argument is met by the contention that Kesava being the managing member of the family has alienated the whole of the property and, therefore, the plaintiff stands in a better position than the alienee from Krishna. This contention overlooks the fact that Kesava could not alienate what he did not possess. The right to the share of Krishna having already been alienated to third persons Kesava could not give a title to the plaintiff in respect of Krishna's share and, therefore, the plaintiff does not stand in a better position than the alienees from Krishna. In such a case as this where the circumstances are such that it would lead to unnecessary litigation by granting the relief asked for by the plaintiff, the Court is not debarred from considering the equities in the case, and in order to avoid multiplicity of suits and unnecessary litigation, from granting only such relief as the equities of the case would justify without in any way prejudicing the rights of the parties.

Mr. Sitarama Rao relies strongly on *Mirza Yaddali Beg v. Tukaram* (1) in support of his contention that the District Judge was wrong in decreeing partial redemption. The facts in that case were: in 1893, A mortgaged 16 fields in Berar to B. In 1896 A conveyed one of the fields to C

and others. In 1899 B brought a suit against A alone to enforce the mortgage and obtained a decree by consent. As A made default in payment within the time fixed, 9 of the fields were foreclosed and possession was handed over to B. C and others, not having been made parties to the suit were not affected by it, and they brought a suit for the redemption of the items. The Privy Council held that there could be no partial redemption, and that C and others who had acquired the equity of redemption to one of the fields were entitled to redeem all the nine fields. Viscount Haldane, in delivering the judgment of their Lordships, observed:—

“The only question that arises is whether they are entitled to redeem the whole of the nine fields, or only the field conveyed to them subject to the mortgage over the whole. According to English Law the respondents would have been entitled to redeem the mortgage in its entirety, subject only to the safe-guarding of the equal title to redeem of any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security, by English Law, if it applied, would on the one hand be entitled to redeem the entire mortgage on the properties generally, and correlatively could not compel the mortgagee to allow them to redeem their part by itself..... The Judge in the original Court thought that the decisions of the Courts in India had established that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safe-guarding of the rights to redeem, which these owners may possess, their Lordships are of opinion that this is not so in India any more than in England.”

This decision does not govern the present case as the defendants have acquired the right of the mortgagors to the mortgaged property. The decision of the Privy Council case would have been different if the persons who resisted the redemption had acquired in whole or in part the right to the equity of redemption from the mortgagor.

The decision in *Velayadain Chetty v. Alangaram Chetty* (2) affirms the principle that there cannot be a partial redemp-

(1) 57 Ind. Cas. 535; 48 C. 22 at pp. 28, 29 (1920) M. W. N. 369; 28 M. L. T. 95; 39 M. L. J. 147; 2 U. L. R. (P. C.) 123; 16 N. L. R. 154; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 241 (P. C.).

(2) 15 Ind. Cas. 605; 23 M. L. J. 475.

tion except in cases where the mortgagees or mortgagees where there are more than one, has or have acquired in whole or in part the share of the mortgagor. As observed by the learned Judges in that case:

"The mortgage is one and indivisible and the exception only arises when the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor."

Mr. Adiga, for the respondents, relies upon *Rathna Mudali v. Perumal Reddy* (3) in support of his contention that the Court could decree partial redemption of a mortgage. The learned Judges who decided the case have laid down the principle too broadly. It is not open in all cases for the Court to decree partial redemption. It is unnecessary to canvass the correctness of this decision in the view we have taken of the facts of this case. It was not followed by a Bench of this Court in *Deynatakath v. Patinharayil Avulla* (4).

In support of the contention that the defendants can only bring a suit for partition in order to enforce their right to the properties, and they are not entitled to be given half the share of the specific items mentioned in the plaint, *Nanjaya Mudali v. Shanmuga Mudali* (5) is relied upon. In that case Sankaran Nair and Bakewell, JJ., held after an examination of various cases that:

"When a co-parcener alienates his share in certain specific family properties the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible. The alienee cannot sue for partition and allotment to him of his share of the property alienated."

In *Kota Balabhadra Patro v. Khetra Doss* (6) it was held that "an alienee from a member of a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by a suit for partition the share to which his alienor is entitled."

(3) 17 Ind. Cas. 837; 38 M. 310; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 576.

(4) 82 Ind. Cas. 943 A. I. R. 1925 Mad. 351.

(5) 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(6) 37 Ind. Cas. 168; 31 M. L. J. 275; 4 L. W. 99; (1917) M. W. N. 149.

If a member of a joint Hindu family alienates any specific item belonging to the family the alienee is not entitled to possession of that property nor can he sue for partition of that property alone. A suit for partition must comprise all the property of the family which is capable of division. But here both the brothers alienated by way of mortgage specific items. The mortgagees were entitled to be in possession of those items. One of the mortgagors afterwards sells his share in those items and the other co-parcener is aware of such alienation and then alienates his share in favour of the plaintiff. In such circumstances the alienee from one sharer cannot insist upon his getting possession of the specific items. The law applicable to mortgages should be applied in cases of this kind and not the strict rule of Hindu Law which is against the alienee of a specific item of property from one co-sharer, claiming to be in possession of that property. The principle of the decision in *Tadepalli Subba Rao Garu v. Balusu Buchi Sarvarayudu* (7) can be applied to this. Though the facts of that case are different from the facts of this, yet the course adopted by the learned Judges in that case commends itself to us. We hold that the learned District Judge was right in decreeing the plaintiff partial redemption.

The next point urged is that the defendants are not entitled to consolidate the usufructuary mortgage with the simple mortgage executed by Kesava alone. The rule as to consolidation is applicable to Indian mortgages provided the mortgagee and mortgagor of both the mortgages sought to be consolidated are the same and the property mortgaged is also the same. There can be no consolidation of two mortgages if the properties mortgaged are different. This is clear from the illustration to s. 61 of the Transfer of Property Act. The mortgagor also should be the same. If A mortgages his share in one item of property and B mortgages his share of the same item to the same mortgagee, though the mortgagee may be the same and the property mortgaged may be the same the mortgagee is not entitled to insist upon A paying the whole of the mortgage amount due on the two mortgages before he can redeem the property. And con-

(7) 72 Ind. Cas. 292; 18 L. W. 61; 44 M. L. J. 534; (1923) M. W. N. 533; A. I. R. 1923 Mad. 533; 47 M. 7.

versely, if A mortgages the same property to B and then to C unless B acquires the rights of C in the second mortgage he cannot insist upon A redeeming both together. The second mortgage was a simple mortgage by Kesava to the 1st defendant. Defendants Nos. 4 to 6 are not interested in the mortgage. Therefore there can be no consolidation of the usufructuary mortgage with the simple mortgage. It is unnecessary to refer to any decision on this point as s. 61 of the Transfer of Property Act is quite clear. In the result the decree of the District Judge will be modified by disallowing the claim of the defendants to the consolidation of the mortgage under Ex. X with the usufructuary mortgage sought to be redeemed. With this modification of the lower Court's decree I dismiss the appeal without costs.

The memorandum of objections is dismissed without costs.

V. N. V.

A. N. A.

Decree modified.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 216 OF 1926.

July 4, 1927.

Present:—Justice Sir Benjamin Herbert Heald, Kt., and Mr. Justice Mya Bu.

R. M. M. CHETTYAR FIRM—APPELLANT
versus

U HLA BU—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 56 (2) (b)
—Receiver—Sale of mortgaged property of insolvent free of mortgage—Commission of Receiver, calculation of—Assets.

Where any part of an insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase-money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage, and it is only on such part that the Receiver is entitled to remuneration. [p. 201, col. 1.]

Shridharnarayan v. Atmaram Gobind (1), Shridhar Narayan v. Krishnaji Vithoji (2), and In re Official Assignee's Commission (3), relied on.

Mr. P. B. Sen, for the Appellant.

Mr. U Thein Maung, for the Respondent.

JUDGMENT.—The respondent, a Pleader of Pyinmana, was appointed Receiver of the estate of Maung Po Tok, who on his own application was adjudicated insolvent in Civil Miscellaneous No. 49 of 1925. As Receiver, the respondent took possession of certain articles of jewellery and immove-

able property set out in his list filed at page 16 of the record. All the properties were mortgaged or pledged with the appellant Chettyar firm. Most, if not, all of these properties were sold by the respondent, who filed his accounts on the 6th July, 1926 (page 23) which shows a sum of Rs. 3,686-10-6 as having been realised, from which two sums, namely, Rs. 10 being the cost of notices for the sales and Rs. 368 being the Receiver's commission, were deducted.

On the 21st August, 1926, the appellant firm tendered a proof of debts due to them by the insolvents amounting to Rs. 20,413-8 out of which the Court admitted Rs. 12,641-6. Subsequently the appellant on finding that a sum of Rs. 378 had been deducted from the proceeds of sale conducted by the Receiver applied to the Court objecting to the deduction and pointing out that the appellant firm were the insolvent's secured creditors and that the amount realised by the Receiver was the proceeds of sale of properties pledged or mortgaged to them. By an order dated the 30th September, 1926, the Court dismissed the application and it is against this dismissal the appellant firm have appealed.

The Court appointed the Receiver under s. 56 of the Provincial Insolvency Act, 1920. Under sub-s. (2) (b) the Court could fix the amount to be paid as remuneration for the services of the Receiver out of the assets of the insolvent. This remuneration was fixed in the shape of a commission at 10 per cent. which is an excessive rate. However, the District Court having fixed the remuneration at that rate the Receiver was entitled to get his remuneration at the rate so fixed but only out of the assets of the insolvent. Where any part of the insolvent's property is subject to a mortgage, it is only the value of the insolvent's right to redeem that property which can be his assets available for distribution. A Receiver is bound as a condition of dealing with mortgaged property to pay off the mortgage. The only interest the insolvent had and which vests in the Receiver was the equity of redemption [see *Shridharnarayan v. Atmaram Gobind (1)* and *Shridhar Narayan v. Krishnaji Vithoji (2)*.] Thus if the property that vests in the Receiver is subject to a mortgage or incumbrance, it is only the equity of redemption which can be counted as assets going into the Receiver's hands.

(1) 7 B. 455; 4 Ind. Dec. (N. S.) 306.

(2) 12 B. 272; 6 Ind. Dec. (N. S.) 667.

Where, therefore, any part of the insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase-money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage and it is only on such part that the Receiver is entitled to remuneration. This view is supported by *In re Official Assignee's Commission* (3). The learned Counsel for the respondent argues that this case is inapplicable to the one under consideration because the Official Assignee is governed by a special Act with which we are not concerned. We are unable to accept this argument inasmuch as the principles underlying the decision are the same as those upon which we are to proceed to decide the case. Even apart from the authority of this ruling we are satisfied that the Receiver is not entitled to remuneration on the whole of the proceeds of sale of property which is subject to a mortgage and that his remuneration should be calculated only on the portion of such proceeds remaining in his hands after satisfying the mortgage-debt. Moveable property held by a creditor in pledge must obviously be on the same footing as property subject to a mortgage for the purpose of the question before us.

A. N. A.

Case remanded.

(3) 4 Ind. Cas. 697; 36 C. 990.

MADRAS HIGH COURT.CIVIL MISCELLANEOUS APPEAL No. 345
OF 1926.

April 20, 1927.

Present:—Mr. Justice Ramesam and Mr.
Justice Odgers.S. K. VEERASWAMI PILLAI—APPELLANT
versus

KALYANASUNDARAM MUDALIAR

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66
—Sale proclamation, omission in, to state value of property, whether material irregularity.

When the decree-holder and the judgment-debtor differ materially as to the probable value of the property, it is open to the Court in settling the terms of a sale proclamation to omit to state the value of the property. Such an omission is not a material irregularity under O. XXI, r. 66, Civil Procedure Code.

Appeal against an order of the Court of the Subordinate Judge, Tiruvalur, dated

the 14th July, 1926, in E. P. R. No. 62 of 1926 in O. S. No. 58 of 1924.

Mr. S. Jagadisa Iyer, for the Appellant.

Mr. K. S. Desikan, for the Respondents.

JUDGMENT.—It has never been held that the omission to state the value of the property is a material irregularity. When the decree-holder and the judgment-debtor differ hopelessly as to the probable value of the property, a statement as to the value by the Court is at best a guess and the Court may, in the circumstances of a particular case, consider it better to abstain from such guess. The case in *Saadatmand Khan v. Phul Kuar* (1) decides that where a Court has chosen to state the value in the proclamation, a gross under-statement is a serious irregularity. The other cases relied on by the Vakil for the appellant do not help him.

The appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

A. N. A.

(1) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624 (P. O.).

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 582

OF 1926.

July 21, 1927.

Present:—Mr. Justice Maung Ba.

U TEZA—APPELLANT

versus

MA E GYWE AND OTHERS—RESPONDENTS.

Burmese Buddhist Law—Buddhist monk—Purchasing and selling of property, legality of—Suit to enforce purchase—Contract Act (IX of 1872), s. 23.

A Buddhist monk cannot engage in any transaction in which silver is used and he cannot engage in buying or selling. [p. 203, col. 1.]

Where a Buddhist monk who had borrowed Rs. 100 and purchased a house brought a suit to recover possession of the house:

Held, that the transaction was one forbidden by the personal law of the plaintiff and was, therefore, void under s. 23 of the Contract Act and that the plaintiff was not entitled to recover the house. [p. 204, col. 2.]

[Case-law discussed.]

Mr. Myint Thein, for the Appellant,

Mr. Ba Tun (2), for the Respondents.

JUDGMENT.—In this appeal an interesting point of Buddhist Ecclesiastical Law is involved.

Appellant U Teza is a Buddhist monk who has been in the Order for over 23 years. He brought a suit against the children of

Ma Oh to get them ejected from a house alleging that he had bought it by a registered deed from those defendants for Rs. 100 with borrowed money. The deed of conveyance was signed by defendants Nos. 1 and 2 for themselves and on behalf of their minor brothers. It transpired later that defendant No. 2 also was a minor at the time. The validity of the sale-deed has been attacked on three grounds, viz., (i) that plaintiff fraudulently induced them to sign it by misrepresenting that it was a mortgage-deed, (ii) that defendants Nos. 3 to 5 were minor pupils of the plaintiff and were not aware of the transaction, and (iii) that plaintiff being a *phongyi* is divested of all worldly things which are not meant for religious purposes and so has no right of possession over the suit house and site.

As regards the first ground the learned Township Judge held that no fraud has been proved. As regards the second ground the learned Judge expressed an opinion that there is no law at the present day which says that monks are not allowed to buy and sell houses though the ideal *Bhikkhu* would shun to do such things. As regards the third ground the learned Judge was of opinion that the sale was for the benefit of the minors and so was binding on them. He accordingly decreed the suit.

On appeal to the District Court of Amherst the learned Additional Judge accepted the findings of the lower Court regarding the first and the third grounds of attack, but, as regards the question of minority, the learned Judge, relying upon the Privy Council ruling of *Mohori Bibee v. Dharmodas Ghose* (1) held that the contract was void so far as the minors were concerned. He, therefore, modified the decree of the lower Court by granting a decree to the extent of a fifth share in the suit house and land. Against that modified decree this second appeal has been filed.

As regards the question of fraud and minority I need only say that the decision of the lower Appellate Court on those points is perfectly correct. As regards the remaining question as to whether a Buddhist monk is prohibited by his personal law to engage in worldly transactions it is one which entails some difficulty in answering because the case-law as it now

stands is that a Buddhist monk can possess property.

It is necessary to ascertain the consequences of joining the order. It is needless to say that it has generally been accepted that a Buddhist layman embracing religious life dies a civil death; in other words he is divested of all his property of which he is possessed. That principle has been adopted by the late Mr. Burgess in the case of *Ma Pwe v. Maung Myat Tha* (2). The learned Judicial Commissioner referred to the Buddhist Scriptures. At the same time the learned Judicial Commissioner admitted that in modern days Burman Buddhist monks' vows of poverty sit lightly on them. He further observed: "There can be no doubt that such relaxation of ancient austerity has to be confined within reasonable limits, and that it does not extend to the renunciation of the world involved in the formal adoption of religious life. The service of God and Mammon cannot be combined. To retain the sensual enjoyments of the secular and at the same time to pretend to the sanctity of the sacred life would be to turn the whole thing into a sham and farce, and would be unquestionably offensive to popular sentiment."

I fully endorse his view. However, it cannot be denied that a Buddhist monk can receive gifts even in the form of *poggalika* as distinguished from *sanghika*. A *sanghika* gift is a gift made to the Order in general or to the *sangha* residing in a particular locality. A *poggalika* gift is a gift made to an individual monk. It is a personal gift, but it must be remembered that it is a religious gift made with a view to providing the monk with his requirements as a monk. So it has been held that a monk can possess property; but, this, in my opinion, should not be taken to mean that a monk can enter into worldly transactions as an ordinary layman for his personal profit. It is true that s. 409 of the *Kinwun Mingyi's Digest* lays down a rule of disposal regarding property acquired by a monk by agriculture or trade, or by usury. But this does not mean that such acquisition is in accordance with his personal law. In my opinion Jurists anticipated such cases where monks might disregard their own personal law and acquire property by employing themselves as laymen. The Jurists accordingly laid down that such property which was of a non-

(1) 30 O. 539; 7 O. W. N. 441; 5 Bom. L. R. 421; 30 I. A. 114; 8 Sar. P. C. J. 374 (P. C.).

(2) U. B. R. (1897-01) 54.

religious character should go to the monks' own relations, and not to the Order. Evidently the Jurists treated such *rahan* as ordinary laymen so far as the property was concerned because a true *rahan* ceases to have any relations in the world; he no longer addresses his parents as father and mother but would address them in the same way as he would any other layman or laywoman by such epithets as "taga" and "tagama."

Evidently, the case of *U. Tilawka v. Nga Shwe Kan* (3), decided by the late Mr. McColl, Judicial Commissioner, Upper Burma, has not been brought to the notice of the learned Additional District Judge. In that case a Buddhist monk brought a suit for redemption of a piece of paddy land alleged to have been mortgaged by him as a monk. The learned Judge rightly applied the personal law of the monk and that personal law is the *Vinaya*. The *Vinaya*, no doubt, prohibits a monk from engaging in worldly transactions as an ordinary layman as will be seen from ss. 18, 19 and 20 of *Patimokkha Nissaggiya Pakittiya Dhamma*. They are as follows:—

(i) "Whatsoever *Bhikku* shall receive gold or silver or get someone to receive it for him or allow it to be kept in deposit for him—that is *Pakittiya* offence involving forfeiture."

(ii) "Whatsoever *Bhikku* shall engage in any one of the various transactions in which silver is used—that is *Pakittiya* offence involving forfeiture."

(iii) "Whatsoever *Bhikku* shall engage in any one of the various kinds of buying and selling—that is *Pakittiya* offence involving forfeiture."

There can be no doubt that monks should regulate their lives according to the *Vinaya* and backslidings should be discouraged. In the case of *Maung Shwe Ton v. Maung Tun Lin* (4) the *Thathanabaing* of Mandalay expressed the opinion that when a matter concerning *rahans* involved a dispute about property between monks themselves or between monks and laymen, the case coming before an ecclesiastical tribunal, the case is decided according to the rules laid down in the *Vinaya*. It is observed in *Nga Po Thin v. U Thi Hla* (5), that although in any case the

(3) 29 Ind. Cas. 613; U. B. R. (1914-16) II, 61.

(4) 49 Ind. Cas. 317; 9 L. B. R. 220; 11 Bur. L. T. 161 (F. B.).

(5) 23 Ind. Cas. 157; U. B. R. (1910-13), I, 183; 7 Bur. L. T. 27.

strict rules of *Vinaya* are sometimes departed from by many monks yet there are other monks who try to conform to them as well as the times would permit. It is also observed in *Maung Shwe Ton's case* (4) that members of the Holy Order in Burma still profess to regulate their lives by the strict rules of the *Vinaya* although backslidings and eccentricities on the part of individual monks are sometimes tolerated.

As regards these backslidings and eccentricities of some individual monks, I agree with the late Mr. McColl that we should enforce the resolution of the venerable *Bhikkus* passed at the first Council held after the death of Buddha. The resolution was that none of the precepts laid down by Lord Buddha should be abolished or altered. Again at the subsequent Council held at Vesali where 700 *Bhikkus* were present it was resolved that the rule as to gold and silver should not be relaxed and that a precedent was no excuse for doing what was forbidden. In the course of his judgment the learned Judicial Commissioner mentioned a case as showing to what length some monks are willing to go in disregard of their vows. He referred to a case where a Buddhist monk brought a suit in the District Court of Mandalay for restitution of conjugal rights, though sexual intercourse is the first of the four cardinal sins which a monk can commit. The learned Judge also made the following pertinent remark:—

"A Buddhist monk who has taken vows of poverty and who professes to have abandoned the pleasures of the world, bringing a suit for his own personal profit is not an edifying spectacle, and I do not think such monks have any cause for complaint, if their vows are regarded by the Courts in a more serious light than they regard them themselves."

From the texts already quoted above it is clear that a *Bhikku* shall not engage in any transaction in which silver is used, and he shall not engage in any transaction of buying and selling. The case here is that the monk borrowed Rs. 100 and bought the house; he then brought a suit out of which this appeal has arisen to recover possession of the house. His conduct is what is prohibited by the *Vinaya*, his personal law.

We have seen that a layman on entering the Order dies a civil death and becomes divested of all his property possessed by him as a layman. This is because he has renounced the world. How can it be logical

to hold that a person civilly dead can employ himself as a layman and enter into worldly transactions while he is still in the Order? He professes to regulate his life in accordance with the *Vinaya*, a Code of discipline for the *Sangha* and that *Vinaya* clearly prohibits such conduct.

Section 23 of the Contract Act lays down that the consideration or object of an agreement is lawful unless forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law, or if the Court regards it as immoral, or opposed to public policy; and that every agreement of which the object or consideration is unlawful is void.

I am of opinion that the transaction in the present case falls within the scope and purview of this section. There can be no doubt that the transaction offends the personal law of Buddhist monks and is immoral. I, therefore, set aside the decree of the District Court and dismiss the suit; each party to bear his own costs.

A. N. A.

Suit dismissed.

ODDH CHIEF COURT.

FIRST RENT APPEAL No. 36 OF 1926.
September 23, 1927.

Present:—Mr. Justice Hasan and
Mr. Justice Misra.

Thakur CHITAR KET SINGH—
DEFENDANT—APPELLANT

versus

Thakur KANHAIYA BAKHSH SINGH
—PLAINTIFF—RESPONDENT.

*Oudh Rent Act (XXII of 1886), s. 108, cl. (15)—
Suit for profits—Lambardar liable to account on
basis of demand—Simultaneous liability to pay interest,
whether justified.*

A *lambardar* is not liable to account to the co-sharer on the basis of demands and also to pay interest on the arrears of profits. [p. 204, col. 2.]

Appeal against the decree of the Assistant Collector, First Class, Bahraich, dated the 15th July, 1926.

Mr. M. Wasim, for Mr. Ali Zaheer, for the Appellant.

Mr. Ali Mohammed, for the Respondent.

JUDGMENT.—This is the defendant's appeal from the decree of an Assistant Collector of the First Class of Bahraich, dated the 15th of July, 1926.

The defendant is the *lambardar* in a *mahal* called *Mahal Jagatpur*. The plaintiff is a co-sharer in that *mahal*. The defendant has also a share in the same *mahal*.

The suit, out of which this appeal arises, is one under cl. (15) of s. 108 of the *Oudh Rent Act*, 1886, for a share of profits. The defendant has failed to produce any account of the collections and disbursements, which he made in the capacity of a *lambardar*.

The Court below has decreed the plaintiff's claim on the basis of gross demand. The question in appeal is whether it has done so rightly. The points which arose for the purpose of deciding that question were referred to a Full Bench* by the order dated the 27th of April, 1927.

They were as follows:—

1. Can a Court decree to a co-sharer, who claims his share of profits from a *lambardar* under s. 108, cl. (15), *Oudh Rent Act*, 1886, not only his share of profits actually collected, but also his share of the profits which have remained uncollected owing to the negligence or misconduct of the *lambardar*?

"2 (a). Is a *lambardar* under a legal or an equitable obligation to maintain accounts of his collections and expenses of the joint estate?

"(b) If the answer to (a) is in the affirmative then if the *lambardar* fails to fulfil the obligation, can he, when accounts are taken, in a suit under s. 108, cl. (15), be made liable for the gross rental?"

Reference has now returned to us with the answers given to the questions by the Full Bench and we have now to decide the appeal in accordance with those answers.

The Full Bench has approved of the decision of one of us in the case of *Sheo Dayal Singh v. Ram Narain* (1).

Mr. Muhammad Wasim, on behalf of the appellant, has stated that he is not in a position to contest the view that the defendant-appellant is guilty of some negligence and that that negligence amounts to a breach of fiduciary duties imposed on him in the character of a *lambardar*. This is in accordance with the decision in the case just now mentioned but he argues on the authority of the same decision that the defendant *lambardar* is not liable to account to the plaintiff on the basis of demands and also to pay interest on the arrears of profits. This contention must be accepted as

(1) 104 Ind. Cas. 2; 4 O. W. N. 694; A. I. R. 1927 Oudh 332.

*See 105 Ind. Cas. 285.—[Ed.]

sound. Mr. Wasim further says that the defendant may be charged with interest and not be made liable to give a share to the plaintiff on the basis of demands.

It might have been possible for us to accept the last mentioned argument of Mr. Wasim had his client taken the trouble of proving what was the amount of collections actually made by him. He has given no evidence either oral or documentary in this behalf. The Courts below have also not given any finding as to what the actual collections were. On the merits of the case, therefore, we are unable to accede to Mr. Wasim's argument.

It follows, however, from what we have already stated that the defendant-appellant should not be saddled with interest also when the decree awards to the plaintiff his share in the profits of the *mahal* on the basis of gross rental.

We accordingly allow this appeal and modify the decree of the Court below to this extent only that the decree of that Court in so far as it awards any interest to the plaintiff for the past or future is set aside. The rest of the decree is maintained. Costs which might be commensurate with the interest allowed by the Court below shall not be allowed to the plaintiff in that Court. The decree of the Court below in the matter of costs in other respects shall also hold good. As to the costs in this Court we direct that each party shall bear his own costs.

G. H.

A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1910 OF 1926.

July 18, 1927.

Present :—Mr. Justice Ramesam and Mr. Justice Cornish.

C. K. SUBRAMANIA MUDALIAR—

PLAINTIFF—APPELLANT

versus

THE CHAIRMAN, MUNICIPAL COUNCIL
COIMBATORE AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Madras District Municipalities Act (V of 1920), s. 9 (1)—Election becoming infructuous on account of irregularities—Retiring Councillor, whether entitled to claim seat.

Section 9 (1) of the Madras District Municipalities Act applies only to cases where a valid election has been held under s. 8 of the Act, [p. 206, col. 1.]

Where an election becomes infructuous and is dropped on account of irregularities in the conduct of the preliminaries the retiring Councillor cannot be deemed to have been re-elected under s. 9 (1) of the Act. [*ibid.*]

Second appeal against the decree of the District Court, Coimbatore, in Civil Appeal No. 288 of 1926, preferred against that of the Court of the District Munsif, Coimbatore, in O. S. No. 1911 of 1926.

Dr. S. Swaminathan, for the Appellant.

Mr. T. M. Krishnaswamy Iyer, for the Respondents.

JUDGMENT.—The facts of this case may be shortly stated as follows :—In anticipation of a vacancy to occur in the Municipal Council of the Coimbatore Municipality, the Chairman originally fixed the 29th of August, 1926, for receiving nominations, the 1st September for the scrutiny of the nominations and the 9th September for the taking of the poll. Two candidates sent letters to the Chairman purporting to withdraw their candidature on the 7th September. Under r. 8 of the Rules made by the Local Government these letters do not amount to proper withdrawals. On the 8th September the Chairman erroneously regarding the letters as proper withdrawals made a declaration that no poll was necessary. He apparently detected his mistake, dropped the proceedings and started fresh proceedings for election. He fixed the 23rd of September for receiving nominations and the 4th October for polling. On the 1st October, the then sitting member declared his willingness to serve but the Chairman refusing to accept this as one which the member was entitled to make at that stage, started fresh election proceedings calling for nominations on the 8th October. On the 4th October this plaintiff was filed for a declaration that the plaintiff continued as a valid member under the Act. Both the lower Courts have decided against the plaintiff and he files this second appeal.

The point to be decided turns on the meaning to be given to s. 9, cl. (1) of the Act which runs as follows :—

“If from any cause no Councillor is elected at an ordinary election held under the previous section, the retiring Councillor shall, if willing to serve, be deemed to have been re-elected.”

Dr. Swaminathan, the learned Counsel for the plaintiff, argues that we ought to hold that an election has been held under the preceding section but that it ended in no Councillor being elected. He lays stress on

the words 'If from any cause no Councillor is elected' for his contention that the section covers all cases where elections have been contemplated but on account of various irregularities committed by the Chairman or by others no Councillor was elected. We are unable to agree with this conclusion. The section seems to apply only to cases where a valid election has been held under the previous section. The scheme of the Act shows that an election begins by the Chairman fixing certain dates and ends with the date on which the polling is fixed. If serious irregularities going to the root of the proceedings happen in the course of such election it may be that the election must be considered void, and in such cases it cannot be said that an election has been held within the meaning of s. 9 (1). In the present case the existing member was anxious to declare his intention to continue as a member on the 1st October, that is three days before the date fixed for the polling. One must wait until the lapse of that day to be able to say that an election has been held.

Where one does not wait until that day it cannot be said that an election has been held. The result is no body is in a position to state on the 1st October that a valid election has been held and that no Councillor has been elected. It is not necessary for us to consider the remarks made by the learned District Judge on the language of s. 9. It is enough to say that we do not think that the words 'an ordinary election held under the previous section' are redundant. There may be cases where an election may be properly held without any Councillor being elected. A simple case is where all the voters for some reason or other do not go to the polling station to exercise their franchise. Other cases may be conceived. We agree with the conclusion arrived at by the learned Judges in considering that this is not a case to which s. 9 applies.

The second appeal fails and is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 837 OF 1925.

July 7, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

RAVJI ANDU NIKAM AND OTHERS—
—DEFENDANTS—APPELLANTS

versus

RAMA KRISHNA MANE—PLAINTIFF—
RESPONDENT.

Hindu Law—Widow—Admission of widow, whether binding on reversioner—Tests.

An admission of fact made by a Hindu widow which is apparently a reasonable one and in the interests of the estate and the parties affected, is binding on the estate. [p. 207, cols. 1 & 2.]

Ramsumran Prasad v. Shyam Kumari (1) and *Katama Natchier v. Raja of Shivgunga* (4), followed.

Natvarlal Maneklal v. Bai Chanchal (8) and *Rama Santu v. Daji Naru* (9), commented upon.

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 489 of 1924, confirming the decree of the Subordinate Judge at Islampur, in Suit No. 292 of 1917.

FACTS.—Andu died leaving his widow Chandra, daughter Sundra and a sister's son Rama. Andu, by his Will left his properties to Rama. Rama's father set up Rama's claim under the Will on Andu's death. The matter was referred to arbitration. Chandra admitted the Will before the arbitrators but said that the Will was to take effect if Rama married Sundra. An award was made accordingly and a decree passed thereon. The parties subsequently fell out. Rama sued on June 21, 1917, for possession and Chandra filed a cross-suit on July 10, 1918, for having the award declared invalid. Chandra's suit was dismissed finally on the 13th July, 1920. Chandra adopted a son Ravji. Rama's suit was decreed in his favour. Chandra and Ravji appealed.

Mr. G. N. Thakor (with him Mr. V. B. Virkar), for the Appellants.

Mr. A. H. Kirtikar (with him Mr. P. S. Bakhale), for the Respondent.

JUDGMENT.

Marten, C. J.—[His Lordship stated the facts and proceeded:—] That brings me to the position which Counsel for the appellants has put before us. Substantially he says the widow had no right to compromise the claim to the estate as against the adopted son, that no matter that the adopted son was not then in existence or at any rate had not been adopted, the true view of the law is she could not make any admission binding on a future

reversioner; she could only litigate a case to the bitter end and have the decision in effect of the highest Court. That proposition to my mind is absolutely unsound in law. We fortunately have a decision by their Lordships of the Privy Council in *Ramsurran Prasad v. Shyam Kumari* (1) and there it is thus stated (page 346*) "Bearing this in mind their Lordships will proceed to consider whether an alienation, which is the result of a compromise, or the mode by which a compromise is carried into effect, should, if the compromise be reasonable and prudent, and for the interest of the estate, fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity. It may be observed at once that the argument which would refuse authority to compromise in any case would have very extreme consequences. A Hindu woman might be party to a litigation concerning considerable immovable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or a few *bighas* he would let the judgment stand. She would have if the argument were sound to refuse the suggested compromise, and be prepared to fight the case up to the Privy Council. Or it might be put in another way. Her opponent could never suggest a compromise, because he would know that any compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld, and their Lordships, after consideration of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position."

The argument here is that though the widow admitted the Will, she had no legal authority to do so. I think the answer is found in the sentences which I have just read.

If then she had the power, the course she took here was apparently a reasonable one in the interests of the estate and the

(1) 69 Ind. Cas. 71; 49 I. A. 342; 25 Bom. L. R. 634; 31 M. L. T. 200; 3 P. L. T. 749; A. I. R. 1922 P. O. 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751 (P. O.).

*Page of 49 I. A.—[Ed.]

parties affected. I do not propose to go into all the authorities that have been cited to us. The question of family arrangements has been dealt with also by their Lordships in *Khunni Lal v. Gobind Krishna Narain* (2) and *Hiran Bibi v. Sohan Bibi* (3). Further we have had a well-known case cited to us, *Katama Natchier v. Raja of Shivagunga* (4), where their Lordships have laid down the proposition that where in a litigation properly entered into and properly conducted the estate is represented by a Hindu widow, and certain results are arrived at, that result may be binding on the reversioners. The subsequent cases on same point will be found in *Vaithialinga Mudaliar v. Srirangath Anni* (5), where the previous authorities are reviewed. Consequently, I may only notice in passing the decision of our own Courts in *Ghelabai v. Bai Javer* (6) and *Subbammal v. Avudaiyammal* (7).

It is, however, said that there are two decisions by our own Court in *Natvarlal Maneklal v. Baichanchal* (8) and *Rama Santu v. Daji Naru* (9) which prevent the present decree award from being relied on. The former is a decision by Sir Norman Macleod and Mr. Justice Heaton. The judgment is given by Mr. Justice Heaton, and if one looks at the facts there, one finds this, that the widow compromised a claim to recover property by partition. In this manner she gave up the claim to the property and she took Rs. 165 a year for life for herself and a reversionary grant of Rs. 30 a year for her daughter who was not a party to the suit. The Court there thought that that compromise was not one which could fairly be regarded as binding on the reversioner. The facts of that particular case we are not concerned with in the present case, but in so far as there are observations either in *Natvarlal Maneklal v. Baichanchal* (8) or in *Rama Santu v. Daji*

(2) 10 Ind. Cas. 477; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 33 A. 356 (P. O.).

(3) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. O.).

(4) 9 M. I. A. 539; 2 W. R. P. O. 31; 1 Suth. P. O. J. 520, Sar. P. O. J. 25; 19 E. R. 843.

(5) 99 Ind. Cas. 85; 28 Bom. L. R. 173; A. I. R. 1925 P. O. 249; L. R. 6 A. (P. O.) 169; 49 M. L. J. 769; 42 C. L. J. 563; 48 M. 883; 30 C. W. N. 313; (1926) M. W. N. 11; 52 I. A. 322 (P. O.).

(6) 17 Ind. Cas. 866; 37 B. 172; 14 Bom. L. R. 1142.

(7) 30 M. 3.

(8) 57 Ind. Cas. 443; 22 Bom. L. R. 768.

Naru (9) to suggest that under no circumstances can any admission of fact by a Hindu widow operate as against her reversioners, however *bona fide* made, all I have to say is that, in my opinion, those observations are inconsistent with what I have already quoted from the Privy Council decision of *Ramsumran Prasad v. Shyam Kumari* (1).

In my opinion that is, therefore, sufficient to dispose of the case. I would hold that the matter was fairly and *bona fide* considered in 1908, and it was not till many years afterwards when the parties began to quarrel that it was suggested that this Will was not a proper Will. Under those circumstances I do not think it necessary to go into the further point as to whether the decree in the widow's suit against her would be binding on the reversioner, the adopted son. It is said that that decree was passed on limitation and not on merits, but, however that may be, it is material to observe that the widow failed in getting the decree award set aside.

The point was also taken under s. 11 of the Civil Procedure Code that inasmuch as Rama's suit was started first, no decision in the widow's suit could be regarded as *res judicata*. But that argument was advanced in forgetfulness of the express provisions of s. 11, Explanation I, which expressly provides that the material date is not the date of the suit, but the date of the decision. Therefore, there is no substance in that point.

On the whole I consider that the learned Judge came to a correct conclusion in the present case, and that this appeal ought to be dismissed with costs.

Crump, J.—I agree.

A. N. A. *Appeal dismissed.*
(9) 48 Ind. Cas. 125; 20 Bom. L. B. 947; 43 B. 249.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 978 OF 1925.

April 20, 1927.

Present:—Mr. Justice Ramesam and Mr. Justice Odgers.

ALAGANAN CHETTIAR—DECREE-HOLDER—PETITIONER

versus

S. V. R. M. RAMANATHAN CHETTIAR
THROUGH HIS AGENT HARIHARAN IYER—
RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 73, 115—
Order under s. 73—Revision—Interference.*

The High Court will not interfere in revision with an order for rateable distribution under s. 73 of the Civil Procedure Code unless it is obviously wrong.

Petition; under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the First Additional Subordinate Judge, Madura, in E. A. No. 43 of 1925, in E. P. No. 82 of 1924, in O. S. No. 1 of 1922, on the file of the Court of the Subordinate Judge, Dindigul.

Mr. T. M. Ramaswami Iyer, for the Petitioner.

Mr. K. S. Ramabhadra Iyer, for the Respondent.

JUDGMENT.—This is a revision petition against an order under s. 73, Civil Procedure Code. It may be that if the order of the Court is obviously wrong and if one can say that the proper order should be in favour of the petitioner, we may interfere in civil revision petition; *vide Sri Krishna Doss v. Chandook Chand* (1). But the matter here is not obvious. The question turns on the meaning of the words "receipt of the assets" in a case where the decree-holder has been allowed to bid and to set off. The petitioner relies on *Mohan Lal v. Amar Nath* (2). The respondent relies on *Arunachellam Chetty v. Somasundaram Chetty* (3).

In these circumstances, we think we ought not to decide the matter in revision. The petitioner has got another remedy by a regular suit.

The petition is dismissed but under the circumstances of the case, without costs.

V. N. V.

Petition dismissed.

A. N. A.

(1) 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307.

(2) 80 Ind. Cas. 40; 10 O. & A. L. R. 1168; A. I. R. 1925 Oudh 287; 1 O. W. N. 729.

(3) 59 Ind. Cas. 86; 12 L. W. 328.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 300 OF 1927.

August 30, 1927.

Present:—Mr. Justice Patkar and
Mr. Justice Baker.

EMPEROR—APPELLANT

versus

FARDUNJI C. GORA—ACCUSED—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 21—Bombay Government Rules, rr. 9, 10—Bench of Honorary Magistrates—Difference of opinion—Dissenting judgment, whether should form part of record. Although under rr. 9 and 10 of the rules framed by the Bombay Government under s. 21 of the Criminal Procedure Code, where there is a difference between two Honorary Magistrates composing a Bench, the opinion of the Chairman prevails, the dissenting Magistrate has a right to have his judgment and finding recorded, and his dissenting judgment should, therefore, form part of the record in the case. [p. 210, col. 1; p. 211, col. 2.]

Criminal appeal by the Government of Bombay, against an order of acquittal passed by a Bench of Honorary. Presidency Magistrates, Girgaum, Bombay.

FACTS.—The accused were tried under s. 12 of the Bombay Prevention of Gambling Act, IV of 1887, by a Bench of two Honorary Magistrates, Mr. Kapadia, Chairman and Mr. Turkhud, Girgaum, Bombay. They differed in opinion, Mr. Kapadia holding that the accused should be acquitted while the other holding that they should be convicted. The opinion of the Chairman being senior prevailed, and the accused were consequently acquitted. The judgment of Mr. Turkhud was not read, not any mention of it was made in the Chairman's judgment. The Government of Bombay appeals against the order of acquittal, and the first question that arises in the case is whether the judgment of the dissenting Honorary Magistrate forms part of the record.

Mr. Velinker, for the Accused.

Mr. P. B. Shingne, Government Pleader, for the Crown.

JUDGMENT.

Patkar, J.—[His Lordship after stating the above facts proceeded:—]

Rule 9 of the rules framed by the Local Government under s. 21 of the Code of Criminal Procedure says:—

"The Chairman shall conduct the proceedings of the Court, but every member of a Bench shall have a voice in the determination of all points arising in any case before

the Bench and in the finding and sentence. When opinions are divided the decision of the majority shall prevail; and when the Bench is equally divided the Chairman shall have a second or casting vote."

Rule 10 of the said rules says:—

"The Chairman of a Bench shall ordinarily record the evidence (when necessary) and the judgment and/or sentence of the Court; but such duty may, with the Chairman's consent, be performed by any one of his colleagues, or, at his dictation, by the Judicial Clerk of the Court. If the last course be adopted each record of judgment or sentence shall be signed by the Chairman of the Bench."

It is argued on behalf of the accused that when the Bench is equally divided in opinion, the Chairman shall have a second or casting vote and that the Chairman shall record the judgment of the Court, and that the rules contemplate that the only judgment of the Court shall be the judgment signed by the Chairman, and though the dissenting Magistrate may have a voice in the determination of all the points arising in the case, his judgment does not form part of the record. It is argued on behalf of the Crown that though the Chairman may have a second or casting vote and the prevailing judgment of the Court may be the judgment of the Chairman, still as the dissenting Magistrate has a voice in the determination of all the points arising in the case, his judgment forms part of the record of the case.

Rule 9 which directs that when a Bench consisting of two members is equally divided in opinion, the decision of the Chairman shall prevail, is apparently not quite consistent with other provisions of the Code. Under s. 429 of the Criminal Procedure Code, "when the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion." To the same effect are the provisions of s. 439 and s. 378 of the Criminal Procedure Code. It might be said on the one hand that the rule investing the Chairman with a second or casting vote when the Bench consists of two members, is arbitrary and inconsistent with natural justice.

and that the guilt or innocence of the accused should not depend upon chance and choice of the Chairman, and that such an arbitrary and apparently unjust rule should not have the force of law. On the other hand the rule is consistent with cl. 35 of the Amended Letters Patent of 1865. With regard to a similar rule in Calcutta there was conflict of judicial opinion on the point as to whether it was inconsistent with the Code, but there was unanimous disapproval of the rule, and the rule was subsequently modified by the Local Government. See *Henry Wakefield v. Haran Sardar* (1), *Lal Behari Chuckerbutty v. Jalukhan* (2), and *Kailash Chandra Indu v. Kali Prosunno Roy* (3). I am not prepared to say that the rule is *ultra vires* as being inconsistent with the Criminal Procedure Code though it is desirable that the rule should be modified. We have, therefore, to construe the rule as it is, and under r. 9 the Chairman shall have a casting vote and the judgment of the Court, according to r. 10, will be the judgment of the Chairman who, according to r. 9, has two votes and the dissenting Magistrate will have one vote. Nevertheless the dissenting Magistrate is contemplated by r. 9 to have a voice in the determination of all the points arising in any case before the Bench and in the finding and sentence as a member of the Bench, and has a right to record his judgment and his finding. I think that the dissenting judgment of the Honorary Magistrate even if the Bench consists of two members, should form part of the record; otherwise the Appellate Court would not be in a position to know whether the judgment of the lower Court is a concurrent judgment of two Judges or is a judgment of the Chairman dissented from by the other member of the Bench. This view is consistent with the intention of the Legislature as expressed in s. 265, cl. 4, of the Criminal Procedure Code: "If the Bench differ in opinion, any dissentient member may write a separate judgment." I think, therefore, that the judgment of Mr. Turkhud does form part of the record of this case.

On the merits, according to the definition in s. 3 of the Bombay Prevention of Gamb-

ing Act IV of 1887, "any transaction by which a person in any capacity whatever employs another in any capacity whatever or engages for another in any capacity whatever to wager or bet whether with such licensee or with any other person shall be deemed to be 'gaming'" and under s. 12 "a Police Officer may apprehend—any person found gaming in any public street, etc." According to the prosecution, accused No. 1 engaged his cook, accused No. 2, to wager or bet with some other person. According to the defence, accused No. 1 did not engage accused No. 2 to wager or bet, but that accused No. 1 wrote out on a piece of paper the horses which were likely to win, and that accused No. 1 gave the tips to accused No. 2. The answer to the question whether accused Nos. 1 and 2 were gaming would depend upon the simple question of fact whether accused No. 1 passed Re. 1-4-0 to accused No. 2. That is a question of fact which would be decided on the evidence in the case. Both the Magistrates are divided in opinion and, though the judgment of the Chairman is to be considered as the prevailing judgment of the Court, it is clear that it is not entitled to greater weight than that of the dissenting Honorary Magistrate. [His Lordship referred to the evidence and continued:—]

On the whole, I am satisfied on the evidence that accused No. 1 passed Re. 1-4-0 to accused No. 2. Both the accused were, therefore, found gaming on a public street and are proved to have committed an offence under s. 12 of the Bombay Prevention of Gambling Act IV of 1887.

I would, therefore, allow the appeal, convict the accused and sentence accused No. 1 to pay a fine of Rs. 10 and accused No. 2 to pay a fine of Rs. 5, in default to undergo one week's simple imprisonment.

Baker, J.—This is an appeal by the Government of Bombay against an order of acquittal passed by the Honorary Presidency Magistrate's Court, Girgaum, Bombay, in a case in which the accused No. 1, Fardunji C. Gora and accused No. 2 Sebastian Menezes were charged with an offence under s. 12 of the Bombay Prevention of Gambling Act IV of 1887.

Before dealing with the facts a point of law arises in connection with the trial by the Honorary Presidency Magistrates' Court. The case was heard by a Bench of two Magistrates, Mr. P. P. Kapadia, Chairman

(1) 8 C. W. N. 862; 1 Cr. L. J. 842.

(2) 9 C. W. N. cclxix (269).

(3) 10 C. W. N. 642; 3 Cr. L. J. 409; 3 C. L. J. 492 (F. B.).

and Mr. B. S. Turkhud. They differed in opinion, Mr. Kapadia, holding that the accused should be acquitted, Mr. Turkhud holding that they should be convicted. The opinion of the Chairman as the senior prevailed, and the accused were accordingly acquitted and the present appeal by Government is against that order of acquittal. Both Magistrates wrote separate judgments, but the judgment of Mr. Turkhud was not read, nor was any mention of it made in the Chairman's judgment. Mr. Turkhud objected and the Chairman, therefore, added a postscript to his judgment to the following effect:—

"I understand from my colleague Mr. B. S. Turkhud that he differs from me both on facts as well as law but I being the Chairman I exercise the privilege of the casting vote under rules for the guidance for the Benches of the Honorary Presidency Magistrates. The above judgment is, therefore, the judgment of the Court. I am not bound under the rules to record this note of dissent. I do so because I am asked by my colleague to record it. This should not be, however, taken as a precedent in future."

The question, therefore, is, whether when there is a difference of opinion between the members of a Bench this fact should be noted in the record. When it was brought to the notice of the High Court that Mr. Turkhud had written a dissentient judgment, which did not form part of the record his judgment was called for and has been printed along with the record. The rules on the subject are rr. 9 and 10 of the rules for the guidance of the Benches of Honorary Presidency Magistrates, published under G. R. J. D. No. 2536 of May 19, 1904 and subsequently modified by G. R. J. D. No. 3801 of July 29, 1905 and G. R. J. D. No. 1653 of March 28, 1908. These rules will be found in the Manual for the use of the Honorary Presidency Magistrates of Bombay at pages 2 and 3. [His Lordship quoted rr. 9 and 10 and proceeded:—]

It will thus appear that no express provision is made by the rules for the record of the dissent of any member of the Bench. In the present case there were two Magistrates, who disagreed. Under r. 9 the Chairman's opinion prevailed. His judgment, as originally written contains no reference to the fact that his colleague differed from him; and that the finding of acquittal was based on his second or casting vote.

In my judgment it is necessary that the

fact of the Bench being divided in opinion, and the decision being the decision of the majority, or in case of equal division, of the Chairman having given a second or casting vote, ought to form part of the record. This is necessary for the information of an Appellate or Revisional Court, and I am, therefore, of opinion that in all such cases the existence of the dissent should be recorded and that the rules should be amended accordingly. It is still more necessary when, as in the present case, the dissenting member of the Bench has written a separate judgment. [His Lordship discussed the facts and proceeded:—]

Under s. 3 of the Bombay Prevention of Gambling Act, any transaction by which a person in any capacity whatever employs another person in any capacity whatever or engages for another in any capacity whatever to wager or bet whether with the racecourse licensee or with any other person shall be deemed to be "gaming". This answers the view taken by the Chairman of the Bench that no offence was committed by accused No. 2. Under s. 12 gaming in a public street is made punishable with fine and imprisonment. Both the accused are, therefore, guilty of an offence under s. 12 of the Act—the slip and money having been handed over in a public street. The offence in this particular case is of a trivial nature, especially in view of the fact that if the accused No. 1 had handed the slip and the money over to accused No. 2 in a private room inside the Hotel instead of in the street outside it, no offence would have been committed.

I am, therefore, of opinion that the order of acquittal should be set aside and the accused convicted under s. 12 of the Act. As regards the sentence, it will be sufficient if accused No. 1 is fined Rs. 10 and accused No. 2 Rs. 5, in default seven days' simple imprisonment.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

CRIMINAL APPEAL NO. 25 OF 1927.

April 21, 1927.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Wort.ZAHURI SAHU—ACCUSED—APPELLANT
—versus—

EMPEROR—RESPONDENT.

Criminal trial—Thumb impression—Power of Court to ask accused to give his thumb-impression—Adverse inference on refusal—Evidence Act (I of 1872), s. 73.—Identification of Prisoners Act (XXXIII of 1920), s. 5.

A Court has power to ask an accused person whether he would consent to have his thumb-impression taken for comparison, and may draw an inference adverse to him if he refuses to give his thumb-impression. [p. 212, col. 2.]

Emperor v. Nga Tun Hlaing (2), relied on.

Bazari Hajam v. Emperor (1), not followed.

Criminal appeal from a decision of the Sessions Judge, Monghyr, dated the 2nd February, 1927.

Mr. M. K. Mukharji, for the Appellant.

Mr. C. M. Agarwala, Assistant Government Advocate, for the Respondent.

JUDGMENT.

Mullick, J.—Agreeing with all four assessors the learned Sessions Judge of Monghyr has sentenced the appellant Zahuri Sahu to rigorous imprisonment for eighteen months for an offence under s. 471 of the Indian Penal Code. Agreeing with three of the assessors the learned Judge has sentenced the appellant to rigorous imprisonment for eighteen months and a fine of Rs. 100 for an offence under s. 209 of the Indian Penal Code; the terms of imprisonment are to run concurrently.

It is found by the learned Judge that on the 20th November, 1925, Zahuri instituted a suit in the Court of the Small Cause Court Munsif at Begusarai upon a hand-note against one Badri Gope. Badri Gope contended that the hand-note was a forgery and that the thumb-impression on it was not his thumb-impression. The hand-note was sent to a fingerprint expert together with the admitted impressions of Badri's thumb in both hands. The expert found that the impression upon the hand-note did not tally with those taken for Badri. When the Small Cause Court case came on for trial, Zahuri absented himself and the suit was dismissed for default. Thereafter Badri applied for the prosecution of Zahuri and notice was issued upon him to show cause why he should not be prosecuted. Zahuri did show cause and his defence was that he had never filed the plaint nor the

hand-note and that the thumb-impression on the verification to the plaint was not his. The Munsif directed a prosecution nevertheless, with the result that Badri was tried in the Session Court at Monghyr and was convicted and sentenced as stated before.

Now the case seems to be proved beyond doubt. It is established by the evidence of the finger-print expert that the hand-note is a forgery and that Badri never put his thumb impression on it. The expert deposes that Badri's thumb-impression is of a different type to that found upon the hand-note and that the number of deltas also differ.

The substantial question in this case is whether the defence that Zahuri never appeared in the Civil Court at all and that some other person impersonated and caused a plaint to be filed in the Small Cause Court can be accepted. Upon this point we have the evidence, first of all, of Jageshwar Prasad, who was the Pleader who filed the plaint, and his clerk, Ajodhya Prasad, who caused the plaint to be prepared and verified; then there is also the evidence of the Pleader Babu Baidyanatheswar Prasad who appeared for Zahuri in the miscellaneous proceedings in which he was called upon to show cause against his prosecution. Babu Jageshwar admits that he had never seen him before the day on which Zahuri came to file the plaint, but he had opportunities of seeing this man in the course of a civil suit and he deposes that Zahuri was the man who brought the hand-note. Ajodhya Prasad similarly had many opportunities of seeing Zahuri and he too deposes that Zahuri was the man who brought the hand-note and that the verification upon the plaint was drawn up by some one under Zahuri's instructions. He himself did not see the verification drawn up nor the thumb-impression put upon the verification. He says he told Zahuri to get it done. Zahuri was asked in Court whether he was willing to give his thumb-impression for comparison with the thumb-impression upon the plaint and he declined. I think, in these circumstances, it is open to the Court to draw an inference adverse to him.

Our attention has been drawn to *Bazari Hajam v. Emperor* (1) in which there are observations by one of the Judges constituting the Division Bench to the effect that it

(1) 68 Ind. Cas. 958; 1 Pat. 242; (1922) Pat. 46; 4 U. P. L. R. (Pat.) 1; 3 P. L. T. 526; A. I. R. 1922 Pat. 73; 23 Cr. L. J. 638.

is improper to take forcibly a thumb-impression from an accused person in a criminal proceeding. The decision, however, did not turn upon that point, and the question whether it is proper or not to ask the accused to give his thumb impression was not clearly raised. On the other hand, it was decided by a Full Bench in the High Court at Rangoon in *Emperor v. Nga Tun Hlaing* (2) that the Court has power under s. 73 of the Indian Evidence Act to direct an accused person, present in Court, to make his finger impression for the purpose described in that section and that s. 342 of the Code of Criminal Procedure relates only to the oral questioning of the accused.

Section 5 of Act XXXIII of 1920 which is an Act to authorise the taking of measurements and photographs of convicts and others lays down.

"If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a Police Officer."

In my opinion there was quite sufficient legal authority for the Court to ask the accused person whether he would consent to have his thumb impression taken for comparison with the thumb-impression upon the plaint. But this is not all. Babu Baidyanatheswar Prasad, the Vakil who appeared for the accused in the miscellaneous proceedings, deposes that the accused was the man who came to answer the notice issued by the Court. There the accused denied that he was the person who had filed the hand-note or the plaint. Babu Baidyanatheswar had several opportunities of seeing the accused and his evidence cannot be lightly brushed aside.

The result is that, in my opinion, the assessors were fully justified, upon the evidence, in believing the case for the prosecution and the learned Sessions Judge's order must, therefore, be affirmed. The conviction under s. 203 of the Indian Penal Code for making a false claim fraudulently and under s. 471 of the Indian Penal Code

(2) 83 Ind. Cas. 668, 1 R. 759; 2 Bur. L. J. 270; A. I. R. 1924 Rang. 115; 26 Cr. L. J. 108 (F.B.).

for dishonestly using as genuine a forged hand-note, is upheld. There is no doubt that the accused being himself the plaintiff knew of the fraudulent nature of the claim and of the fraudulent nature of the hand-note. In these circumstances the convictions under both sections are correct and the sentences are not unduly severe.

The appeal is dismissed.

Wort, J.—I agree.

B. K. P.

Appeal dismissed.

OUDDH CHIEF COURT.

CRIMINAL APPEAL No. 450 OF 1925.

October 14, 1927.

Present :—Mr. Justice Hasan and Mr. Justice Raza.

RAM LAL—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304—Murder and culpable homicide not amounting to murder, distinction between—Interpretation of Statutes—Illustrations as aid to interpretation.

Per *Hasan J.*—If an act which an accused person is said to have committed falls within any of the explanations to s. 300, Penal Code and does not fall within any of the exceptions, the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in s. 300, the act is one of culpable homicide not amounting to murder. [p 215, col. 1.]

Illustrations are part and parcel of enactment and when a Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision. [p. 215, col. 2.]

Criminal appeal against the judgment of the Sessions Judge, Rai Bareli, dated the 12th September, 1927.

Mr. J. Jackson, for the Appellant.

Mr. H. K. Ghosh, Government Pleader, for the Respondent.

JUDGMENT.

Raza, J.—Ram Lal, a Brahman of Dumtaha, District Rae Bareli, has been convicted by the learned Sessions Judge of Rae Bareli of having murdered Manna Pasi of Misra-khera, hamlet of Dumtaha, on the 18th January, 1927. He has been sentenced to death subject to confirmation by this Court. He appeals and the reference in confirmation is also before us.

The accused was committed for trial to

the Sessions Court on a charge under s. 304, Indian Penal Code, but the learned Sessions Judge amended the charge and convicted the accused under s. 302, Indian Penal Code.

The facts as found by the learned Sessions Judge are these :—

The accused beat the deceased with a heavy *lathi* and caused his death. The deceased was unarmed at that time and the accused went on ill-treating him with the *lathi* after he had become insensible. The accused pretended to think that Manna was shamming and had him carried into the village slung to a pole saying that he would *chalan* him. When Manna died the accused absconded.

The accused's defence in this case was that he found Manna stealing *sarson* from his field. He (accused) went up to Manna quietly and tried to catch him. Manna then attacked him with a *hansiya*. A fight ensued and in that fight he accidentally killed Manna with the *lathi*. He did not know that Manna was seriously hurt and had him taken into the village and wanted to *chalan* him. However he gave Manna up to Ohhabba, maternal uncle of Manna, on the request of the villagers. When he heard of the death of Manna he was afraid of the Police and absconded.

The principal witnesses for prosecution in this case are Manni Kori, Ghansila Pasi and Newal Kishore Brahman. I have carefully considered the evidence given by these witnesses. Manni's evidence shows simply that the accused was striking Manna with the butt of the *lathi* thrusting it against him. Manna tried to get up but was knocked down again. He states in his cross-examination that he saw Ram Lal strike only one *lathi* thrust. He says nothing as to how the quarrel arose. He states that the quarrel had started before he arrived there and that he first noticed the beating when the accused was striking the deceased who was lying on the ground. The evidence given by Ghansila and Newal Kishore shows that Ram Lal shouted 'thief, thief', and so they ran to the place of occurrence to see what was the matter. They found Ram Lal standing there with a *lathi* in his hand. Manna was lying in the field. Ram Lal said then and there that he had struck Manna as the latter was trying to run off after theft. Ram Lal gave Manna a pole in the belly with his *lathi* in their

presence and told him to get up. Manna could not get up as he was unconscious. Manna was then taken to the village and Ram Lal also went there.

Manna was beaten in the field of Dayal. That field is close to the fields of Ram Lal accused and Manna deceased.

I am not prepared to agree with the finding of the learned Sessions Judge that the whole story of the accused is false. The evidence given by Ghansila and Newal Kishore shows that they saw the accused and the deceased in Dayal's field. They saw that Ram Lal had some *sarson* plants in his hand and there were also some *sarson* plants lying scattered there. It may be safely inferred from their evidence that Manna was really found stealing *sarson* from Ram Lal's field. He (Manna) tried to run off after theft. Ram Lal tried to catch him and struck him with his *lathi*. There is no reliable evidence on record to show that Manna had attacked Ram Lal with a *hansiya*.

The medical evidence is as follows:—

(1) Abrasion $1\frac{1}{2}'' \times \frac{1}{8}''$ along the upper and forepart of the left temporal region.

(2) Bruise $1\frac{1}{4}'' \times \frac{1}{2}''$ on the upper and anterior and inner part of the right arm with swelling on the whole of the arm. There was a large effusion of blood which was coagulated underneath the skin of the whole of the right arm.

(3) Bruise $1\frac{1}{2}'' \times \frac{1}{2}''$ on the right side and middle of the back near the spine.

There was no ligature mark on the neck. There was small effusion of blood which was coagulated underneath the scalp in the left temporal region underneath wound No. 1. Death was probably due to concussion of the brain. It was the result of the head injury described under No. 1. All the injuries could have been caused by a blunt weapon such as *lathi*.

There is no doubt that Ram Lal accused is responsible for the fatal injury caused to Manna. I have seen the *lathi* which was used by the accused in striking Manna. It is a heavy *lathi*. It is a highly dangerous act to beat a man upon the head with a heavy *lathi*. Though it is not established in this case that the act by which death was caused was done with the intention of causing death, but having regard to all the facts and circumstances of the case, I think the accused should be held to have had the knowledge that he was likely to cause death. If the offence committed by

the accused in this case be held to be culpable homicide amounting to murder, his act would fall within the second or fourth clause of s. 300, Indian Penal Code. But I think the accused was not guilty of the offence of murder, but of the offence of culpable homicide not amounting to murder and the case falls within Exception (2) of s. 300, Indian Penal Code. The accused in the exercise of his right of private defence of property exceeded the power given to him by law and caused the death of Manna against whom he was exercising such right of private defence, without premeditation. He is, therefore, guilty of the offence of culpable homicide not amounting to murder punishable under s. 304, Indian Penal Code.

The result is that the appeal is allowed to the extent of altering the section of conviction from 302 to 304, Indian Penal Code. I direct that Ram Lal accused be punished with rigorous imprisonment for five years.

Hasan, J.—I entirely agree with my learned brother in his conclusion that the appellant Ram Lal is not guilty of the offence of murder, but I feel serious and have grave doubts in my mind as to whether he is guilty even of culpable homicide not amounting to murder. The definition of culpable homicide which includes both culpable homicide which amounts to murder and culpable homicide not amounting to murder is given in s. 299 of the Indian Penal Code. When that section is analysed it will be realised that the elements which constitute the offence of culpable homicide are expressed and explained in terms of the four explanations enacted in s. 300 of the same Code. It follows to my mind that if an act which an accused person is said to have committed does fall within any of those explanations and does not fall within any of the exceptions, the act is 'murder'; but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in s. 300, the act is one of 'culpable homicide not amounting to murder.' My learned brother thinks that the case before us might well fall within Expls. 2 and 4 and as it further falls within Exception (2) of the same section it is a case of culpable homicide not amounting to murder.

It seems to me that in interpreting the several clauses or explanations in s. 300 of the Indian Penal Code aid must be taken

from the illustrations enacted in that section. In this connection the first thing to be borne in mind is that the illustrations find place in the body of the section previous to the five exceptions that follow. It is further clear that before the exceptions begin and immediately preceding the illustrations the Legislature enacts the four clauses which are intended to give a complete and exhaustive definition of culpable homicide. It cannot be suggested that an act may amount to an offence of culpable homicide even if it does not fall within one or other of the clauses of s. 300. Those clauses must, therefore, be taken to define the limits and exhaustive in themselves, for the purposes of the Code, of the offence of culpable homicide. This being so, it is significant that the Legislature has enacted only as many illustrations as there are clauses to s. 300. I may here be permitted to make a digression and say that illustrations do not stand on the same footing as marginal notes. Marginal notes may not be notes enacted by the Legislature and the commonly accepted view now is that they cannot be referred to for the purpose of construing the enactment. "It is well-settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament." Per Lord Macnaghten in the case of *Balraj Kunwar v. Jagatpal Singh* (1).

On the other hand illustrations are part and parcel of enactment and it seems to me that when the Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision. In the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (2) Lord Shaw in delivering the judgment of the Judicial Committee made the following observations:

(1) 31 I. A. 132 at p. 142; 26 A. 393; 8 C. W. N. 699; 1 A. L. J. 331; 7 O. C. 248; 8 Sar. P. O. J. 639 (P. C.).

(2) 39 Ind. Cas. 401; 43 I. A. 256 at p. 263; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 137; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 (P. C.).

"On the second point their Lordships are of opinion that in the construction of the Evidence Ordinance it is the duty of a Court of Law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired."

It was suggested that there is nothing in s. 300 to support the view that a particular illustration in that section applies to any particular clause of the same section. It is true that there are no express words to that effect, but if we read the clauses and the illustrations together and the section as a whole we can say at once that a particular illustration can apply to no other but a particular clause. Thus it will be seen that ill. (a) is only applicable to the first clause of the section and similarly ill. (b), (c) and (d) are applicable to the corresponding clauses in the substantive enactment separately.

When, therefore, I read cls. 2 and 4 with the help of ill. (b) and (c) my mind gets filled up with serious doubts as to the applicability of either the one or the other of those clauses to the facts of the present case.

I do not think that it is necessary for me to pursue this matter further. I have said what I have said above only for the purpose of making it clear as to what my own views on the question of the interpretation of the provisions of s. 300 are. But if according to my judgment the appellant is not guilty of the offence punishable by s. 304 of the Indian Penal Code, he is certainly guilty of the offence punishable by s. 325 of the same Code. I, therefore, agree with my learned brother that the conviction under s. 302 should be set aside and that the appellant should be sentenc-

ed to five years' rigorous imprisonment and we accordingly do so.

By The Court.—We allow the appeal to the extent of altering the section of conviction from s. 302 to s. 304 or s. 325, Indian Penal Code. We direct that Ram Lal accused be punished with rigorous imprisonment for five years.

G. H.

Sentence reduced.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No.

120 OF 1927.

August 10, 1927.

Present:—Mr. Justice Patkar and Mr. Justice Baker.

KALLASANI AND OTHERS—ACCUSED—
APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898) ss. 236, 403—Penal Code (Act XLV of 1860), s. 160—Bombay District Police Act (IV of 1890), s. 61 (o)—Fighting in public place—Acquittal under s. 160, Penal Code—Subsequent trial for offence under s. 61 (o), Police Act, legality of—Autrefois acquit—Alternative charges, framing of.

The accused who fought with another in a public place was tried for an offence under s. 160 of the Penal Code and acquitted as it was found that the public peace was not disturbed. He was again charged under s. 61 (o) of the Bombay District Police Act, 1890, on the same facts and same evidence:

Held, that the acquittal in the previous case operated as a bar to the subsequent prosecution inasmuch as an alternative charge for the latter offence could have been framed in the previous case under s. 236 of the Code. [p. 217, col. 1.]

Manhari Chowdhury v. Emperor (1), followed. *Deoki Koeri v. Emperor* (2), and *Ram Sewak Lal v. Maneshwar Singh* (3), distinguished.

Per Patkar, J.—The test is whether the evidence in both cases is the same, and the subsequent trial is on the same basis of facts falling within ss. 236 and 237 of the Criminal Procedure Code. [p. 218, col. 1.]

Criminal application for revision against an order passed by the Second Class Magistrate at Hubli.

Mr. A. G. Desai, for the Accused.

Mr. Shingne, Government Pleader, for the Crown.

JUDGMENT.

Patkar, J.—In this case the accused were tried on a charge under s. 160 of the Indian Penal Code and were acquitted. They have been again charged under s. 61 (o) of the Bombay District Police Act IV of 1890. The accused were acquitted in the previous case as it was found that the public peace was not disturbed. The question that arises for decision is whether the

acquittal in the previous case bars the present prosecution. The evidence in the present case will be exactly the same evidence that was led in the previous case. Section 403 (1) of the Criminal Procedure Code says:—

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under s. 237."

Section 236 says:—

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

We think the facts of the present case fall under s. 236 for it was doubtful from the beginning whether the act or the series of acts committed by the accused fell under s. 160 of the Indian Penal Code or under s. 61 (o) of the Bombay District Police Act. If the public peace was disturbed, then the case fell under s. 160 of the Indian Penal Code, otherwise, it would fall under s. 61 (o) of the Bombay District Police Act. If there was a doubt from the beginning on the point as to whether public peace was disturbed, alternate charges could have been framed in the previous case under s. 160 of the Indian Penal Code and also under s. 61 (o) of the Bombay District Police Act, and the accused could have been convicted under s. 61 (o) of the Bombay District Police Act in the previous case under s. 237 of the Criminal Procedure Code. We think, therefore, that the acquittal in the previous case operates as a bar to the present prosecution.

This view is supported by the case of *Manhari Chowdhuri v. Emperor* (1). In that case the previous prosecution was under ss. 380 and 411, Indian Penal Code,

(1) 43 Ind. Cas. 614; 45 C. 727; 22 C. W. N. 199; 19 Cr. L. J. 193; 27 C. L. J. 434.

and the accused were acquitted. There was a subsequent prosecution under s. 54-A of the Calcutta Police Act in respect of the same act, and it was held that the previous acquittal operated as a bar to the subsequent trial. At page 731* it is said:—

"The trial, in other words, will take place on the same facts, and it is not suggested that there are any additional facts to be placed before the Court. In that state of things we can see no reason why the accused should not have been charged at the previous trial, under the provisions of s. 236, with the offence for which he is now being prosecuted."

The case of *Deoki Koeri v. Emperor* (2) relied upon by the learned Magistrate, has no application to the facts of the present case. There the previous prosecution was for theft under s. 379 of the Indian Penal Code, and the subsequent trial was for an offence under s. 9 of the Indian Opium Act. The evidence in both the cases would be quite different. For an offence under s. 379 the essential facts to be proved were that the gunny bags in which the opium was found belonged to another person and that they were removed by the accused dishonestly without the owner's consent. Under s. 9 of the Opium Act the facts which were to be proved by the prosecution were that the accused was in possession of the opium, that the opium was crude opium and that the accused could not lawfully be in possession of such opium. The facts to be proved in the two trials would be quite distinct.

Similarly, the case of *Ram Sewak Lal v. Maheshwar Singh* (3) would have no application to the facts of the present case. The previous prosecution was for an offence under s. 182, and the subsequent prosecution was for defamation under s. 500 of the Indian Penal Code. The case fell under s. 235, cl. (1), and not under s. 236 of the Criminal Procedure Code. The evidence that would be led in the two trials would be quite distinct, and at page 609† it is observed:—

"Although...the finding of the Magistrate in the s. 182 case cannot be in any way allowed to prejudice the accused in the

(2) 95 Ind. Cas. 287; 48 A. 496; 24 A. L. J. 559; L. R. 7 A. 95 Cr. A. I. R. 1926 All. 405; 27 Cr. L. J. 767.

(3) 6 Ind. Cas. 352; 37 C. 604; 14 C. W. N. 839; 11 Cr. L. J. 325; 12 C. L. J. 15.

*Page of 45 C.—[Ed.]

†Page of 37 C.—[Ed.]

s. 500, Indian Penal Code case, it is clear that the question of malice has not at all been tried, and the accused has not been acquitted of any charge involving malice. That is a question which has to be tried on evidence which would be irrelevant in a trial under s. 182 of the Indian Penal Code."

The test laid down is whether the evidence in both cases is the same, and the subsequent trial is on the same basis of facts falling within ss. 236 and 237 of the Criminal Procedure Code. See *Queen-Empress v. Subedar Krishnappa* (4). It is clear that the evidence that would be led in the present case would be exactly the same evidence which was adduced in the previous case, and an alternative charge under s. 61 (c) of the Bombay District Police Act could have been framed in the previous case.

We think, therefore, that the acquittal in the previous case operates as a bar to the present trial.

We would, therefore, make the Rule absolute and quash the proceedings.

Baker, J.—I agree.

I have no doubt that the present proceedings are clearly covered by s. 403, cl. (1), of the Criminal Procedure Code. The facts are on all fours with those in the case of *Manhari Chowdhury v. Emperor* (1). Both the cases quoted on the other side, namely, *Deoki Koeri v. Emperor* (2) and *Ram Sewak Lal v. Maneshwar Singh* (3) are cases where in one transaction more offences than one are committed by the same person as mentioned in cl. (1) of s. 235, and, therefore, are covered by cl. (2) of s. 403 of the Criminal Procedure Code.

A. N. A.

(4) 1 Bom. L. R. 15.

Rule made absolute.

MADARS HIGH COURT.

CRIMINAL REVISION CASE No. 76 OF 1927.

(CRIMINAL REVISION PETITION No. 68 OF 1927.)

July 28, 1927.

Present:—Mr. Justice Wallace.

In re IBRAYA ROWTHAN AND ANOTHER—

ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V. of 1898), ss. 106,

123—*Duty of Court to fix date for furnishing security before sentence—Sentence, form of.*

Section 123, Criminal Procedure Code, contemplates that the accused shall be separately brought up for sentence if security is not furnished, so that the Court should in its judgment fix a date for the furnishing of security, without any order for alternative imprisonment and then, if by that date accused has not furnished the security, he must appear and receive sentence.

As an accused sentenced under s. 123, Criminal Procedure Code, is entitled to be released from custody the moment he furnishes security, the Court should not pass an absolute sentence of imprisonment for a particular period, but should sentence the accused for imprisonment for a particular period or until such date within that period as the required security is furnished.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Court of the First Class Bench Magistrate, Palghat, in Survey Trial No. 1389 of 1926.

Mr. A. V. Narayanaswami Iyer, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The order of the lower Court directing that petitioner should, in default of giving security, suffer simple imprisonment for one year, cannot be upheld on two grounds:—

(1) Section 123 contemplates that the accused shall be separately brought up for sentence if security is not furnished, so that the Court should in its judgment fix a date for the furnishing of security, without any order for alternative imprisonment and then if by that date, accused has not furnished the security, he is to appear and receive sentence under s. 123;

(2) it was wrong to fix a period of one year, since accused is entitled to be released from custody the moment he furnishes the security; the sentence ought to run: "for one year or until such date within that year as the required security be furnished."

As security appears to have been furnished in this case, no further action is called for. I do not, as at present advised, subscribe to the contention that a summary Court has no power to award under s. 123 more than three months' imprisonment.

V. N. V.

A. N. A.

Order set aside.

PATNA HIGH COURT.
CRIMINAL MISCELLANEOUS CASE No. 22
OF 1927.

March 8, 1927.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Scroope.
LOKA MAHTON AND OTHERS—ACCUSED—
PETITIONER
versus

KALI SINGH—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 526 (8)—Proceedings under s. 145—Application for stay for moving for transfer, maintainability of.

A party to a proceeding under s. 145 of the Criminal Procedure Code is not entitled to make an application under s. 526, cl. (8) of the Code for stay of proceedings with a view to enable the applicant to move the High Court for transfer of the case.

Mr. H. L. Nandkeolyar, for the Petitioner.

Mr. Sultan Ahmed, Government Advocate
(with him Mr. S. Saran), for the Opponent.

JUDGMENT.

Mullick, J.—The petitioners are the first party in a case under s. 145 of the Code of Criminal Procedure before the Sub-Divisional Magistrate of Monghyr, Mr. Shams-ul-Huda. On the 8th February, 1927, the Sub-Divisional Magistrate held a local investigation, and he admits that in the course of that local investigation he rather lost his temper with the petitioners and used certain words with regard to some of them which perhaps were not altogether justifiable. Then on the 14th February he called upon the second party to proceed with the cross-examination of the first party's witnesses. The second party asked for a stay of proceedings under s. 526, cl. (8) of the Code of Criminal Procedure and stated that they desired to move the High Court for a transfer. The learned Magistrate refused the prayer holding that it was not *bona fide* and proceeded with the trial. The petitioners declined to cross-examine the witnesses on the plea that they were unprepared. The case was adjourned till the 18th and then till the 19th on which date under compulsion, it is alleged, the second party addressed the Court with regard to the merits of their case and judgment was reserved. In the meantime application had been made to this Court for action under s. 526 of the Code of Criminal Procedure and on the 21st February an order was issued by this Court directing the Magistrate to stay further proceedings. It appears that when the order was communicated to the

learned Magistrate he had already written his judgment and signed it and that he was about to deliver it in Court. Very properly he stayed further proceedings and did not deliver the judgment.

It now appears that the Magistrate has been transferred from the district and the question is whether we should direct some other officer to deliver the judgment or order a re-trial of the case from the stage at which it was left on the 14th February.

We think on the whole that the proper course will be to direct the officer who has succeeded the learned Magistrate, or such officer as may be selected for the trial of this case by the District Magistrate, to re-call the two witnesses whom the second party declined to cross-examine on the 14th August and to proceed with the trial from that stage according to law.

A point has been taken as to whether cl. (8) of s. 526 of the Code of Criminal Procedure applies to proceedings under s. 145 of the Code of Criminal Procedure. The clause as amended makes it clear that a case within the meaning of the clause includes a proceeding under s. 145; but as the clause directs that the application to the trial Court is to be made either by the Public Prosecutor or the complainant or the accused, it would seem that the parties in a proceeding under s. 145 cannot take advantage of the clause. That clause would seem to apply only to cases arising out of an offence under the Criminal Law and probably the Legislature thought that proceedings which are *quasi* civil in nature such as inquiries into the possession of land, do not require the exercise of the very summary power which cl. (8) confers. Nevertheless I think that although the learned Deputy Magistrate was right in holding that the application under cl. (8) was not competent before him, still in the circumstances he would have exercised a proper discretion in giving the first party time to cross-examine the second party's witnesses.

The result, therefore, is that the application for transfer being no longer necessary is dismissed, but the case is remanded to the District Magistrate in order that it may be disposed of in the manner directed in this judgment.

Scroope, J.—I agree.

A. N. A.

Case remanded.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 114
OF 1927.

March 14, 1927.

Present:—Mr. Justice Dalip Singh.

KHEM CHAND AND ANOTHER—ACCUSED.

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 138—Various obstructions by several persons—Order, what it must contain—Jury, appointment, of—Procedure.

When in proceedings under s. 133, Criminal Procedure Code, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order issued under the section should state accurately with regard to each person, the specific obstruction made by him which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. [p. 220, col. 2.]

Raimohan Karmokar v. Emperor (1), followed.

Where in a proceeding under s. 133, Criminal Procedure Code, a Magistrate appointed the nominees of the two parties with a Foreman, appointed by himself, to constitute a Jury:

Held, that the Jury was not constituted legally and was incapable of making a legally binding award. [*ibid.*]

Upendra Nath Bhattacharjee v. Khitish Chandra Bhattacharjee (2), followed.

Case reported by the Sessions Judge, Karnal, with his No. 15 J. of 15th January, 1927.

FACTS.—Hem Raj and four others had applied to the Magistrate under s. 133, Criminal Procedure Code, for removal of certain obstructions by 16 persons of the opposite party from the Goradeh of the village Kirora in Tehsil Kaithal. An initial order was recorded in the case by the Magistrate on the 25th March, 1926, and the Jury was appointed by order, dated 29th May, 1926, and their verdict dated 24th July, 1926, was not acceptable to either party. On 22nd August, 1926, the Magistrate passed an order that the case be sent back to the Jurors for recording the evidence of the parties which they had not done before and filing a fresh award. But on the 23rd he recorded a statement of the Foreman of the Jury that all the obstructions in the *shamilat* land should be removed and then passed an order making his order dated 26th March absolute. As there is no order dated 26th of March probably what the Magistrate meant was his order, dated 25th March. It is against this order of the Magistrate that the present application for revision has been filed by Khem Chand and Singh Ram.

GROUND.—The initial order of the Magistrate does not specify what are the obstructions raised by each one of the accused. I am very doubtful if a single proceeding could have been taken against all the 16 persons because the obstruction raised by each was his own affair and the others had nothing to do with it. So I think that each person should have been separately proceeded against. But even if the single proceeding against all the 16 persons be held valid, the initial order of the Magistrate should have specified what was the nature and the extent of the obstruction raised by each person. In *Raimohan Karmokar v. Emperor* (1) it was held that an order issued under s. 133 should not be vague and indefinite but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it and that when in proceedings under s. 133 instituted against a number of persons it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately with regard to each person, the specific obstructions made by him which he is required to remove unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned.

That the Jury was not legally constituted, firstly because there was no application by the accused, as required by ss. 133 and 138 for the appointment of Jury, secondly, the Magistrate's order of 29th of May shows that he appointed two of the nominees of the one party and two of the other and Foreman himself. Section 138 lays down that the Foreman and half of the remaining members shall be nominated by the Magistrate and *Upendra Nath Bhattacharjee v. Khitish Chandra Bhattacharjee* (2) shows that when the Magistrate appoints only the nominees of the two parties, with a Foreman appointed by himself, the Jury is not constituted legally and is incapable of making a legally binding award.

It is recommended, therefore, that the order of the Magistrate may be set aside.

ORDER.—Proceedings under s. 133 of the Criminal Procedure Code have been

(1) 35 Ind. Cas. 969; 20 C. W. N. 1171; 17 Cr. L. J. 408; 44 C. 61.

(2) 23 C. 499; 12 Ind. Dec. (N. S.) 332.

forwarded by the learned Sessions Judge of Karnal for revision to this Court on the ground that the order of the Magistrate does not specify what are the obstructions raised by each of the accused. I do not find on the record any allegation that all the persons had jointly raised these obstructions or that they had raised them in conspiracy with each other. I, therefore, consider that the order was bad in form. I also hold as pointed out by the learned Sessions Judge that the Jury was not legally constituted in that the Magistrate seems to have appointed the entire Jury himself instead of appointing the Foreman and half the Jury and leaving the other half to be nominated by the parties. I, therefore, accept the revision and set aside the order of the learned Magistrate.

R. L.

*Revision accepted.***PATNA HIGH COURT.**

CRIMINAL REVISION No. 773 OF 1926.

February 1, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Allanson.

PARSOTIM DAS AND OTHERS—ACCUSED—
PETITIONERS

*versus***EMPEROR—OPPOSITE PARTY.**

Criminal Procedure Code (Act V of 1898), ss. 342, 364.—Summary trial of warrant case—Examination of accused, whether should be recorded.

In a summary trial of a warrant case, although a Magistrate is bound to examine the accused under s. 342 of the Criminal Procedure Code he is not bound to record such examination as provided for in s. 364 of the Code.

Criminal revision from an order of the Sessions Judge, Shahabad, dated the 4th October, 1926, affirming that of the Magistrate, First Class, Sasaram, dated the 15th September, 1926.

Mr. S. Sinha (with him Mr. D. L. Nandkeolyar), for the Petitioners.

JUDGMENT.

Kulwant Sahay, J.—The petitioners were convicted of an offence punishable under s. 121 of the Indian Railways Act. The petitioner No. 1 was sentenced to pay a fine of Rs. 60 and the petitioner No. 2 to pay a fine of Rs. 30.

The only question raised in the present application for revision is that the provisions of s. 342 of the Code of Criminal Pro-

cedure have not been complied with. The trial in this case was a summary trial under the provisions of Chap. XXII of the Code. Section 263 of the Code prescribes the form in which certain particulars have to be recorded and cl. (g) of s. 263 provides that the plea of the accused and his examination (if any) are to be recorded in the form prescribed. Section 364 of the Code prescribes the mode in which an accused person ought to be examined by a Magistrate or by any Court other than a High Court. Clause (4) of s. 364, however, says:

“Nothing in this section shall be deemed to apply to the examination of an accused person under s. 263 (or in the course of a trial held by a Presidency Magistrate).”

The case made is that the examination of the accused persons by the Magistrate was not in compliance with the provisions of s. 364 inasmuch as the proper questions to be put to the accused under s. 342 were not put to him. It appears from the order sheet of the Magistrate that the examination of the prosecution witnesses was finished on the 10th August, 1926, and thereafter the accused were told what the charge against them was and they pleaded not guilty to the charge. Thereafter on the 20th August, 1926, one prosecution witness was re-called and examined. Thereafter as appears from the order sheet of that date, the accused persons were examined and then a date was fixed for defence witnesses. The record in the form prescribed under s. 263 of the Code shows in the column prescribed for recording the plea of the accused and his examination, if any, the accused pleaded not guilty, and it is stated that they would file a written statement. Therefore, on a reference to the order sheet of the 20th August, 1926, and to the form prescribed under s. 263 of the Code, it is clear that the accused were examined under the provisions of s. 342. What the nature of the examination was is not stated; but in a summary trial, under the provisions of s. 364, it is not necessary for the Magistrate to take down the questions and answers in detail and there is nothing in this case to show that the examination of the accused persons in this case was not a proper examination as prescribed by s. 342 of the Code.

Reliance has been placed by learned Counsel for the petitioners upon the decision in *Balkeshwar Singh v. Emperor* (1)

(1) 65 Ind. Cas. 546; 3 P. L. T. 322; 23 Cr. L. J. 114; A. I. R. 1922 Pat. 5.

where it was held that a written statement filed by an accused person cannot take the place of his examination under s. 342 and that the procedure laid down for warrant cases applies although the trial is a summary one under s. 262 and that it is, therefore, mandatory upon the Magistrate to examine the accused under s. 342 even in a summary trial of warrant cases. The correctness of this proposition is not challenged and nobody denies that even in a summary trial the Magistrate is bound to examine the accused under s. 342. The question is whether he is bound to record the examination as provided for in s. 364 of the Code. That section itself says that it is not necessary for the Magistrate in a summary trial to record the examination in detail. Nothing has been shown in this case that the examination was not a proper examination.

This application is dismissed.

Allanson, J.—I agree.

A. N. A.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 372 OF 1927.

(CRIMINAL REVISION PETITION No. 328 OF 1927).

September 23, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Curgenvven.

S. S. JAGANNADHASWAMI NAIDU—
ACCUSED—PETITIONER

versus

T. MANIKYAM—COMPLAINANT—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 197—Government Officer acting as Polling Officer in Municipal election—Prosecution for offence under Madras District Municipalities Act (V of 1920)—Sanction of Local Government, whether necessary—Acting in the discharge of official duty, meaning of.

A Government Officer, such as a Tahsildar, who is appointed by the Chairman of a Municipal Council as a Polling Officer under the Madras District Municipalities Act does not, while he is acting as a Polling Officer, act or purport to act in the discharge of his official duty as a Tahsildar; and sanction under s. 197 of the Criminal Procedure Code need not, therefore, be obtained before instituting criminal proceedings against him for an offence committed by him while acting as a Polling Officer. [p. 223, col. 2.]

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, West Godavari, at

Ellore, in Cr. R. P. No. 23 of 1926 presented to revise the judgment of the Court of the Joint First Class Magistrate, Narasapur, in C. O. No. 80 of 1926.

Mr. P. Venkataramana Rao, for the Petitioner.

Mr. V. Suryanarayana, for the Respondent.

The Public Prosecutor, for the Crown.

JUDGMENT.—This petition raises the question whether sanction under s. 197 of the Criminal Procedure Code should be obtained before instituting criminal proceedings against a Tahsildar who acted as a Polling Officer in connection with a Municipal election.

The facts are briefly these: Under G. O. No. 1367, L. & M. dated April 3, 1925, "...where a Chairman of a Municipal Council or the President of a Local Board desires to have the services of an officer of the Revenue Department for the conduct of a particular election, he may apply to the Collector and the Collector may spare an officer's services if he is able to do so." Acting under this Government Order, the Chairman of the Ellore Municipality obtained from the Collector the services of the petitioner, a Tahsildar, to act as a Polling Officer in the 5th Ward of the Ellore Municipality during a recent Municipal election. It is alleged that, while acting in that capacity, the petitioner committed an offence under s. 58 of the District Municipalities Act, which runs as follows: "Every person who in the course of electoral operations falsifies or attempts to falsify the record of an election by removing, destroying, altering or fabricating nomination papers or voting papers or by any other act or by any omission, shall be punished with imprisonment of either description which may extend to one year or with fine or with both." The case against the petitioner is described in paras. 6 and 7 of the complaint. Paragraph 7 runs thus: "The accused wilfully marked the votes wrongly and falsified and attempted to falsify and fabricate the records of the election and committed an offence punishable under s. 58 of the Madras District Municipalities Act and also ss. 465 and 469 of the Indian Penal Code." It is not necessary for the purpose of this case to state the facts of the complaint in greater detail.

When the case was taken up for trial, objection was taken on behalf of the petitioner that this is a case in which sanction

of the Government is necessary under s. 197 of the Criminal Procedure Code and that, as such sanction had admittedly not been obtained, the complaint should be dismissed. Upholding the objection, the Joint Magistrate dismissed the complaint. The learned Sessions Judge on revision set aside the order of the Joint Magistrate and directed him to dispose of the case according to law. The present revision petition is against the order of the Sessions Judge.

Section 197 (1) of the Criminal Procedure Code runs as follows:—"When any person who is a Judge within the meaning of s. 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government." To establish the contention that sanction should have been obtained the petitioner has to show (1) that he is a public servant who is not removable from his office save by or with the sanction of the Local Government and (2) that he is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. If either of these conditions does not apply to the petitioner, then clearly it is not necessary to obtain the previous sanction of the Local Government to institute proceedings against him. Following the argument of the learned Vakil for the petitioner, dealing with the second question first, we have to see whether the petitioner, while acting as a Polling Officer under the District Municipalities Act, was acting or purporting to act in the discharge of his official duty, his official duty being that of a Tahsildar. It is alleged that, because the Collector has lent the petitioner's services to the Chairman, notwithstanding the fact that he was acting as a Polling Officer, he still remains a Tahsildar and was acting or purporting to act in the discharge of his official duty as a Tahsildar. No direct authority in support of the argument has been brought to our notice. Under r. 8 (1) of the rules for the conduct of elections of Municipal Councillors, "If owing to there being more candidates than

there are vacancies, a poll has to be taken, the Chairman shall appoint forthwith one or more Polling Officers for each polling station and may pay them reasonable remuneration for their services." It is conceded that the petitioner, when his services were lent to the Chairman, was appointed as a Polling Officer by the Chairman and that it was after this appointment that he began to discharge the duties of a Polling Officer. In certain cases it is the duty of the Municipal Chairman to appoint a Polling Officer, and the Polling Officer acquires the status of a Polling Officer by the appointment by the Municipal Chairman. The Municipal Chairman may appoint any person he likes as a Polling Officer subject to the restrictions contained in the rule. The fact that the officer so appointed happens to be a Tahsildar or that he was appointed after obtaining the permission of the Collector does not affect the decision of the question. We are of opinion that the person appointed, though he is a Tahsildar, was, for the time being, not acting or purporting to act in the discharge of his official duty as a Tahsildar and, therefore, s. 197 of the Criminal Procedure Code can have no application. As one of the essential conditions necessary for the application of the section is not satisfied in this case, it is not necessary to consider the other condition, namely, whether the petitioner is a public servant who is not removable from his office save by or with the sanction of the Local Government.

We think the order of the Sessions Judge is right and dismiss this criminal revision petition.

V. N. V.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 535 OF 1927.

September 3, 1927.

Present:—Mr. Justice Allanson.

Musammât LATIFAN—ACCUSED—

PETITIONER

versus

MOHAMMAD IBRAHIM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Proceedings under s. 144, when to be taken.

A Court should not proceed under s. 144 of the Criminal Procedure Code where it will be better to draw up proceedings under s. 145 of the Code.

Criminal revision from an order of the District Magistrate, Patna, dated the 2nd August, 1927.

Messrs. H. L. Nandkeolyar and B. K. Prasad, for the Petitioner.

Mr. H. P. Sinha and Government Pleader, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the Sub-Divisional Officer of Barh directing under s. 144 of the Criminal Procedure Code that the second party should not go on to the land in dispute. The application is made by *Musammât Latifan* who is one of the second party. The land originally belonged to her husband who died a number of years ago leaving three daughters, one of whom was married to *Mohammad Ibrahim*, the first party. The Sub-Divisional Magistrate has found that the rent receipts from 1326 to 1331 show that rent was paid by Ibrahim. In the next two years the rent was paid by his son. The second party's case was that she obtained all the land in lieu of dower. Ibrahim's case is that he is in possession as a co-sharer as his wife's heir. The order under s. 144 has already expired. I would have declined to interfere for that reason, had it not been for the fact that in my opinion on the report submitted by the Police this was certainly a case in which it would have been better to draw up proceedings under s. 145. The Magistrate has found that Ibrahim lived with *Musammât Latifan* and, as I have said, that Ibrahim paid the rent. These facts by themselves certainly do not necessarily indicate that Ibrahim is solely in possession of the land. He may be a co-sharer or he may be cultivating on behalf of his mother-in-law. It is argued that prejudice may accrue to the second party if the order under s. 144 is allowed to stand. In my opinion the dispute between the parties is not likely to be satisfactorily settled in this way, and proceedings under s. 145 should have been drawn up in the first instance. I, therefore, set aside the order under s. 144. If it is thought desirable, proceedings should be taken under s. 145 without delay.

A. N. A.

Petition accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 817 OF 1927.

June 24, 1927.

Present:—Mr. Justice Zafar Ali.

TAHIRU AND ANOTHER—ACCUSED—

PETITIONERS

versus

JALLU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 139—Charge—No offence disclosed—High Court's power to quash charge.

A High Court is competent to quash a charge and dismiss a complaint, in exercise of its revisional powers where no offence is disclosed by the prosecution evidence.

Petition for revision of an order of the District Magistrate, Shapur District, dated the 3rd May, 1927.

Mr. M. L. Puri, for the Petitioners.

Mr. Lachhman Singh, for the Respondent.

JUDGMENT.—The petitioners are Tahiru and his wife *Musammât Taban*. Jallu claimed to be the father-in-law of the petitioner's daughter *Musammât Shani* and his complaint was that they (petitioners) came to him and asked him to send *Musammât Shani* with them for paying a visit to the goddess at Kangra, that he sent *Shani* with them but they did not return her to him. He further stated that *Musammât Shani* took away with her her ornaments of the value of Rs. 700 and that the petitioners made a false representation to him in order to take away the girl with her ornaments. It is contended on behalf of the petitioners that the complaint discloses no offence and that the charge framed against them under s. 417, Indian Penal Code, should, therefore, be quashed.

Now assuming that the statement of facts made in the complaint is true (though the petitioners plead that it is entirely false) it does not conclusively follow therefrom that the petitioners made a false representation to the complainant, even if, as a matter of fact, they did not take the girl to Kangra for paying a visit to the temple of the goddess there. There is nothing in the evidence produced by the complainant to show that the petitioners had no intention of visiting Kangra when they represented to the complainant that they wanted to go there. It may be that they changed their mind subsequently and did not go. Thus no case under s. 417, Indian Penal Code, appears to have been made out. I, therefore, quash the charge and dismiss the complaint.

A. N. A.

Complaint dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2257 OF 1922.

February 18, 1927.

Present:—Mr. Justice Harrison and
Mr. Justice Dalip Singh.UMRA AND OTHERS—DEFENDANTS—
APPELLANTS*versus*

Musammat DURGA DEVI AND OTHERS

—PLAINTIFFS, Musammat THAKARI—

DEFENDANT—RESPONDENTS.

Custom—Succession—Chopra Khatri of Jullundur District—Collaterals, whether exclude daughters.

There is no special custom among the Chopra Khatri of the Jullundur District by which daughters are excluded from inheriting the property of their father by collaterals where the father was separate from the collaterals. [p. 225, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Jullundur, dated the 16th May, 1922.

Lala Badri Das, R. B., and Mr. Dev Raj Sawhney, for the Appellants.

Messrs. Fakir Chand and Wasdev, for the Respondents.

JUDGMENT.—The pedigree table of the parties is printed at page 74 of the paper-book. The plaintiffs are the daughters of Megh Raj, deceased, and they sued his brother Ganesh Das, and the widow of one Nandu, son of another brother of Megh Raj, namely, Chint Ram, and Umra, grandson of Chint Ram, for possession of their father's property. They also claimed Rs. 400 from Ganesh Das alleging that the said sum had been deposited with Ganesh Das by their mother Musammat Ralli. Ganesh Das died during the pendency of the suit, and his sons were brought on the record as his legal representatives. Various pleas were raised by the defendants, but the trial Court decreed the plaintiffs' suit except as to a half share in the property shown as No. (d) in the plaint, namely, a shop situate in Lal Bazar, Jullundur City, and as to the Rs. 400 alleged to have been deposited with Ganesh Das. Both sides have appealed.

So far as the appeal of Umra and others is concerned the sole point urged before us has been that by the custom of the Chopra Khatri of Jullundur District daughters are excluded from inheriting the property of their father by collaterals, even though the father was separate from the collaterals. The parties are high caste Hindus, and the onus admittedly lies heavily on the appellants to prove the special

custom alleged. The evidence given in the case is oral. Various instances are given by the witnesses in which daughters were excluded by the collaterals. It is also urged that a custom of this kind can be proved by the statements of persons of the brotherhood, who are in a position to know the facts and who have deposed to the existence of this custom. It is also contended that there is no rebuttal of the evidence given on behalf of the appellants, and that not a single instance has been proved by the other side in which a daughter succeeded to the exclusion of the collaterals. We have been through the instances adduced in support of the custom and we are satisfied that they are not sufficient to prove the alleged custom. In many of the cases it is not clear that the deceased father was separate from the collaterals who excluded the daughters. In others it seems that the daughters had no issue and were maintained by the collaterals. In such cases it is quite possible that the daughter was unwilling to assert her right to a life-interest in her father's property, and it does not follow that she could not have inherited the property of her separated father if she had chosen to assert that right instead of contenting herself with being maintained. We have been pressed by the argument that the respondents have been unable to produce a single instance of a daughter succeeding in the presence of collaterals. It must, however, be borne in mind that these Chopra families in the Jullundur District are not very numerous, and it is possible that no case has arisen in which a separated Chopra Khatri died leaving no sons, and leaving daughters who were in a position to assert their right of succession. We are, therefore, of opinion that the defendants-appellants have failed to establish the special custom which they pleaded and the appeal, therefore, fails and is dismissed with costs.

As regards the cross-appeal of the plaintiffs the important document mentioned in the judgment (Ex. P-19) has not been printed and by the rules of this Court cannot, therefore, be referred to. There is no excuse for the non-printing of this document which is distinctly referred to in the judgment. The cross-appeal, therefore, as to the half share of the shop which is disallowed must also fail as the plaintiffs-appellants cannot establish that

Kishen Chand was a tenant of the shop. The only other point urged by Counsel for the appellants was that the costs should have been given in proportion to the success of the parties. It seems to us, however, that the defendants-appellants had some ground for raising the plea of custom and the plaintiffs failed as to that part of the case on which they produced evidence. The only question, therefore, could be of Pleader's fee. In the circumstances we are not prepared to interfere with the discretion of the trial Court in the matter, and we, therefore, dismiss the cross-appeal with costs also.

A. N. A.

Appeals dismissed.

MADRAS HIGH COURT. FULL BENCH.

REFERRED CASE No. 21 of 1925.
September 6, 1927.

Present:—Sir William Watkins
Phillips, Kt., Officiating Chief Justice,
Mr. Justice Ramésam and Mr. Justice
Beasley.

THE COMMISSIONER OF INCOME TAX,
MADRAS—REFERRING OFFICER

versus

MOHIDEEN SAHIB OF BELLARY—
ASSESSEE.

Contract Act (IX of 1872), s. 28—Income Tax Act (XI of 1922), s. 3—Partnership between license-holders of toddy shops with persons not so licensed, legality of—Liability of all persons to assessment to income-tax.

Where four persons bid and obtained some toddy shops on lease and the profits from the said shops were shared between seven persons, and all the seven assisted in the working and financing of the shop:

Held, that the partnership was not illegal and did not offend the Abkari Rules, inasmuch as there was no case of the license-holders either selling, transferring or sub-renting the shops which they had taken on lease; and that it was, therefore, competent in such a case to the Income-tax Commissioner to assess under s. 3 of the Income Tax Act all the members of the partnership on the combined profits of the four shops.

Case stated by the Commissioner of Income-tax, Madras, in his reference to the High Court, dated the 21st October, 1925, under s. 65 (2) of the Income Tax Act for a decision on the following question:

"Whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under s. 3 of the Indian Income Tax Act on the combined profits of the four shops."

Mr. M. Patanjali Sastri, for the Referring Officer.

Mr. T. R. Ramachandra Iyer, for the Assessee.

JUDGMENT.—The question referred is, "Whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under s. 3 of the Income Tax Act on the combined profits of the four shops."

The Income-tax Commissioner finds that there was a body of seven persons who formed a sort of partnership. Of these seven persons, four bid and obtained leases of four toddy shops and the profits from those four toddy shops were shared between the seven persons; apparently also all the seven assisted in the working and financing of those shops. On this finding he holds that this association of persons was not an illegal association under the Abkari Rules. Here the petitioner's Vakil questions that finding and contends that his client and others have offended against the law in that they have contravened the provisions of r. 27 of the General Conditions of those licenses, *viz.*, "No privilege of supply or vend shall be sold, transferred or sub-rented without Collector's previous permission." There is no evidence that the license-holders have either sold, transferred or sub-rented the shops which they have taken on lease. It is not, therefore, apparent how that rule has been contravened and, certainly, we cannot presume illegality, in the absence of any evidence of such illegality.

The answer, therefore, to the question must be in the affirmative. Costs, including Counsel's fee Rs. 250 to be paid by the petitioner.

V. N. V. *Reference answered in the affirmative.*

LAHORE HIGH COURT, CIVIL REVISION PETITION No. 744 OF 1926.

February 9, 1927.

Present:—Mr. Justice Tek Chand.
THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—PETITIONER
versus

THE FIRM KNOWN AS SHEIK HAJI-BAKHA
FAZAL DIN THROUGH BAKHA—
PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Risk Note B—

Suit for damages for loss of goods—Burden of proving neglect of Railway—Theft from running train, onus of—Admission of theft, effect of—Civil Procedure Code (Act V of 1908), s. 115—Real point in case not decided—Revision.

Before a person who has consigned his goods under Risk Note B is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants. If and when he has succeeded in proving such neglect it will be open to the Railway Administration to claim immunity by proving that the theft was from a running train. The onus of proving that the Railway was guilty of wilful neglect lies clearly upon the plaintiff. [p. 228, col. 1.]

Smith, Ltd. v. Great Western Ry., Co. (1), followed.

Where a Railway Company alleges theft from a running train but fails to prove it, the admission is not of theft at large but of a specific form of theft and the onus still lies on the plaintiff to prove neglect or theft by the Railway servants. [p. 228, col. 2.]

Great Indian Peninsula Ry. v. Datti Ram (2) and *B. B. & C. I. Ry. Co. v. Ranchhodlal Chotalal & Co.* (3), followed.

The failure on the part of a Court to take notice of the real point in the case and to give a decision on it is a material irregularity justifying interference in revision. [*ibid.*]

Petition for revision of a decree of the Senior Sub-Judge, Ferozepore, dated the 28th July, 1926, affirming that of the Sub-Judge, Fourth Class, Ferozepore, dated the 14th May, 1926.

Mr. C. H. Carden Noad, Government Advocate, for the Petitioner.

Mr. Muhammad Amin, for the Respondents.

JUDGMENT.—On the 14th July, 1922, the Gwalior Metal Works Company Ltd. booked a consignment of 21 bags of aluminium wares at the Gwalior Railway Station on the G. I. P. Railway for carriage to Ferozepore City on the North Western Railway. The goods were booked to the consignor himself but he had endorsed the Railway receipt in favour of the plaintiff thus entitling him to take delivery of the consignment at Ferozepore. When the plaintiff went to the Ferozepore Railway Station to take delivery, it was discovered that only 3 bags out of 21 had arrived and that the remaining 18 bags were not forthcoming. The plaintiff took delivery of the 3 bags and on the 27th of August, 1923, instituted the present suit against the Secretary of State for India through the Agent, North Western Railway, for recovery of Rs. 495-3-6 being the price of the missing 18 bags. In the plaint it was alleged that the loss was due to the wilful neglect and gross carelessness of the Railway Administration. The G. I. P. Rail-

way and the Gwalior Metal Works were also impleaded as defendants but none of them appeared and the proceedings were *ex parte* against them.

The Secretary of State pleaded, *inter alia*, that the goods were booked at a special reduced rate at the owner's risk under Risk Note B and that for this reason the Railway Administration was free from all liability for the alleged loss. It was further pleaded that the goods had been lost on the G. I. P. Railway in a theft committed from a running train and that for this reason also the defendant No. 1 was not liable. The plaintiff at first denied the execution of the Risk Note B but later on he admitted it.

The trial Court found that the contention of the defendant that the goods had been lost on the G. I. P. Railway was not proved and also that the defendant had failed to establish that the goods were lost in a theft committed from a running train.

On these findings but without going into the question as to whether the defendant No. 1 was guilty of wilful neglect, it decreed the plaintiff's suit.

On appeal by the defendant No. 1 to the Senior Sub-Judge at Ferozepore, it was specifically urged in the memorandum of appeal that the lower Court could not legally pass a decree in favour of the plaintiff in view of the fact that there was no evidence of negligence on the part of the Railway Administration. The other findings as to the loss having occurred on the N.W. Railway and the goods not having been stolen from a running train were also challenged. The Appellate Court, however, upheld these findings, but without going into the question of wilful neglect on the part of the defendant No. 1 dismissed the appeal.

The defendant No. 1 has come up to this Court on the revision side and the learned Government Advocate, who appears in support of the petition for revision has, accepting the findings of the Courts below as correct, argued that the Courts have acted with material irregularity in not applying their minds to the really vital point in the case, namely, whether a decree for damages for loss of the goods consigned, under Risk Note B could be passed in favour of a consignee against the Railway Administration without a definite finding that the Railway Administration was guilty of wilful neglect.

After hearing the learned Government Advocate for the petitioner and Mr. Muhammad Amin, who appears for the respondent, I am of opinion that this contention must prevail.

In Risk Note B it is definitely provided that the Railway Administration will carry the goods "harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of a one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants,.....provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident." It is, therefore, clear that before a person, who has consigned his goods under Risk Note B is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants. If and when he has succeeded in proving such neglect, it will be open to the Railway Administration to claim immunity by proving that the theft was from a running train. It is now well-settled that the onus of proving that the Railway was guilty of wilful neglect lies clearly upon the plaintiff. There was at one time a conflict of judicial authority on this point but all doubts have been set at rest by the decision of the House of Lords in the well-known case of *Smith Ltd. v. Great Western Ry. Co.* (1), where it was held with reference to a Risk Note, the terms of which were very similar to those of Risk Note B, that it lies upon the plaintiff to affirmatively establish that the loss was due to the wilful misconduct of the Railway Company and its servants, and that the failure of the Railway to account for the loss of the goods was not evidence, which justified the Court in inferring that the loss arose from such wilful misconduct.

The learned Counsel for the respondents, however, has argued that in this case the Railway had set up a plea of loss by theft from a running train and having failed to prove it, it is not open to it now

to insist upon the plaintiff proving wilful neglect on the part of the defendants. In my opinion this contention is devoid of all force. In a case, which is very similar to the present one a Division Bench of the Patna High Court held that where the Railway Company alleged theft from a running train but failed to prove the allegation, the admission was not of theft at large but of a specific form of theft; and that in any case the onus still lay on the plaintiff to prove neglect or theft by the servants of the Company: *Great Indian Peninsula Ry. v. Datti Ram* (2). In a somewhat similar case, the Bombay High Court also came to the same decision in *B. B. & C. I. Ry. Co. v. Ranchhodlal Chotalal & Co.* (3). The terms of the Risk Note are very clear and cast a duty on the consignor to establish that the Railway was guilty of wilful neglect before he can hold it liable for the loss.

In the present case the plaintiff specifically alleged in his plaint wilful neglect on the part of the defendant, but led no evidence whatever in support of it. Nor are there any materials on the record from which I can infer that the defendant or any of its servants was guilty of any such neglect. Respondent's Counsel concedes that this is so, but urges that this is a petition for revision under s. 44 of the Punjab Courts Act and even if a mistake of law has been committed by the Appellate Court this Court ought not to interfere. But this is not a case in which the lower Appellate Court has come to an erroneous decision on a point of law. Here as already pointed out the Appellate Court (as also the trial Judge), has failed to take notice of the real point in the case and has given no decision on it at all. This is clearly a material irregularity justifying interference on the revision side. See *Tej Bhan v. Wali Dad* (4), *Bawa Naraingir v. Miran Baksh* (5), *Baij Nath Mistry v. Jang Bahadur* (6) and *Sibu Sant v. Netai Charan Das* (7).

For the foregoing reason, I accept the petition and setting aside the decrees of the Courts below, dismiss the plaintiff's suit. As the defendant No. 1 put forward a plea of theft from a running train but

(2) 90 Ind. Cas. 812; 5 Pat. 118; (1925) Pat. 305; A. I. R. 1926 Pat. 148; 7 P. L. T. 561.

(3) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

(4) 60 Ind. Cas. 716; 3 Lah. L. J. 181.

(5) 4 Ind. Cas. 314; 18 P. W. R. 1909.

(6) 13 Ind. Cas. 657.

(7) 9 Ind. Cas. 806; 15 C. L. J. 114.

(1) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

failed to prove it, I leave the parties to bear their own costs throughout.

R. L.

Petition accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1053 OF 1924.

March 18, 1927.

Present:—Mr. Justice Devadoss.

C. A. C. CHINNAN CHETTY—DEFENDANT

—APPELLANT

versus

V. VILATHAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 7—Suit by servant for wages—Entry in master's accounts, effect of—Limitation—Plea of limitation by defendant—Evidence let in trial saving limitation, effect of, on plea.

A suit for wages as a domestic servant must be brought within one year after the same became due under Art. 7, Limitation Act. But it is open to a master, instead of paying the salary then and there to give credit in his account books and treat the servant as his creditor, and if the master does that the Law of Limitation applicable is not that under Art. 7 but the ordinary rule of limitation as to debts.

When a defendant pleads limitation and in the course of the trial something transpires which shows that the plea of limitation is not sustainable, he cannot turn round and say that he has been prejudiced by the evidence which saves limitation.

Second appeal against a decree of the Court of the Subordinate Judge, Sivaganga, in A. S. No. 8 of 1923, preferred against that of the Court of the District Munsif, Sivaganga, in O. S. No. 342 of 1920.

Mr. T. D. Srinivasagopalachariar, for the Appellant.

Mr. M. Patanjali Sastri, for the Respondent.

JUDGMENT.—The point argued in this second appeal is that the plaintiff's suit is barred by limitation under Art. 7 of the Limitation Act, inasmuch as it is a claim for salary as a domestic servant. The contention of Mr. Srinivasagopalachariar for the appellant is that the plaint as laid is only for salary as a domestic servant and the suit having been brought more than one year after the wages became due the suit is barred by limitation. No doubt the plaint recites the circumstances under which the plaintiff entered into the service of the defendant and it also mentions when and where he worked. The defendant pleaded limitation and in the course of the evidence it transpired that there were entries in plaintiff's favour

in the defendant's account books in his branches at Sokkatrang and Annoy. Both the lower Courts have relied upon these entries as saving the bar of limitation. The suit for wages as a domestic servant no doubt must be brought within one year after the same became due. But it is open to a master, instead of paying the salary then and there to give credit in his account books and treat the servant as his creditor. It would make no difference whether the master gives a pro-note for wages or whether he gives credit in his account books and treats him as his creditor. If the master does that then the Law of Limitation applicable is not that under Art. 7 but the ordinary rule of limitation as to debts. In this case the amount due to the plaintiff was entered in the account books of the defendant's branches at two different places. What is contended by Mr. Srinivasagopalachariar before me is that the plaintiff did not make any reference to it and that his client's case should not be prejudiced by any evidence turning up in the course of the trial in the case. He is not able to show that he was in any way prejudiced by the evidence which came out during the trial. When a defendant pleads limitation and in the course of the trial something transpires which shows that the plea of limitation is not sustainable he cannot turn round and say that he has been prejudiced by the evidence which saves limitation. The plaintiff would have been well advised in averring in his plaint the fact that the amount of salary which was due to him was credited in the books of the defendant. Though the plaintiff is bound by the averments in the plaint yet in the case of a *mofussil* plaints we cannot apply the strict rule that the parties should not vary their pleadings during the course of the trial. No doubt if the character of the suit is likely to be materially changed as to prejudice the other party such a change should not be permitted. But I do not think the defendant has in any way been prejudiced by the District Munsif and the Subordinate Judge acting upon the evidence which came out during the trial that the plaintiff's salary was credited in the defendant's firm and thereby the plaintiff became a creditor of the defendant. The second appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

**MADRAS HIGH COURT.
FULL BENCH.**

APPEAL AGAINST APPELLATE ORDER NO. 132
OF 1925.

September 1, 1927.

Present:—Sir William Watkins Phillips,
Kt., Officiating Chief Justice,
Mr. Justice Beasley and Mr. Justice
Ananthakrishna Ayyar.

A. NARAYANAN NAMBU DIRI—
KARNAVAN AND MANAGER OF
ETTASERI MUNNOT MANGALATH
ILLAM—APPELLANT

versus

PUTHISSERI THEVA AMMA

AND OTHERS—RESPONDENTS.

Malabar Law—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Decree against karnavan in representative capacity—Members of tarwad, whether parties to suit—Objection by member to attachment, whether falls within s. 47 or O. XXI, r. 58, Civil Procedure Code—Appeal.

Where a decree is passed against the karnavan of a Malabar tarwad in his representative capacity, the junior members of the tarwad cannot be held to be parties to the decree within the meaning of s. 47 of the Civil Procedure Code, and a claim by a junior member to property attached in execution of that decree falls within the purview of O. XXI, r. 58 of the Civil Procedure Code and not within s. 47 of the Code. [p. 238, col. 1; p. 239, col. 2.]

Ramanathan Chettiar v. Levvai Morakayar (2), followed.

Marivittil Mathu Amma v. Pathram Kannot Cherukot (6) and *Kamal Kutti v. Ibrayi* (7), overruled.

Per Phillips, Offg. C. J.—Where a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must, consequently, come under s. 47 of the Civil Procedure Code; but when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party. [p. 238, col. 1.]

Per Ananthakrishna Ayyar, J.—The circumstance that a decree obtained against the tarwad karnavan as such is binding on all the members of the tarwad does not make the other members parties to the suit. [p. 238, col. 2.]

Prima facie only those are parties to the suit within the meaning of s. 47, Civil Procedure Code, whose names appear in the decree. [*ibid.*]

Where such members of a tarwad are not *eo nomine* parties to the decree, and where only the karnavan of the whole tarwad is sued as such, the claims that might be put forward in the course of execution of such decree by the joint co-owner members or the tavazhi members should not be dealt with as put forward by persons who are parties to the suit. [p. 239, col. 1.]

A decree for money obtained against the karnavan alone as such could not be executed against the junior members. Such a decree could be executed

against the tarwad properties, but not against the junior members. [p. 239, col. 2.]

Appeal against an order of the Court of the Subordinate Judge, Tellicherry, dated the 17th July, 1925, in A.S. No. 174 of 1925 (A. S. No. 28 of 1924, District Court) preferred against that of the Court of the District Munsif, Quilandi, dated the 10th November, 1923, in R.M.P. No. 1667 of 1923, in O.S. No. 345 of 1912.

This appeal came on for hearing on the 30th March, 1927, and having been set down to be spoken to on the 1st and 11th of April, 1927, and having stood over for consideration till the 29th April, 1927, the Court (Devadoss and Madhavan Nair, JJ.), delivered the following

**ORDER OF REFERENCE TO A
FULL BENCH.**

Devadoss, J.—The only point for consideration in this appeal is whether an appeal lay to the lower Appellate Court from the order of the District Munsif on a petition filed under O. XXI, r. 58, and s. 47, Civil Procedure Code. A decree was obtained in O. S. No. 345 of 1912 by one Narayanan Nambudri against Krishnan Nair and his brother Ramunni Nair for Rs. 344. Krishnan Nair was made liable as karnavan of the tarwad in addition to his personal liability. In execution of that decree certain moveables belonging to the tarwad were attached. The junior members objected to the attachment on the ground that the tarwad was not bound by the decree. They failed in their petition and 22 junior members brought O.S. No. 38 of 1920 to set aside the decree so far as the tarwad was concerned and they succeeded in the suit with the result that Krishnan Nair and Ramunni Nair were made personally liable for the decree amount. The decree-holder attached some of the properties of the tavazhi and the sister of Krishnan Nair and Ramunni Nair objected to the attachment on the ground that the properties belonged to the Putravakasam tavazhi and that the judgment-debtors had no exclusive interest over it. This petition was presented under O. XXI, r. 58, and s. 47, Civil Procedure Code. The District Munsif dismissed that petition; on appeal to the lower Appellate Court it was contended that no appeal lay as the members of the tavazhi were not parties to the suit. But the Subordinate Judge overruled that objection and on the merits allowed the

appeal. Narayanan Nambudri, the decree-holder, has filed this civil miscellaneous appeal. The contention of Mr. Krishna Menon for the appellant is that the appeal to the lower Appellate Court was incompetent as the petitioners who objected to the attachment were not parties to the decree or their legal representatives.

To O. S. No. 345 of 1912 Krishnan Nair and Ramunni Nair were parties as well as the *tarwad* of which Krishnan Nair was the *karnavan*. The objection now put forward is that the property under attachment does not belong to the *tarwad*, but is the property of the *tavazhi* which was not represented in the suit. The Subordinate Judge, in para. 3 of his judgment, says: "No doubt the property is now claimed as belonging to a *tavazhi* within the common *tarwad*, but on the same principle the *tavazhi* must also be considered to have been a constructive party." The argument of the Subordinate Judge amounts to this: that if a *tarwad* is sued by making the *karnavan* party or all the members of the *tarwad* parties, the *tavazhis* of which the *tarwad* is composed must necessarily be considered to be parties to the suit. This view is against the theory that a *tavazhi* is a distinct entity so far as the holding of property is concerned from the *tarwad* and though according to the peculiar system of Malabar Law members of a *tavazhi* may form a *tarwad*, yet each *tavazhi* is entitled to own property separately and a *tarwad* cannot utilize the properties of the *tavazhi* for its purposes. In other words the *tarwad* and the *tavazhi* are two distinct entities or bodies for the purpose of owning property. The *tavazhi* property cannot benefit the members of the *tarwad* as a whole though the *tavazhi* members are entitled to get a share of the income of the *tarwad* property. This distinction unfortunately has not been given effect to in some of the decisions quoted at the bar. Even though all the members of a *tarwad* are made parties to a suit *eo nomine*, yet if the suit is only against a *tarwad* it would not be right to say that the *tavazhi* also was represented in the suit merely because the members of the *tavazhi* were made parties in their capacity as members of the *tarwad*. If a person occupies two distinct positions or fills two different offices his being sued in his capacity as representing

one body, cannot be held as his being sued in another capacity representing another body which was not sued. Suppose A and B are the trustees of a certain trust; suppose they also happen to be the trustees of another trust. If a suit is brought against them in respect of one trust would it be right to say that they being the trustees of the second trust it must be held that the second trust was a party to the suit in order to attract the provisions of s. 47 of the Code of Civil Procedure. When the *karnavan* of a *tarwad* is sued as *karnavan* I think it would not only be doing violence to language, but it would be against all principles of construction of pleadings to hold that he is also sued as representing the *tavazhi*. Where he is sued as representing the *tarwad* and the *tavazhi* it may be said that he must be taken to represent both in the suit. But where the suit is confined to some relief against the *tarwad* only I think it would be opposed to all principles of justice to hold that he must be taken to have represented the *tavazhi*. It is not the name of the person that is of importance, but the substance and the nature of the suit. With these observations I proceed to consider the cases relied on by both the parties.

Mr. Krishna Menon relies upon a recent decision of this Court reported as *Peetika-yila Kath Mammad Haji v. Alam Ibran Haji* (1). The facts in that case were, A obtained a decree against the Anandravan of a Malabar *tarwad* and in execution thereof attached certain immoveable properties in possession of the judgment-debtor. He died; but on his death the *karnavan* of the *tarwad* was brought on the record as his legal representative. He set up the claim of the *tarwad* to the property, and contended that the judgment-debtor had no partible interest in the property and it was not attachable. The District Munsif dismissed the petition and on appeal by the *karnavan* the Appellate Court set aside the attachment. Against that order a revision petition was filed in the High Court. The question was raised whether an appeal lay to the lower Appellate Court. Justice Abdur Rahim and Justice Spencer held that no appeal lay to the lower Appellate Court and that the point was covered by the Full Bench case in *Ramanathan Chet-*

(1) 31 Ind. Cas. 303.

tiar v. Levvai Morakayar (2) and a decision of the Calcutta High Court in Kartick Chandra Ghose v. Ashutosh Dhara (3). They observe at page 394* "The claim he put forward in respect of the property was that it belonged not to the judgment-debtor, but to the *tarwad*. There seems to us no distinction in principle between this case and the cases in which the person who was a party to the suit or was brought on record as a representative of the judgment-debtor claimed the property as the trustee for certain other persons or as *shebait* of a temple." This decision in *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1) was followed by Sadasiva Ayyar and Phillips, JJ., in Second Appeal No. 1 of 1916. The opening lines of that judgment make the point clear:—

"The plaintiffs' Thiyya Makkathayam *tarwad*, was not impleaded as the legal representative of the judgment-debtor Ramutty in the proceedings in execution in the former suit. Five of the present plaintiffs were impleaded as such legal representatives in their individual capacity as sons and, therefore, heirs of Ramutty to his self-acquired and separate properties. The plaintiffs, therefore, as representing the *tarwad* were not bound to make an application under s. 47 of the Code of Civil Procedure for re-delivery of the property which belonged to the *tarwad* and which the decree-holder-purchaser wrongfully took possession of in execution, though it was neither attached nor sold in execution. They (plaintiffs) as representing the *tarwad* (a third party) were entitled to bring a separate suit to recover possession of the property so wrongfully taken possession of by the decree-holder-purchaser: *Ramanathan Chettiar v. Levvai Morakayar* (2).

The law has been clearly laid down by Abdur Rahim and Spencer, JJ., in *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1) and though one sentence in that judgment about *Kuriyali v. Mayan* (4) may be inaccurate as pointed out in *Naduvil Edom Kelu Achan v. Parasu Patar* (5) the reasoning in that decision seems to us to be unimpeachable. Following *Ramana-*

(2) 23 M. 195; 10 M. L. J. 64; 8 Ind. Dec. (N. S.) 535 (F. B.).

(3) 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26.

(4) 7 M. 255; 8 Ind. Jur. 133; 2 Ind. Dec. (N. S.) 762.

(5) 38 Ind. Cas. 360; 5 L. W. 158.

*Page of 31 Ind. Cas.—[Ed.]

than *Chettiar v. Levvai Morakayar* (2) and *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1) we hold that a separate suit can be brought by the plaintiffs' *tarwad* as it is not the legal representative of Ramutty." This clearly shows that where the *tarwad* is not brought in as the legal representative of a deceased judgment-debtor and if any of its property is attached it can apply under O. XXI, r. 58, as it is not a party either to the suit or the execution proceedings.

The facts in *Ramanathan Chettiar v. Levvai Morakayar* (2) were, a decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree was passed presented a petition that the property may be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by the defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. The plaintiff then appealed to the High Court and a preliminary objection was taken to the appeal on the ground that no appeal lay against the order of the Subordinate Judge. The point was referred to a Full Bench and it held that the claim fell under s. 278 and not under s. 244 of the Code of Civil Procedure and that no appeal lay against an order passed by the Court executing the decree. It was further held that the claims of third parties whether put forward by themselves or by a party to the suit must be dealt with under ss. 278 to 283 and not under s. 244. Mr. Justice O'Farrell, who delivered the leading judgment in that case, observed at page 200*: "I think, however, that there can be no doubt that the balance of authority is in favour of the view that the claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under ss. 278 to 283 and not under s. 244." He further observes: "a Court should look to the substance of the objection, and not to the accident that it is put forward by A rather than by B. If it is, in substance, an objection that falls under s. 278, it should be dealt with under that section," and he observes that this view is in accordance with a number of cases cited by him. This decision is right in principle if I may say so. If A is sued in his individual capacity, property of which

*Page of 23 M.—[Ed.]

he is only a trustee cannot be attached and brought to sale in execution of a personal decree against him and if such property is attached the proper course is for him to apply under O. XXI, r. 58 of the present Code corresponding to s. 278 of the old Code. The mere fact that a person is a party to a suit in his personal capacity does not make the trust of which he is a trustee a party to the suit. The question is complicated by the peculiar system obtaining in Malabar under which the *tavazhis* which compose a *tarwad* are distinct legal entities from the *tarwad* itself so far as the ownership of property is concerned. All the members of the *tarwad* are entitled to be maintained out of the income of the property of the *tarwad*. Even though some of the members may be members of a *tavazhi* which is rich yet they as members of the *tarwad* are entitled to receive maintenance from the *tarwad* so that the *tarwad* and the *tavazhi* cannot be said to be one and the same judicial person and when a *tarwad* is sued as such either by making the *karnavan* or all the members of the *tarwad* parties, the suit is not one against any or all the *tavazhis* composing the *tarwad*.

Mr. Ramakrishna Ayyar for the respondent very strongly relies upon *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) as supporting his contention that an appeal in this case lay to the lower Appellate Court. The facts in that case were, a decree was obtained against the *karnavan* of a *tarwad*. In execution of that decree certain properties were attached and some of the members of the *tarwad* put in a petition for release of the properties attached on the ground that the properties belonged not to the common *tarwad* but to their own *tavazhi*. The petition was rejected. On appeal the Subordinate Judge of South Malabar held that no appeal lay to his Court. The expression District Court in the report is obviously a mistake for Sub-Court. A civil miscellaneous appeal was presented to the High Court against the order of the Sub-Court. A Bench of this Court consisting of Justice Benson and Justice Wallis, held that an appeal lay. Benson, J., observed: "Not only defendants Nos. 2 and 6 but also all the members of their *tavazhi* must be held to be bound by the decree against the *tarwad* and parties to the suit on the principle laid

down in *Kamal Kutti v. Ibrayi* (7)." Wallis, J., observed: "In this case a decree has been given against the *karnavan* as representing the members of the whole *tarwad*. In accordance with the decision in *Kamal Kutti v. Ibrayi* (7) all the members of the *tarwad* must be taken to be parties to the suit for the purpose of execution proceedings, and, if parties, they must proceed under s. 244 and not under s. 278. The fact that they claimed the property, which has been attached, adversely to the other members of the *tarwad* does not make them any less constructive parties to the decree." He refers to *Ramanathan Chettiar v. Levvai Morakayar* (2) and says "a defendant who objected to the attachment of property of which he was trustee was allowed to proceed under s. 278, because he was claiming as trustee on behalf of persons who were not parties to the suit, and similarly in *Abdurrahiman Kutti Haji v. Kunhammad Koya* (8)." With very great respect to the learned Judges I must observe that they did not keep before them the distinction between a *tarwad* and a *tavazhi*. The mere fact that the *tarwad* members are members of the *tavazhi* would not make the *tavazhi* a party to a suit in which the *tarwad* alone is concerned. Though this decision may be distinguished from the present on the facts I think the better course would be to canvass the correctness of this decision for the learned Judges have expressed themselves in such a wide language that it would not be right to go behind the plain meaning of their language by making reference to the facts of the case. If the principle of this decision is that when a *tarwad* is sued in the name of the *karnavan*, the *karnavan* being the representative of all the *anandravans*, all the *tavazhis* which compose the *tarwad* must be considered to be parties to the litigation, I am unable to accept any such proposition as correct. When there are two separate bodies which can hold properties independently of one another and whose interests may clash with one another, it cannot be said that one represents the other simply by reason that for some purposes the members composing the one happen to be members composing the other. If this decision had been consistently followed in a number of cases one should hesitate before questioning its correctness. Though

(7) 24 M. 658.

(8) 10 M. L. J. 85.

the matter has been fully argued and though we gave every opportunity to both the parties to refer to the cases in which this decision has been followed we have not been referred to any case in which the principle of this decision was given effect to. In *Rangan Pattar v. Lakshmi Neithiar* (9) it was held that "an objection by a defendant that immoveable property attached in execution of a decree is not the private property of the judgment-debtor but that of the *tavazhi* consisting of the defendant, the judgment-debtor and others is one falling within s. 244 of the Code of Civil Procedure and an appeal will lie from the order of the Court of first instance." The facts were, a decree was obtained against defendants Nos. 1 to 3. In execution of the decree, the properties in dispute were attached. The 6th defendant objected to the attachment on the ground that the properties were not private properties of defendants Nos. 2 and 3 but belonged to a *tavazhi* consisting of defendants Nos. 1 to 9. The District Munsif rejected the claim. On appeal, the Subordinate Judge held that it was the property of the *tavazhi* and directed the raising of the attachment. From the facts it is clear that the properties were gifted to the 2nd and 3rd defendants and the question was whether the gift was exclusively for the 2nd and 3rd defendants or for the *tavazhi* which they represented. Arnold White, Chief Justice, and Justice Bashyam Ayyangar held that this point was covered by the Full Bench ruling in *Ramaswami Sastrulu v. Kameswarama* (10). In this case, the question was whether it was the property of defendants Nos. 2 and 3 or the property which belonged to them as well as to the other members of the *tavazhi*, and it is distinguishable from the cases in *Ramanathan Chettier v. Levvai Morakayar* (2) and *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1). Where a person is sued and property belonging to him and some others is attached, a claim has to be made only under s. 47, for the property which is attached belongs to him though it belongs to others as well. But when he is sued in one capacity he cannot be said to be sued in all the capacities in which he could be sued. In other words when one institution is sued, it cannot be said that another in-

stitution of which the defendant happened to be the manager or trustee is also sued.

Naduvil Edom Kelu Achan v. Parasu Patar (5) is relied upon by Mr. Ramakrishna Ayyar. In that case a decree was obtained against an Anandravan of a Malabar *tarwad*. Certain properties alleged to belong to him were attached after his death, and the *karnavan* of the *tarwad* was brought on the record as the legal representative of the deceased Anandravan. He contended that the attached properties had been appropriated towards a debt due from the Anandravan. The Subordinate Judge held that the *karnavan* was not the legal representative of the Anandravan and under the above circumstances rejected the *tarwad's* petition. On appeal, the District Judge held that no appeal lay to him as the matter arose in claim proceedings. The High Court held that an appeal lay. Ayling and Seshagiri Ayyar, JJ., after referring to a number of cases observed: "Thus there has been a course of decisions in this Presidency which has recognized the correctness of the principle that where a person's claim is traceable to the same capacity in which he is brought in as the legal representative, the executing Court should hear and determine the matter." This observation is not against the principle of the decision in *Ramanathan Chettier v. Levvai Morakayar* (2). The real question is in what capacity was the defendant impleaded in the suit. If he was impleaded in the suit in one capacity he cannot be held to have been impleaded in another capacity so as to prevent him from putting forward the claim of the body which was not made a party to the suit. The decision in *Meyyappa Chetty v. Chidambaram Chetty* (11) has nothing to do with the present question. In O.M.A. No. 143 of 1920 this point is not discussed. Ayling and Venkatasubba Rao, JJ., observed: "It is specifically stated by the District Munsif in his order on the claim petition that the case fell under s. 47, Civil Procedure Code, and we must take it that his order was passed under that section. This being so, an appeal lies [*vide Latchmanan Chetty v. Ramanathan Chetty* (12)], no matter whether the petition should properly have been treated as one under O. XXI, r. 58, or not."

(9) 14 M. L. J. 137.

(10) 23 M. L. J. 126; 8 Ind. Dec. (N. S.) 653.

(11) 61 Ind. Cas. 349; 39 M. L. J. 603; 12 I. W. 272 (1920) M. W. N. 562.

(12) 23 M. L. J. 127; 11 M. L. J. 230.

In Second Appeal No. 647 of 1921 the *karnavan* of a *tarwad* was made a defendant to a suit. The decree was finally passed exonerating the *tavazhi* properties altogether and the decree was only against the assets of one Raman Nair in the hands of the 3rd defendant as his legal representative. The learned Judge observed that "as the *karnavan* of the *tavazhi* was joined in the suit by the 1st defendant in his capacity as *karnavan*, I must hold that the other members of the *tavazhi* are constructively parties to that suit, and the plaintiff must also be treated as if he was a party and his remedy in putting forward the claim of the *tavazhi* is by way of an application under s. 47 and not by a suit." This case does not touch the present point. Where a person is a party to a suit even though he may be exonerated still for the purposes of s. 47 he is a party. This is clear from the Full Bench ruling in *Vaddadi Sannamma v. Koduganti Radhabhai* (13) and from the explanation to s. 47.

The decision in *Chowdhry Wahid Ali v. Jumae* (14) is discussed in *Ramanathan Chettiar v. Levvai Marakayar* (2) and it is unnecessary to discuss it here. The case of *Arunachellam Chetty v. Maung San Ngwe* (15) does not help the respondent. There it was held that where a person is brought on the record as a legal representative of the deceased judgment debtor, the question whether the property attached is part of the assets or his own property, is one arising under s. 47, Civil Procedure Code. In cases of persons who are brought in as legal representatives they represent the deceased person and any question as to what or what is not the property of the deceased is a question which naturally arises under s. 47. If improperly the legal representatives' separate property or private property is attached he has to show that it is not part of the assets of the deceased. But that is different from saying that where a person is brought in as the legal representative in possession of the assets of the deceased person he cannot set up the right of a trust which had nothing to do with the deceased person. The question is not one of form but one of substance.

(13) 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 234 (F. B.).

(14) 11 B. L. R. 149; 18 W. R. 185.

(15) 83 Ind. Cas. 550; 2 Rang. 168; A. I. R. 1924 Rang. 323.

Section 47 is clear. All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, etc., shall be determined by the Court executing the decree. It must be first a question arising between the parties to the suit or legal representatives and must relate to execution, etc. But where property which is attached or which is sought to be proceeded against is not the property of a party to the suit I fail to see how an application in respect of it could come under s. 47. It can only come in under O. XXI, r. 58. The decisions in *Vengapayyan v. Karimpanakal Parvati* (16) and *Sivarama Sastrial v. Somasundara Mudali* (17) do not touch the present question. On the facts in *Sivarama Sastrial v. Somasundara Mudali* (17) it was held that s. 244, Civil Procedure Code applied, for the person putting forward the claim put it forward on the ground that he stood in the shoes of the person who was the party to the suit in which the decree was passed.

As the decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) is opposed to the Full Bench ruling in *Ramanathan Chettiar v. Levvai Marakayar* (2) we should follow the Full Bench ruling in preference to the ruling of a Bench but as the matter is one of considerable importance and as it is likely to arise very often I would refer the following question to the Full Bench:—Is the decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) correct?

Madhavan Nair, J.—The Full Bench is requested to examine the correctness of the decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6). I do not object to this reference. But speaking for myself, I am quite content to stand by the decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6). The question is essentially one of procedure and if the procedure has been well-understood and has been followed for a long number of years, I think it is not desirable to set about altering it even if it is not deemed to be correct according to the strict letter of the law. Neither party has been able to refer to cases which have reached this Court wherein this Court has expressly followed, *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) or refused to

(16) 26 M. 501.

(17) 23 M. 119 at p. 121.

follow it. The paucity of the decisions would rather suggest that the procedure is well-understood; but, however, that may be, I am not satisfied that *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) requires re-consideration.

The two decisions that are relied on as departing from the principle embodied in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) are (i) *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1) and (ii) Second Appeal No. 1 of 1916. The facts in *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1) are stated in my learned brother's judgment. It would appear that *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) is referred to neither in the arguments of the Counsel who appeared in the case nor in the judgment. In that case, on the death of an Anandran against whom a decree was obtained, the *karnavan* of the *tarwad* was brought on the record as his legal representative in the course of execution, and he put forward title to the property on behalf of the *tarwad*. The judgment is based on the ground that as the Anandran cannot be said to represent the *tarwad*, the *tarwad* was not constructively a party to the suit; and as the *karnavan* was putting forward a claim on behalf of those who were not parties to the suit it was held that the claim put forward by him could not be investigated under s. 47 of the Code of Civil Procedure. This decision in no way departs from the principle laid down in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6). Second Appeal No. 1 of 1916 followed the decision in *Peetikayilakath Mammad Haji v. Alam Ibran Haji* (1). The Full Bench decision in *Ramanathan Chettiar v. Levvai Mora Kayar* (2) is referred to and distinguished in the judgment in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6). The other decisions referred to, as pointed out by my learned brother, do not bear directly on the question. That a *karnavan* of a Malabar *tarwad* sued as such, represents constructively all the members of the *tarwad* and a decree so obtained against him is binding on the *tarwad* was laid down as early as *Vasudevan v. Sankaran* (18) and this principle was made applicable to execution proceedings in *Kamal Kutti v. Ibrayi* (7) and *Marivittil Mathu Amma v. Pathram*

Kannot Cherukot (6). Without calling into question the correctness of the Full Bench decision in *Vasudevan v. Sankaran* (18), I do not think it is possible to re-consider *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6). As observed in *Kamal Kutti v. Ibrayi* (7) "to allow the junior members to make a claim as strangers under s. 278 of the Code of Civil Procedure (s. 47 of the present Code) seems to be inconsistent with their being bound by the decree and with the policy of s. 244 and of the decision in *Vasudevan v. Sankaran* (18)."

I do not think that the fact that the *tarwad* and *tavazhi* are two distinct entities capable of owning separate property has been ignored in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) or in any of the decisions applying the principle embodied in it. For the sake of convenience, the *karnavan* is recognized as representing the entire *tarwad* in a suit when he is made a party to it as *karnavan*. The fact that the members of the *tarwad* fall into various *tavazhis* does not in any way affect the representative character of the *karnavan* when he is sued as the *karnavan* representing the entire *tarwad*, which, of course, includes all the *tavazhis*. The interests of the *tavazhi*, which may be adverse, are not jeopardized by this procedure. So far as the decree binds the *tarwad*, no one can question it; but if the *tavazhi* properties are attached in the course of execution of that decree, the *tavazhi*, if it has any right, may put forward its claim to the attached properties. When this is done, the question raised will be one between parties to the suit and will relate to the execution, discharge or satisfaction of the decree, and s. 47 of the Code of Civil Procedure will be applicable to such proceedings.

On the facts, it is possible to distinguish the present case from the decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) as the decision in the subsequent suit by the junior members may be said to convert the decree under execution into a decree merely against two individual members of the *tarwad* one of whom happened to be the *karnavan*. However, as I have said, though I am willing to stand by that decision, I have no objection to the question decided in it being referred to a Full Bench for fresh consideration.

(18) 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90 (F. B.).

This appeal came on for hearing before a Full Bench on the 16th of August, 1927, in pursuance of the above Order of Reference.

Mr. K. Krishna Menon, for the Appellant
Mr. K. P. Ramakrishna Ayyar, for Respondents Nos. 1 and 2.

OPINION.

Phillips, Offg. C. J.—The question that has been referred for our opinion is "Is the decision in *Marivittil Mathu Amma v. Pathiram Kannot Cherukot* (6) correct?"

In that decision it was held that, where a decree is passed against the *karnavan* of a *tarwad* in his representative capacity, all the members of the *tarwad* must be held to be parties to the suit and such members in execution proceedings must proceed under s. 244 of the Code of Civil Procedure and not under s. 278. The decree had been passed against the *tarwad*, but certain members of the *tarwad* objected to the attachment of certain properties on the ground that they belonged not to the *tarwad*, but to a separate *tavazhi* to which the claimants belonged. In order to consider the validity of this decision, it is necessary to consider the decision in *Kamal Kutti v. Ibrayi*, (7) which was relied on as authority for it. In *Kamal Kutti v. Ibrayi* (7) the decree had been passed against the *karnavan* of the *tarwad* as senior member and manager and it was held that members of the *tarwad* who claimed certain property in their individual right must be deemed to be parties, or representatives of parties, to the decree and, as such, any claim made by them came within s. 244 of the Civil Procedure Code (s. 47 of the present Code). The judgment is that of Shephard and Benson, J.J. Benson, J., who was also a party to *Marivittil Mathu Amma v. Pathiram Kannot Cherukot* (6) wrote the leading judgment in *Kamal Kutti v. Ibrayi* (7) whereas Shephard, J., merely said: "I concur, though I must say that I have had considerable doubt about the question." The decision is based upon the Full Bench ruling in *Vasudevan v. Sankaran* (18) where it was held that a decree against the *karnavan* of a *tarwad* sued as such in a suit which he defended *bona fide* was binding on all the members of the *tarwad*, as they must be deemed to be represented in that suit by their *karnavan*. It must be observed that it was only as members of the *tarwad* that they were so represented and not in any other capacity that they

might hold. Therefore, the decision in *Kamal Kutti v. Ibrayi* (7) in which it was held that members of the *tarwad* in their individual capacity and not as members of the *tarwad* must also be deemed to be parties to the decree, is a considerable extension of the principle laid down in *Vasudevan v. Sankaran* (18). The *karnavan* undoubtedly represents the members of the *tarwad* as such, and the decision in *Vasudevan v. Sankaran* (18) is merely to that effect; but to go further and say that he represents them in any other capacity, e. g., as members of a separate *tavazhi*, or as individual owners, whose interests may be, and probably are, opposed to the interests of the *tarwad*, seems to be contrary to the principle of the decision. In fact, in *Ramanathan Chettiar v. Levdai Morakayar* (2) it was held by a Full Bench of this Court that when a decree had been obtained against a person in his individual capacity, a claim by him as a trustee for others who were not parties to the decree was one that fell under s. 278 of the Civil Procedure Code and not under s. 244. The *ratio decidendi* of this case is that the persons interested in the trust had not been parties to the decree and, consequently, were not bound by it, and, therefore, any claim made by them was a claim made by a stranger to the decree. It is difficult to distinguish this case on principle from *Marivittil Mathu Amma v. Pathiram Kannot Cherukot* (6) and *Kamal Kutti v. Ibrayi* (7). As members of the *tarwad*, the claimants in both cases were deemed to be constructive parties to the decree; but their interests as members of a *tavazhi* or as individual owners were not represented at all in the suit, which was concerned merely with their interests as members of the *tarwad*. If they were not represented in their individual capacity in the suit, it is difficult to see how they could be deemed to be parties even constructively to the decree. They were not actual parties and, therefore, they could only come under s. 244 (now s. 47) if they were representatives of the parties; but it is not in their capacity as representatives of the parties that they now come forward with their claim, but as representing themselves, whose interests are adverse to those of the *karnavan*, who is deemed to be their representative in so far as they were members of the *tarwad*. Hence it would appear that they, in their individual capacity, were not represented in the suit and

cannot, therefore, be held to be representatives of parties to the suit. The conclusion, therefore, is that, in accordance with the Full Bench decision in *Ramanathan Chettiar v. Levvai Morakayar* (2) the decisions in *Kamal Kutti v. Ibrayi* (7) and *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) are wrong. If the claimants had been impleaded in the suit personally, they would undoubtedly be parties and would come within the meaning of s. 47, although the interests put forward in execution might not be the interests in respect of which they were made parties, for it has been held that, when a trustee is sued in his capacity as trustee and in execution puts forward his individual rights, he must be deemed to be a party to the suit also in his individual capacity. Where, therefore, a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must, consequently, come under s. 47 of the Civil Procedure Code; but when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party.

The decision in *Kamal Kutti v. Ibrayi* (7) has stood for many years and it is contended on the principle of *stare decisis* that it should be upheld. We see, however, that it was a decision of one Judge in which the second Judge reluctantly concurred. The correctness of the decision has also been doubted by the late Mr. Justice Sundara Ayyar in his Treatise on Malabar and Aliyasentana Law and he was undoubtedly a great authority on Malabar Law. The decision was also not followed in *Pettikayilakath Mammad Haji v. Alam Ibran Haji* (1) and in Second Appeal No. 1 of 1916 (unreported). If, therefore, the decisions are not correct in law they cannot be upheld, even though they relate merely to a question of procedure. On reference to the papers in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) it would appear that the *karnavan* of the *tavazhi* was an actual party to the decree and on that ground the decision may be correct; but as the judgment did not proceed upon

that basis, we must answer the question referred to us in the negative, and this will have the further effect of overruling *Kamal Kutti v. Ibrayi* (7) also.

Beasley, J.—I agree.

Anantakrishna Ayyar, J.—I agree with my Lord. The circumstance that a money decree obtained against the *tarwad karnavan* as such is binding on all the members of the *tarwad* does not make the other members parties to the suit. Under ordinary circumstances their interests in the *tarwad* property should be deemed to have been represented by the *karnavan*, and it is only in this sense that the decree obtained against the *karnavan* in his representative capacity is binding on the other members: [*Vasudevan v. Sankaran* (18).] The *karnavan* is taken to sufficiently represent also their interests in the *tarwad* property, the interests of the *karnavan* and the junior members in respect of the *tarwad* property with reference to such suit being ordinarily the same. From this circumstance that the decree is thus binding on the *tarwad* including the interests of junior members in the *tarwad* properties, it does not follow that the junior members are parties to the suit. Similarly under s. 11 of the Civil Procedure Code, Explanation VI: "Where persons litigate *bona fide* in respect of a right claimed in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the person so litigating." This does not, I think, make all the other persons so interested parties to the suit.

It appears to me that it does not follow that because a decision is binding upon a person, therefore, he must be taken to be a party to the suit. *Prima facie* only those are parties to the suit within the meaning of s. 47, Civil Procedure Code, whose names appear in the decree. If any person's name so appears, then all questions raised by him relating to the execution, etc., of the decree should be determined in the execution department, and not by a separate suit. If his name does not so appear, then the next question is—were his interests (that is, those put forward by him) represented in the suit? He may have his own separate or private interests, and he may have his common interests in the *tarwad* properties as a member of the *tarwad*. If only his common interests in the *tarwad* were represented, then it seems to me it

is impossible to hold that his other interest (separate and private interests) should also be taken to have been represented in the suit, with the result that if in execution proceedings occasion arises for putting forward such separate and private interests, he should be treated not as a stranger-*qua* such interests but as a party to the suit within the meaning of s. 47, Civil Procedure Code. The same remarks would apply to interests as co-owners possessed by two of the junior members of the *tarwad* in respect of some property owned by those two only as co-owners. The same remarks would also apply to properties owned by some only of the members of a *tarwad* as their exclusive *tavazhi* properties. It seems to me that in cases where such members were not *eo-nomine* parties to the decree, and where only the *karnavan* of the whole *tarwad* was sued as such, the claims that might be put forward in the course of execution of such decree by the joint co-owner members or the *tavazhi* members aforesaid should not be dealt with as put forward by persons who are parties to the suit. Ordinarily the *karnavan* of a *tarwad*, as such, has no concern with the private and separate properties of the junior members or of any *tavazhi*. But, on the other hand, it often happens that his interests as *karnavan* representing the *tarwad* are adverse to the separate interests put forward by the junior members or the *tavazhi* in the circumstances mentioned above. The present case is not even complicated by any permission of Court granted under O. I, r. 8, Civil Procedure Code. The decision in *Marivittil Mathu Amma v. Pathram Kannot Cherukot* (6) is based on the authority of the decision in *Kamal Kutti v. Ibrayi* (7): Justice Shephard had considerable doubt about the question. If the principle laid down by Benson, J., in *Kamal Kutti v. Ibrayi* (7) should be accepted, it would seem to follow that in the case of a decree obtained only against a Hindu father or joint family manager as such, claims preferred by other members of the joint family setting up private and exclusive right to properties attached would have to be decided under s. 47 of the Code; as also similar claims put forward by *cestui que trust* when their private and separate properties not included in the trust are sought to be proceeded against in execution of decrees obtained against the trustees only as such. I am not prepared

to place such a construction on s. 47 which would involve the above consequences. In *Kamal Kutti v. Ibrayi* (7) the learned Judge argues: "If the decree can be executed against them (junior members) does not this imply that they are parties or representatives of parties?" With all respect, it is difficult to understand how a decree for money obtained against the *karnavan* alone as such could be executed against the junior members. Such a decree could be executed against the *tarwad* properties, but not against the junior members. If the learned Judge was right in saying that such a decree could be executed against the junior members, then the conclusion reached by him would, of course, be correct.

I accordingly agree in answering the question referred to us in the negative.

V. N. V.

Reference answered in negative.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 103 OF 1925.

July 12, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.
THE SECRETARY OF STATE FOR INDIA
DEFENDANT—APPELLANT

versus

ABDUL HUSEN DOSAJI GODWALA—
PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (V of 1879), ss. 3 (9), 66, 148—Use of agricultural land for building—Fine, whether leviable with reference to whole area—'Building site,' meaning of—'Adjacent,' construction of—Section 148, whether applicable.

The penalty leviable under s. 66 of the Bombay Land Revenue Code where a portion of land assessed or held for purposes of agriculture is used without the permission of the Collector for building purposes, is not to be levied with reference to the whole plot but only with reference to the area actually used for building purposes and it would be a question of fact in each case what area has been used for non-agricultural purposes. [p. 240, col. 2.]

What portion of an area falls within the term 'building site' is a question of fact depending upon the circumstances of each case. [*ibid.*]

The word 'adjacent' in the definition of the term 'building site' in s. 3, cl. (9) of the Bombay Land Revenue Code must be construed with reasonable limitations. [p. 241, col. 1.]

Section 148 of the Bombay Land Revenue Code is not applicable to fines levied under the provisions of s. 66 of the Code. [*ibid.*]

First appeal from the decision of the Joint Judge at Thana, in Civil Suit No. 17 of 1923.

Mr. P. B. Shingne, Government Pleader, for the Appellant.

Mr. W. B. Pradhan, for the Respondent.

JUDGMENT.

Crump, J.—The facts necessary for the decision of the present case may be briefly stated as follows:

The plaintiff purchased certain plot numbers in Survey No. 119 at Santa Cruz, and after his purchase he erected upon a portion of the total area a building covering 146 square yards. The exact area of the whole land need not necessarily be stated in the view which we take of the present case, but it may be said that it was very much larger than that, and that it was only a small portion that was covered by the building. That there was a previously existing structure used for agricultural purposes does not affect the present matter. It is conceded that the erection of this building was, so far as that portion of the land is concerned, a conversion of this agricultural holding to a non-agricultural purpose. Before the lower Court a question arose as to the altered assessment which in those circumstances might be levied under the provisions of s. 48 of the Bombay Land Revenue Code. With that point we are not now concerned. It may, however, be remarked that the lower Court, relying upon what is now r. 81 of the Rules under s. 214 of the Bombay Land Revenue Code, and also r. 85, held that the altered assessment could be levied upon the whole area and not merely upon the area occupied by the building. That point not being before us, we do not propose to express any opinion upon it, but speaking for myself, I must not be taken as acquiescing in the view taken by the lower Court.

What we are concerned with here is the fine which is admittedly payable by the respondent under the provisions of s. 66 of the Bombay Land Revenue Code. That section lays down, reading it with s. 65, that if any land assessed or held for purposes of agriculture be used without the permission of the Collector for any other purpose than that of agriculture, then the person so using the land shall be liable to be summarily evicted by the Collector from the land so used and from the entire survey

number, and shall also be liable to pay in addition to the new assessment which may be leviable under the provisions of s. 48 such fine as the Collector, subject to the general orders of Government, may direct. Now, the meaning of the section seems clear enough in itself. It contemplates plainly a survey number and a portion of a survey number which has been diverted from an agricultural purpose to some other purpose, which indeed is the case here. But it does not say in terms that the penalty leviable under the section can be levied with reference to the whole of the survey number. In order to decide what penalty is applicable, that is to say, with reference to what area it is to be calculated, we have to refer to r. 100 of the existing rules under s. 214. And assuming that this field comes within cl. (1), as we are told it does, the maximum would be Rs. 1,250, and it is leviable per acre of the land actually used for any purpose unconnected with agriculture and at the same rates in proportion as to any fraction of an acre. Therefore, it would be in each case a question of fact to be determined, what area has been used for any purpose unconnected with agriculture. The facts as disclosed in the present case are that, except for the area covered by the building, no use has been made of the rest of the land with the exception that occasionally vegetables are grown upon it. It is thus impossible to say that anything except the site has been diverted to a non-agricultural purpose. The fact that it has remained to a large extent unused for agriculture does not touch the matter, for the holder is not bound to cultivate the land. He can, if he likes, leave it uncultivated. Therefore, for the purposes of r. 100 considered in the light of the facts of this case, one would say that only the actual site is chargeable with fine. And that is the view which has been taken by the Court below.

But it has further been argued before us that we must have reference to r. 101, that we must regard this as a building site, and for the purpose of understanding what is meant by *building site*, we must refer to the definition in s. 3, cl. (9) of the Bombay Land Revenue Code. That point was apparently never raised in the Court below, and whatever may be the definition in s. 3 (9), it must necessarily be a question of fact in each case to decide what portion of the area falls within the term 'building site.' Building site is there defined as a portion

of land held for building purposes and it is said to include the open ground adjacent to any building erected thereupon. The word *adjacent* is extremely vague, and must necessarily be construed within reasonable limitations. And, in the absence of any inquiry directed to this point and of any evidence upon it, it would be impossible by the mere force of this definition to hold that the whole of this land should be regarded as a building site. Though we are not dealing with a penal statute in the strict sense of the word, nevertheless, this is in the nature of a penal statute; and, therefore, must be strictly considered in favour of the subject. Bearing that in mind it is not established in this case that the whole of this area should be regarded as building site within the definition contained in s. 3 (9), and, therefore, it is impossible to apply r. 100 in the sense in which it is desired to apply it.

A further point has been raised as regards the question of penalty. Section 148 is invoked. It is said that the case falls within that section, and the Collector, therefore, may impose as a penalty such amount as has been fixed from time to time under the orders of the Governor-in-Council. We may take it that the maximum penalty is one-fourth of the land revenue overdue. That is the result of the orders of Government to which we have been referred, and is indeed a matter of common knowledge among those who are familiar with revenue law, but before s. 148 can be invoked it is necessary that it should precisely apply to the facts of the present case. Section 148 deals with failure to pay instalments of land revenue within the prescribed time, and referring back to s. 146 where these land revenue instalments are introduced for the first time in the Act so far as I am aware, it is perfectly clear that what is meant by instalments of land revenue are those instalments of the total land revenue payable for the year which have to be paid at dates fixed from time to time by Government. So far as I understand the matter, s. 148 has no bearing whatever upon the question now before us. We are dealing here with a fine leviable under the provisions of s. 66, and I fail to see how that can be regarded in the light of an instalment of land revenue within the meaning of s. 146. That being so, s. 148 has no application to this case, and the further citation of s. 187 becomes meaningless; for that section merely provides the procedure by which monies leviable under

the provisions of the Chapter can be recovered. Unless this penalty is so leviable s. 187 does not apply to it.

Those are the only two points that have been argued before us, and we think that upon both the points the decision arrived at by the lower Court is correct, and ought to be affirmed, and this appeal ought to be dismissed with costs.

Marten, C. J.—I agree. The memorandum of appeal shows that in any event the plaintiff was entitled to be re-paid Rs. 473-1-6. That was because the Collector's notices were based on an erroneous area, *viz.*, 3,146 square yards whereas the correct area was 2,043 square yards.

As regards the increased assessment which the lower Court has found to be leviable, there has been no appeal by the defendant, and I respectfully agree with what my brother Crump has said that under these circumstances it must not be taken that we acquiesce in the correctness of the decision on that point by the learned Judge.

Next, turning to the question of fine, in my opinion, the words "any such land" in s. 66 must be given the same meaning as the same words "any such land" in the concluding paragraph of s. 65. That takes us back to the second paragraph of s. 65, *viz.*, "his holding or any part thereof." Consequently, as I read s. 66, it applies to the holding or such part thereof as has been used for non-agricultural purposes. User is, therefore, the test whether for the whole land or only a part. This construction of s. 66 is borne out by the provision that the Collector may eject from "the land so used," and also from the entire holding or survey number of which that particular portion forms part. On that construction I think the Collector had no power in law to impose the fine that he purported to do in the present case, for only a portion of the land was used for non-agricultural purpose, and not the whole.

I wish to add this. Speaking for myself I fully appreciate the importance of preventing the holders of Government land who have got that land on certain conditions, *e. g.*, as agricultural land, from turning that land or any portion of it into land for non-agricultural purposes. But the penalty given by the Act must be fairly construed. Before us, the contention of the Government Pleader went to this extent, (if I understood it correctly), *viz.*, that supposing there was a farm of 100 acres which according

to him would form one "holding," and supposing a small summer-house or bathing hut or some other small non-agricultural building was put up on a few square yards of that farm, that would nevertheless result in an increased assessment for the whole 100 acres, and also in a liability to ejectment from the whole and in a liability to pay fine and penalty upon the whole. In my opinion that is not the true construction of the Act, although I quite appreciate that a tenant can be forced by proper means to keep his contract or be ejected, just as would be the case in an ordinary case of landlord and tenant where a tenant broke certain covenants of the lease, subject of course to the power of the Court to relieve from the forfeiture on certain equitable grounds.

As regards the penalty I entirely agree with my learned brother that that also is not leviable. Section 66 provides in effect penalties for a defaulting tenant. In my judgment it was never intended by s. 148 to pile penalty on the top of penalty in that indirect way. I agree that s. 148 has no application on the present case.

I concur, therefore, that this appeal should be dismissed with costs.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No.

56 OF 1926.

May 5, 1927.

Present:—Mr. Justice Waller and

Mr. Justice Madhavan Nair.

AMMAKUTTI ACHI—APPELLANT

versus

DORAISWAMI IYER AND OTHERS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Limitation Act (IX of 1908), Sch. I, Arts. 166, 181—Decree providing for sale of properties in particular order—Sale contrary to direction—Application to set aside sale—Limitation.

An application to set aside an execution sale on the ground that it was held in contravention of a direction in the decree that the properties should be sold in a certain order, falls under s. 47 of the Civil Procedure Code and is governed by Art. 166 of Sch. I of the Limitation Act and not by Art. 181.

Muthiah Chettiar v. Bawa Sahib (1), followed.

Appeal against an order of the District Court, East Tanjore at Negapatam, dated

the 27th April, 1926, in O. M. A. No. 120 of 1925 preferred against that of the Court of the District Munsif, Mayavaram, dated the 7th October, 1925, in E. A No. 530 of 1925, in E. P. No. 9 of 1925 in O. S. No. 39 of 1918 on the file of the Court of the District Munsif Shiyali.

Mr. C. A. Seshagiri Sastri, for the Appellant.

Mr. T. R. Ramachandra Iyer, for the Respondents.

JUDGMENT.—This is an appeal by the 4th defendant against the appellate order passed by the District Judge by which he confirmed the District Munsif's order refusing to set aside a sale in the following circumstances. A mortgage decree directed that items Nos. 1 to 3 of the mortgaged properties should be sold last and that item No. 4 should be sold first. Items Nos. 1 to 3 belonged to the present appellant. As regards item No. 4 an order staying sale had been obtained by the 1st defendant's son from the District Court on proceedings taken in connection with O. S. No. 119 of 1925 in which he claimed the 4th item as his own and asked for an injunction restraining its sale. The appellant though she had notice of the sale did not inform the Court that her properties were to be sold last according to the decree. Items Nos. 1 to 3 were sold in auction and then the appellant put in the present application under ss. 47 and 151, Civil Procedure Code, to set aside the sale on the ground that the sale is bad because it took place contrary to the direction in the decree that it should take place in a certain order. The lower Court held that the application is barred by limitation under Art. 166 of the Limitation Act as it had been filed admittedly more than 30 days after the date of sale.

It is argued that the sale in contravention of the directions in the decree amounts to an illegality, that it is, therefore, void *ab initio* and that the proper Article applicable is Art. 181 of the Limitation Act which prescribes a period of 3 years and not Art. 166. The question is whether the sale in the present case is an illegality or a mere irregularity. In *Muthiah Chettiar v. Bawa Sahib* (1) Oldfield, J., held that where a sale took place contrary to the directions in the decree that it should take place in a certain order, the application to set aside the sale on that ground was one under s.

(1) 26 Ind. Cas. 46; 27 M. L. J. 605.

47 of the Civil Procedure Code and would be governed by Art. 166. So far as we can see, there is nothing in *Rajagopala Aiyar v. Ramanujachariar* (2) which throws doubt on this decision. The observation of the learned Chief Justice "I cannot agree with the view that all applications under s. 47 are governed by Art. 165" rather suggests that some applications under that section are certainly governed by that Article. The present application though it was made under s. 47 was one to set aside a sale and is governed by Art. 166 of the Limitation Act. We think the present tendency is to apply Art. 166 to applications of this nature. The order of the lower Court is right and this appeal against appellate order is dismissed with costs.

V. N. V.

Appeal dismissed.

(2) 80 Ind. Cas. 92; 47 M. 288; 46 M. L. J. 104; 19 L. W. 179; (1924) M. W. N. 182; A. I. R. 1924 Mad. 431; 34 M. L. T. 37 (F.B.).

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 38 OF 1926.

August 9, 1927.

Present:— Sir B. K. Mullick, Acting Chief Justice, and Justice Sir Jwala Prasad, Kt.

MAHADEO LAL MARWARI—

APPELLANT

versus

Rai Bahadur DALIP NARAYAN SINGH

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Appeal to Privy Council—Redemption decree—Extension of time by Appellate Court—Appellate decree, whether one of reversal—Burden of proof—Whole evidence adduced—Question of onus, whether material.

A decree of a High Court affirming a decree for redemption passed by a lower Court does not cease to be a decree of affirmance simply because a new date for redemption was fixed by the High Court and interest at the bond rate was made to run from the expiry of the date fixed by the lower Court till the date fixed by the High Court. [p. 244, col. 1.]

When the whole evidence is in, the question of onus of proof is merely academic. [p. 244, col. 2.]

Messrs. N. C. Sinha and N. C. Ghosh, for the Appellant.

Messrs. Hasan Imam, J. Prasad, R. G. S. Prasad and C. M. Prasad, for the Respondents.

JUDGMENT.

Mullick, Atg. C. J.—This is an application for leave to appeal to His Majesty

in Council by Mahadeo Lal Marwari who was the unsuccessful appellant in Appeal No. 243 of 1922 before a Division Bench of this Court. The facts are these:

On the 22nd December, 1915, Mukemi Begum and four of her sons, namely, Amir Hussain, Lutof Ali, Davar Ali and Yavar Ali executed a mortgage bond for a sum of Rs. 1,35,000 in favour of Rai Bahadur Baijnath Goenka, the remaining son Tabarak Ali, not joining in the bond.

On the 10th February, 1916, the four sons, Amir Hussain, Lutof Ali, Davar Ali and Yavar Ali executed each a separate mortgage bond in respect of not only their interest in the properties covered by the bond of the 22nd December, 1915, but also in respect of some other properties in favour of Rai Bahadur Dalip Narayan Singh. The sums borrowed were respectively Rs. 50,000, Rs. 30,000, Rs. 16,000 and Rs. 10,000.

Rai Bahadur Dalip Narayan Singh then paid off the mortgage of the 22nd December, 1915, and brought a suit upon that mortgage as well as upon the four mortgages of the 10th February, 1916.

In the suit on the bond of 22nd December, 1915, he impleaded among others Tabarak Ali, who, though he had not joined in the bond, had, after Mukemi Begum's death, succeeded to her share in the property.

In the suit on Amir Hussain's bond the plaintiff added Mahadeo Marwari as a defendant because he had purchased Amir Hussain's interest.

Rai Bahadur Dalip Narayan obtained decrees upon all the bonds before the Subordinate Judge of Monghyr who among other things directed the sales in respect of the bonds of the 10th February, 1916, to be held subject to the sale in respect of the bond of the 22nd December, 1915.

Appeals were preferred to the High Court against the decree in each case, but we are concerned here only with Appeal No. 243. That appeal was dismissed, but the appellant Mahadeo Lal Marwari's Advocate Mr. Naresh Chandra Sinha among other things contended that the proper order was that only one sale should be held and that the fund should be distributed rateably after satisfying the first bond. The Division Bench accepted this contention and fixed a new date for redemption, six months from the date of its judgment. Upon the main question whether the principal de-

fendants were liable for the mortgage money the Court found against them.

It is contended on behalf of Mahadeo Lal Marwari that, though the decision of the Division Bench was apparently one of affirmance, it was in reality a decision of reversal inasmuch as a new date for redemption has been fixed and interest at the bond rate has been made to run from the expiry of the date fixed by the trial Court till the date fixed by the Division Bench thereby imposing an additional liability of about Rs. 19,000 on the petitioner.

It is true that the High Court decree is for a larger amount than the trial Court's decree but that does not make the decision one of reversal, and one has to look at the substance of the matter. The petitioner was the appellant before the Division Bench and it was in consequence of his objection there that the mode of executing the decree was varied. It was open to him when pressing the objection to inform the Division Bench that he could not under any circumstances consent to an extension of the period of redemption. The Court was not bound to extend and if he had given the slightest inkling that he would let the property be sold rather than have an extra period of time for redemption the Court would, as it was bound to do, have acceded to his prayer. He cannot, in my opinion, appeal against an order which has been made for his benefit.

In substance, therefore, the decision is not one of reversal.

But the petitioner's real object in taking this point is to press his case as regards the merits.

His defence in the trial Court and also in the Appeal Court was that out of the consideration of Rs. 50,000 Amir Hussain got only Rs. 14,000 and that the balance of Rs. 36,000 was not accounted for. The Appeal Court examined this objection carefully and found on the facts that the alleged partial failure of consideration was not established.

The decision of the Division Bench was one of affirmance and the petitioner is not entitled to leave unless he can show a substantial point of law.

The petitioner then falls back upon his next point which is that even if the decision is one of affirmance, he has a substantial point of law inasmuch as the Division Bench has wrongly called upon the de-

fendant to prove that the consideration money was not applied as alleged by the plaintiff. The answer to this is that when the whole evidence is in, the question of onus is merely academical. Further more having carefully considered the judgment of Mr. Justice Das, it does not appear that there is any substance in the point about onus.

The result is that the application for leave to appeal is dismissed with costs: hearing-fee five gold mohurs.

Jwala Prasad, J.—I agree.

A. N. A.

Application dismissed.

OUDE CHIEF COURT.

SECOND CIVIL APPEAL No. 222 OF 1927.

October 14, 1927.

Present:—Mr. Justice Misra.

Pundit RAM DAT AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

CHHOTAK AND OTHERS—DEFENDANTS—
RESPONDENTS.

Co-sharers—Managing co-sharer—Power to grant lease for planting groves—Omission to raise objection to planting, whether creates estoppel.

The mere fact that a person manages property belonging to another does not clothe him with authority to grant leases of land for the purpose of planting groves. [p. 245, col. 2.]

The fact that a co-sharer did not raise any objection when a person, claiming under an unauthorised lease from another co-sharer began to plant groves does not estop him from claiming possession of the land. [p. 246, col. 1.]

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. [*ibid.*]

Appeal against the decree of a Subordinate Judge, Sitapur, in Civil Appeal No. 35 of 1926, dated the 11th March, 1927, upholding that of the Munsif, Biswan at Sitapur, in Regular Suit No. 37 of 1926, dated 7th September, 1926.

Messrs. M. Wasim and Khaliquzzaman, for the Appellants.

Mr. S. M. Ahmad, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of 1 bigha 14 biswas land in village Sheopuri, District Sitapur, by uprooting trees and for damages. The facts alleged by the plaintiffs are that the land in dispute is the joint land belonging to plaintiff No. 1 Ram Dat, plaintiff No. 2

Ram Ghulam and defendants Nos. 2 and 3, Bhagwati Prasad and Ram Autar respectively; that the said defendants wrongfully gave a lease of the said land to defendant No. 1, Ohhotak, for planting a grove thereon without their consent; and that the plaintiffs are, therefore, entitled to recover possession of the land by uprooting trees planted by defendant No. 1 thereon. The plaintiffs also claimed a sum of Rs. 50 as damages.

The defence put forward by defendant No. 1 was to the effect that defendants Nos. 2 and 3 managed the share of the village in which the land in dispute lies on behalf of the plaintiffs and, therefore, the lease granted by defendants Nos. 2 and 3 was a good and valid lease binding on them. It was also contended by him that the plaintiffs were estopped from claiming possession of the land in suit since they had not objected to defendant No. 1's planting trees on the land in dispute when he had obtained the lease of the said land. Defendants Nos. 2 and 3 admitted the fact of having given the lease of the land in suit to defendant No. 1 but alleged that while giving the lease they had told him that he must obtain the consent of the plaintiffs in respect of their share.

The learned Munsif of Biswan, District Sitapur, who tried the case held that the defendants Nos. 2 and 3 used to manage the share of the plaintiffs in the village Sheopuri and were, therefore, justified in giving the lease of the land for the purpose of planting a grove thereon. He, however, held that the plea of estoppel could not be maintained. In this view of the case he dismissed the plaintiffs' suit.

In appeal the learned Subordinate Judge of Sitapur agreed with the learned Munsif's finding that defendants Nos. 2 and 3 used to manage the share of the village in which the land in dispute lies on behalf of the plaintiffs and that they were, therefore, competent to grant the alleged lease to defendant No. 1. He, however, differed from the Munsif on the question of estoppel and held that the plaintiffs not having objected to defendant No. 1's planting the trees at the time when the lease was granted to him were now estopped from bringing the present suit. Upon these findings he confirmed the decree passed by the learned Munsif and dismissed the appeal.

The plaintiffs have now come up to this Court in second appeal, and the learned

Pleader on their behalf has urged two points in support of the appeal: Firstly, that there is no proof on the record that the plaintiffs had authorised defendants Nos. 2 and 3 to grant a lease of the land in dispute for the purpose of planting a grove and that the mere fact that the said defendants managed the property on the plaintiffs' behalf would not be a sufficient ground in law to give them an authority to grant a lease of the land for the purpose of planting a grove thereon. Secondly, that the finding of the learned Subordinate Judge on the question of estoppel was erroneous.

As to the first point I am of opinion that the contention urged on behalf of the appellants is sound and must be given effect to. I do not find any evidence on the record showing that the plaintiffs had expressly authorised defendants Nos. 2 and 3 to give a lease of the land in suit on their behalf for the purpose of planting a grove thereon. The Courts below, it appears to me, have inferred this authority from the fact that defendants Nos. 2 and 3 used to manage the property on the plaintiffs' behalf and also from the fact that the plaintiffs did not object to the planting of the trees at the time when the alleged lease of the land in dispute was given to defendant No. 1. I do not agree with this view of the Court below. In my opinion the mere fact that a person manages the property belonging to another does not clothe him with authority to grant leases of land for the purpose of planting groves. The ordinary incidence of management would include the power to realise rent and power to give ordinary leases of land to tenants for the purpose of cultivation. I am unable to agree with the view taken by the Courts below that the power of management also includes the power to grant perpetual leases for the purpose of planting groves. It has been held in several cases that a *lambardar* has no power to grant a perpetual lease on behalf of his co-sharer, and I am, therefore, inclined to think that land cannot similarly be let by a manager for the purpose of planting a grove thereon without the express permission of the principal. Plaintiff No. 1 further gave his own evidence to the effect that when defendant No. 1 proceeded to plant trees on the land in dispute he at once objected. His story has not, however, been believed by the Courts below. Apart from that fact it appears to me that even if we assume

that plaintiffs did not object to defendant No. 1's planting trees on the land in suit at the time of the grant of the lease, that would not be any evidence of the fact that they had authorised defendants Nos. 2 and 3 to give such a lease on their behalf. There being no presumption that the authority to manage would also imply the authority to give lands for the purpose of planting groves, it was the bounden duty of defendant No. 1 to give clear proof of such authority. There being no such proof I am unable to infer such authority from the facts proved in the case. I, therefore, hold that defendants Nos. 2 and 3 had no authority to give defendant No. 1 the lease of the land in dispute for the purpose of planting a grove thereon.

As to the second point, I am of opinion that the plea of estoppel cannot be maintained. The law on the subject is laid down very clearly by their Lordships of the Privy Council in *Beni Ram v. Kundan Lal* (1) and *Mohori Bibee v. Dharmodas Ghose* (2). The principle enunciated by their Lordships in those cases is that unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. In one of the cases recently decided by a learned Judge of this Court in *Mustafa Husain v. Saidul Nisan* (3), it was held that a plea of estoppel in such cases can only be maintained if the conduct of the person against whom the estoppel is alleged, is found to be fraudulent. I am unable to find such elements proved in the case. I, therefore, overrule the plea of estoppel.

It now remains to be seen whether on the above findings the plaintiffs are entitled to a decree for possession. At the last hearing of the case after I had heard arguments on both sides I intimated to the parties that I had come to the conclusion that the fair arrangement which should be arrived at in this case would be to allow defendant No. 1 Chhotak to remain in possession of the land in dispute on which he has already planted a grove and to ask

him to pay to plaintiffs Nos. 1 and 2 their share of rent of the land and to allow the burden of the transfer made by defendants Nos. 2 and 3 to fall upon their share at the time of partition. The plaintiffs not having come to Court at once and the land being a joint one, I intimated to the parties my opinion that they must seek their remedy at the time of partition. To this arrangement the parties agreed. In view of such agreement I thought it proper that I should myself determine the amount of rent which defendant No. 1 should pay to the plaintiffs for the use of the land in dispute. With this object I ordered the *Patwari* of the village to be summoned before the Court. The evidence of the *Patwari* was recorded and after he had been examined the learned Pleader for the plaintiffs and the learned Counsel for defendant No. 1 agreed that the fair and equitable rent for the land in suit would be at the rate of Rs. 3 per *pucca bigha*. The land in dispute consists of four plots, namely, No. 701/1 (11 *biswas*), No. 701/2 (10 *biswas*) and No. 702/1 (3 *biswas*), all measuring 24 *biswas*; and No. 708/2 (10 *biswas*). The share of plaintiff No. 1 in the first three plots is one-third and the share of plaintiff No. 2 in them is one-sixth; and the share of plaintiff No. 2 in the fourth plot is 5/18ths, there being no share of plaintiff No. 1 in the said plot. Calculating the rent at the aforesaid rate the share of plaintiff No. 1 comes to Rs. 1-3 odd but for facility of account I fix the rent at Rs. 1-4. The share of plaintiff No. 2 comes to about Re. 1 but for facility of account I fix it exactly at Re. 1. Defendant No. 1 will, therefore, pay Rs. 2-4 on account of rent of the land in dispute in this way that he will pay Rs. 1-4 to plaintiff No. 1 and Re. 1 to plaintiff No. 2. Defendant No. 1 will be allowed to remain in possession of the plots in suit as long as he continues to pay the said rent. If at any time he fails to pay the rent to plaintiffs Nos. 1 and 2 he will be liable to ejectment from the land in suit to the extent of their shares. The plaintiffs Nos. 1 and 2 will also be entitled to get a decree for Rs. 5 as damages.

I, therefore, allow the appeal to the extent indicated above.

As to costs my order is that owing to the circumstances in the case the parties should bear their own costs throughout.

A. N. A. Appeal allowed in part.

(1) 21 A. 498; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. O. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. O.).

(2) 80 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 30 I. A. 114; 8 Sar. P. O. J. 374 (P. O.).

(3) 99 Ind. Cas. 255; 3 C. W. N. 282 Supp.; A. I. R. 1927 Oudh 66.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE NO. 1336
OF 1924.

July 11, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.
THE GREAT INDIAN PENINSULA
RY., CO.—DEFENDANT NO. 1—APPELLANT
versus

MEBRS. CHAKRAVARTI SONS &
CO. AND OTHERS—PLAINTIFFS—RESPONDENTS.
Railways Act (IX of 1890), s. 72—Consignor sending illiterate person to deliver goods—Signature of such person to Risk Note, whether binding on consignors—Condition of package—Consignor agreeing in Risk Note that condition was unsatisfactory—Subsequent plea to the contrary, whether allowable.

If a consignor sends another person to deliver goods to a Railway Administration and that person signs the contract, the contract so signed by that person is binding upon the consignor as though he had signed it himself. It is immaterial whether that person was literate or illiterate, was authorised to sign or not authorised, or signed personally or as agent of the consignor. [p. 248, col. 1.]

Kirby v. G. W. Ry. (1), Foreman v. G. W. Ry. (2) and Aldridge v. G. W. Ry. (3), followed.

If at the time of booking the Railway Company was dissatisfied and the person delivering the goods for carriage agreed that the condition of the packages was not satisfactory, it cannot afterwards be made a matter of objection in a suit upon the contract that the packages were in good condition. [p. 249, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 24th of March, 1924, modifying that of the Subordinate Judge at Krishnagar, Nadia, dated the 18th of December, 1922.

Babu Surendra Nath Guha and Mr. Sisir Kumar Ghoshal, for the Appellant.

Sir Provash Chandra Mitter, Kt., Babus Ambika Pada Choudhuri and Jotindra Mohan Choudhuri, for the Respondents.

JUDGMENT.

Rankin, C. J.—This is the defendants' appeal in a suit brought by consignees of goods which were despatched by the defendants' Railway from the Victoria Terminus in Bombay to Kushtea—a station on the Eastern Bengal Railway. Two consignments of yarn are involved in the case. These goods had been sent out from England and were consigned from Bombay to Kushtea without being re-packed. It appears that the yarn was contained in wooden cases and these wooden cases had gunny coverings as to which there is certain evidence that the coverings were old and torn. On the arrival of the goods at Kushtea, it was found that, as regards the first consignment, certain of the goods

were damaged and that, as regards the second consignment, certain of the goods were damaged and certain parts of the contents had been lost.

The firm of Mr P. N. Mehta and Company were sending these goods to the plaintiffs. P. N. Mehta and Company had a Manager or Managing Director Mr. Parekh. It is quite clear that when the carters brought the goods to the Railway Station, some person in charge of the goods employed an individual called Gangaram Punaji to act as *muccadam*, that is to say, to be the forwarding agent despatching the goods on the Railway. The consignors defendants say that the *muccadam* whom they were in the habit of employing was another individual altogether and they say that they gave no authority to any one to get Gangaram Punaji to do any work for them. It is in no way explained how the carter or foreman came to employ Gangaram Punaji or, owing to what circumstances or under what instructions, Gangaram Punaji was employed; but it is quite clear that he was the person who, in fact, delivered these goods for carriage to the defendants' Railway. When he did so deliver the goods, the Railway Company took the view that the cases were damaged and defective. Gangaram Punaji agreed and signed the Risk Note in Form A. As regards the second consignment, Risk Notes both in Form A and Form B were signed by Gangaram Punaji. So far as the Risk Note B is concerned, it is clear that the rate of freight would be less; so far as the Risk Note in Form A is concerned, it does not appear that the rate of freight would be less, though in such circumstances the consideration for which Risk Note A is executed is that it obviates the expense of putting the packages into proper condition before consignment and also that the sender gains in the matter of weight upon which freight has to be charged. In this case, what happened was that these goods were damaged in the process of carriage and the suit was brought against the several Railways concerned in the carriage. Ultimately, it has been decreed against the appellant Railway only—the Great Indian Peninsula Railway Company—which was the railway to whom the goods were handed over.

The first question which arises is this: It is said that Gangaram Punaji had no authority from the consignors and that his

signature does not bind the consignor. It is said, secondly, that he was a man who could not read English and that it is not shown whether he knew what he was signing. As regards the Risk Note A, it is said that the learned Judge has found as a fact that the goods were, in proper packing cases, that there was no defect in the packing, and that the defendant Railway can, therefore, take no advantage from the Risk Note in Form A.

These questions turn upon s. 72 of the Indian Railways Act (IX of 1890). By that Act, the responsibility of a Railway Company is *prima facie* the responsibility of a bailee under ss. 152 and 161 of the Indian Contract Act, but agreement may be made limiting that responsibility and "an agreement purporting to limit that responsibility shall, in so far as it purports to affect such limitation, be void, unless it is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the animals or goods, and is otherwise in a form approved by the Governor-General in Council." The phrase "the person sending or delivering to the Railway Administration" is an important phrase in the Indian Railways Act. It appears in more than one section in one form or another. Its equivalent is to be found in s. 58 and also in ss. 73 and 75. As a matter of fact, it would appear that the phrase is taken from s. 7 of the English Railway and Canal Traffic Act of 1854, where the words of the last proviso are: "Unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage." Now, it is quite clear that a Railway Company when goods are tendered to it for carriage cannot hold an inquest as to the right of the person delivering to deal with the goods, the property in the goods or the authority given by the owner to the person presenting the articles for carriage; and, when one comes across the phrase "the person sending or delivering to the Railway Administration" it is clear that this fact is being recognised by the Statute. Under the same words in England, no difficulty has apparently been found. I find in English text books that this matter is treated as clear upon the face of s. 7 of the Act of 1854. I find, for instance, in Disney's Law of Carriage by Railway, 6th Edition, at page 37: "The consignor,

therefore, may be bound not only by the signature of himself or his agent but also by the signature of the person who delivers the goods to the Company whether, in fact, that person had authority to sign or not." In Alan Leslie's Law of Transport by Railway, the matter is put thus: "The section further provides that the contract may be signed not merely by 'the party' but also by 'the person delivering (the goods) for carriage.' Such person has, therefore, not merely such authority to bind the sender as naturally arises from his position as agent but an absolute statutory authority to bind him and it seems that *prima facie*, he has authority to sign any form of contract." The English cases in which this matter has been more specifically dealt with are three in number: *Kirby v. G. W. Ry.* (1), *Foreman v. G. W. Ry.* (2) and *Aldridge v. G. W. Ry.* (3). There can, therefore, be no doubt that when Gangaram Punaji tendered these goods to the Railway Company he had, so far as any question of contract with the Railway for carriage is concerned, power under the Statute to sign the Risk Notes so as to bind the consignor. If, of course, the question were not a question upon a contract of bailment or affreightment but this suit were a suit by a person claiming in detinue or trover against the Railway Company for having in possession goods belonging to the plaintiff without his authorisation, different principles would apply. That is not the nature of this suit which is a suit on the contract by the consignees.

The next question is this: It is said that because Gangaram Punaji signed not merely his own name but his own name with the addition of "agent for P. N. Mehta & Co." that vitiates the contract. I am of opinion that there is no reasonable ground for this contention. The Risk Notes in this case were signed by the person delivering the goods within the meaning of the section.

So far as regards Risk Note A, there is a finding by the learned Judge that "the cases were in perfect, good and sound condition when they were booked." It does not seem to me that the learned Judge has found that with regard to the coverings as distinct from the cases, but

(1) (1868) 18 L. T. 658.

(2) (1878) 38 L. T. 851.

(3) (1864) 15 C. B. (N. S.) 582; 33 L. J. C. P. 161; 143 E. R. 913; 137 R. R. 667.

it must be reasonably clear that, if at the time of booking the Railway Company was dissatisfied and the person delivering the goods for carriage agreed that the condition of the packages was not satisfactory, it cannot afterwards be made a matter of objection in a suit upon the contract that the packages were in good condition. A person cannot hold to a part of a contract and reject the rest unless there is statutory authority for so doing. In this particular case, what have to be applied are the terms of cl. (b) of sub-s. (2) of s. 72 of the Indian Railways Act. The contract has to be otherwise in a "form approved by the Governor-General in Council." In this case, the contract was in such a form. Whether any of the authorised forms are to be used, and if so, which, is a matter left by the Statute to the parties. In my judgment, it is not open in a suit of this kind to reject the terms of the Risk Note in the manner which is contended for.

The learned Judge in dealing with this case has committed himself to a certain amount of advice to Railway Companies and to a statement of the law which cannot, in my opinion, be accepted. Apart from holding that the Railway Company have to prove the authority of the person delivering the goods, he has gone on to say that the Company must satisfy the Court that the person who signed it knew the terms of the contract and that the contract should be explained to him. He admits that this may be inconvenient but thinks it necessary in law, when a contract is entered into by an ignorant person. The learned Judge in this respect is entirely mistaken. It is well held in England—and the rule is the same in India—that, if a person being illiterate signs a contract thinking it to be of a different character altogether from what it is in fact or if any misrepresentation is made to him as to what he is signing then no doubt the signature will not be binding on him; but it is quite wrong to suppose that it is the legal duty of a Railway Company to see whether the person delivering the goods is ignorant or not or to see that he reads and understands before he signs. It has been held in England that, if a consignor who can read sends an illiterate person to deliver goods to a Railway Administration and that person signs the contract, the contract so

signed by that person is binding on the consignor as though he has signed it himself [*Kirby v. G. W. Ry.* (1)]. Apart from the question of authority to sign, the ordinary law of the land is applicable to a case of this kind and a very good statement of it can be found in Pollock and Mulla's Contract Act in the notes to s. 13. Ignorant people are very commonly sent to deliver certain classes of goods and animals for transit by Railway, e. g., grooms, drivers, carters. It is for the sender if he is not satisfied of their competence to give them instructions or assistance. It is quite wrong to treat a Railway Company in a case of this kind as though it were dealing with a *parda-nashin* woman and taking a transfer of her estate, or as a person in a fiduciary relation to the consignor of the goods.

In the present case Gangaram was professing to be a forwarding agent and might well be very familiar with Railway forms in the vernacular translation.

The only other question that seems to call for observation is whether or not it is open to the defendants now to maintain that the plaintiffs have not proved under Risk Note B that the goods which were not delivered were lost. In my judgment, that is not open in this case because it is evident particularly from the judgment of the trial Court—that it was in no way in dispute: indeed it could not well be in dispute—that the goods which were short delivered having fallen out of damaged cases were goods lost and the appellants on this point cannot be allowed to make a new case.

In my judgment, the appeal should be allowed and the suit should be dismissed with costs in all the Courts as against the defendants appellants. As regards the other defendants, the judgment of the learned District Judge will stand.

Mitter, J.—I agree.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 886 of 1925.

May 17, 1927.

*Present:—*Mr. Justice Ashworth and
Mr. Justice Kendall.**SITA RAM—DEFENDANT—APPELLANT**
*versus***NANKU AND OTHERS—PLAINTIFFS—****RESPONDENTS.***Civil Procedure Code (Act V of 1908), s. 100—
Second appeal—Failure to raise presumption of fact,
whether ground for interference—Presumption of
fact and mere inference, distinction between—Deeds
—Presumption of voluntary execution—Evidence Act
(I of 1872), s. 114.*

There is a presumption of fact that a document signed by a person was voluntarily signed by him, and failure of the lower Court to invoke a presumption of fact of this kind is a ground for second appeal. [p. 251, col. 2; p. 252, l.]

Per Ashworth, J.—The distinction between a mere inference and a presumption of fact is that a presumption of fact is an inference drawn under s. 114 of the Evidence Act. A presumption of fact would also include anything that in English Law would rank as a presumption of law. [p. 251, col. 1.]

Second appeal from a decree of the Subordinate Judge, Benares, confirming that of the City Munsif.

Mr. Kamla Kant Verma, for the Appellant.

Mr. N. C. Vaish, for the Respondents.

JUDGMENT.

Ashworth, J.—This second appeal arises out of a suit brought by the respondents Nanku and Sukhu, against one Sitaram, appellant, for a declaration that a sale-deed purporting to have been executed on the 2nd of June, 1923 by Deosaran defendant No. 2 (*i. e.*, respondent No. 3) was forged, fraudulent and fictitious. The suit was decreed by the trial Court on a finding that the defendant Sitaram had failed to prove the due execution of the deed by Deosaran his vendor.

On first appeal the Subordinate Judge of Benares found that there had been no clear issue in the trial Court as to forgery, and that, by reason of the absence of a clear issue, the defendant No. 1 may have been led into supposing that he was not required to produce evidence of due execution of the deed by Deosaran. He accordingly framed an issue whether the sale-deed was genuine and had been executed by Deosaran, and took fresh evidence.

The defendant Sitaram produced a finger impression expert. He gave evidence that the thumb-impression on the deed purporting to be that of Deosaran agreed with the undoubted thumb-impressions tendered in

evidence. He also produced the scribe by name Bishunath Singh and one Ram Sundar, who purported to be an attesting witness. The conclusion of the Subordinate Judge, after hearing this evidence, was that (a) the thumb-impression on the deed did agree with Deosaran's thumb-impression, (b) that the thumb impression suggested that one of the thumb-impressions of Deosaran was taken on the top of another thumb impression of Deosaran, (c) that the scribe could not be believed, because he being a man of experience would never have allowed one thumb-impression to be taken on the top of another, but in the event of the first impression being obscure would have taken a second one on a different portion of the paper, and (d) that the other witness contradicted one another and the scribe. On these findings the lower Appellate Court came to an extraordinary conclusion. It was that somehow or other the thumb-impression of Deosaran had been fraudulently obtained upon the document, and that the defendant had failed to show that it was Deosaran's thumb-impression voluntarily impressed on the document. In order to give any meaning to this decision we have to suppose that the Subordinate Judge conceived the possibility either of a die having been made from some other thumb-impression of Deosaran and a forged impression by means of the die impressed on the document in question or that Deosaran's thumb-impression had been obtained when he was asleep or drunk.

The first question that arises in this appeal is whether in these circumstances we are entitled in second appeal to interfere with the finding of the Subordinate Judge. There can be no question that it was a finding of fact. As I shall subsequently show, the error of the lower Appellate Court was its failure to invoke a presumption of fact. The question then arises whether such a failure justifies interference in second appeal. The question has not been discussed at length in any decisions to which my attention has been directed. There is authority for holding that a second appeal may be entertained on the ground that the lower Appellate Court has failed to invoke a presumption of fact which would have shifted the burden of proof. A distinction, however, should, in my opinion, be made where the burden of proof is shifted by

a presumption of fact, and where it is shifted by a mere inference. In the case of *Ranee Surnomoyee v. Luchmeeput Doogur* (1) a second appeal was allowed on the ground that the burden of proof which originally was placed on the husband of a Muhammadan wife to prove some property his, because the property was in the name of the wife, was shifted from him upon proof by him that he had paid the purchase price for the property and had had the property under his control. This decision was by no less an authority than Peacock, C. J. He held that a question of law was involved, because the Judge should have directed himself to draw this presumption from the facts mentioned. Again in *Nilatachi v. Venkatachala Mudali* (2) it was held that silence on the part of the plaintiffs to take a step to claim property in the enjoyment of the defendant and over which the defendant was exercising acts of ownership raised a presumption of acquiescence. Both these cases go further than I should be disposed to go; for they interfered on the ground of failure to draw what I should regard as a mere inference and not as a presumption of fact. They are, however, both clear authority for interference in the present case. The distinction that I would draw between a mere inference and a presumption of fact, as already indicated, is that a presumption of fact is an inference drawn under s. 114 of the Evidence Act and will include a presumption of the nature described in the illustrations. A presumption of fact should in my opinion, also include anything that in English Law (though not under the Indian Evidence Act) would rank as a presumption of law. The presumption which the lower Appellate Court failed to make in this case was a presumption that when signature on a document is proved by a certain person, it is for that person to prove that it was affixed by him otherwise than voluntarily. According to Taylor on Evidence, Third Edition, page 145, "Courts of Law are in general bound to presume *prima facie* in favour of deeds which appear to have been duly executed." "Appear" must mean here which bear a proved signature. The presumption then which the lower Appellate Court, I shall hold,

ought to have made was a presumption that in England would have been a presumption of law. It is difficult to find a formula to express the difference between presumptions of fact of the nature indicated by me and mere inferences. Phipson in his work on Evidence says: "The burden of proof may be shifted not alone by rebuttable presumptions of law but by presumptions of fact of the stronger kind or indeed by any species of evidence sufficient to raise a *prima facie* case."

My conclusion then is that a second appeal lies on the ground of the failure of the lower Appellate Court to invoke a presumption of fact "of the stronger kind" (by which I mean inferences of the nature illustrated in s. 114 of the Evidence Act and inferences that in English Law would be legal presumptions), and that there is even authority for holding that the failure of the lower Appellate Court to draw any mere inference that it should have drawn would justify interference in second appeal, though I would not follow authority to this extent. The consequence is that in this case a second appeal, in my opinion, lies.

It appears desirable to state that the probabilities were all against this document being a forgery. Deosaran had mortgaged his land to the defendant Sitaram on the 12th of August, 1915, for Rs. 300. It is said that, by this sale-deed now impeached, on the 2nd of June, 1923, he sold the equity of redemption to Sitaram for another Rs. 400. Then we get the fact that he executed a further sale-deed in favour of the plaintiffs Nanku and Sukhu, on the 5th of June, 1923. He got by this last sale-deed a sum of Rs. 1,100. Consequently it was all to the interest of Deosaran to deny his execution of the sale deed, impeached in the present suit, and no one could place any reliance on his evidence. It does not appear that the Subordinate Judge did place any reliance on his evidence, but the case started with the probability in favour of the execution of the impeached document having been executed being greater than the reverse. Then we get the clear evidence of the thumb-impression expert that the thumb-impression mark on the document corresponds to Deosaran's genuine thumb-impression. This evidence is of much more value than the ordinary evidence of an expert. We are not aware

(1) 9 W. R. 338.

(2) 1 M. H. C. R. 131.

that the test of similarity has ever failed. The Subordinate Judge admitted that this evidence conclusively proved the thumb-mark to correspond with that of Deosaran. This being so, he had evidence of a document which in other respects was not open to suspicion and was not improbable. He attempts to discount the evidence of the thumb-impression expert by his own impression that one thumb mark had been placed on the top of another. This impression is not one that we are disposed to share. It was not shared by the thumb-impression expert himself. It appears then to us that at this stage it was for the plaintiffs to show that the thumb-impression of Deosaran had been obtained by some improper means either when he was asleep or in some such way. There was a presumption of fact that the document which bore his thumb-impression was voluntarily executed by him. Instead of invoking this presumption the lower Appellate Court proceeded to require the defendant to produce all his evidence, and on the ground that this evidence was discrepant it found that the defendant had failed to prove the genuineness of the document. This we consider to have been a failure to invoke the presumption that arose from the proof of the thumb-impression on the document being the thumb-impression of Deosaran. It is obvious that if a person, who has proved execution by showing that a signature or thumb-impression on a deed is the signature or thumb-impression of the alleged executant, is required to go on and prove, after a considerable lapse of time, due execution by putting forward an attesting witness and other witnesses whose story will agree in every detail, there will be a great risk of injustice and an intolerable burden thrown upon the parties setting up a document. This was not a document which required attestation. The lower Appellate Court should have in the circumstances of the case rested content with proof of the thumb-impression of Deosaran in the absence of the plaintiffs being able to produce any evidence that the thumb-impression was improperly obtained. I consider, therefore, that the finding of the lower Appellate Court, though a finding of fact, was one based on its failure to presume the genuineness of the document in the absence of any evidence believed by the Court led by the plaintiffs to

prove that the deed was otherwise than properly executed. For these reasons, we would allow the appeal and dismiss the suit with costs throughout.

Kendall, J.—I agree. The lower Appellate Court has found that Deosaran's thumb-impression is on the sale-deed in suit. It did not, therefore, rely on the evidence of Deosaran himself in the first Court to the effect that he had not put his thumb-mark on the sale-deed. Having arrived at this decision the lower Appellate Court had no evidence whatever produced before it on which it could base a finding that the thumb-impression of Deosaran was put on the sale-deed in any irregular manner, and that finding is, therefore, not based on any evidence. For this reason I agree that we are justified in interfering with the decision of the lower Court in second appeal.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1123 AND 1124 OF 1924.

June 24, 1927.

Present :—Sir George Claus Rankin, Kt., Chief Justice, and Mr. Justice Mitter.
THE GREAT INDIAN PENINSULAR RAILWAY Co. LTD.—DEFENDANTS—
APPELLANTS

versus

JESRAJ PATWARI AND OTHERS—
PLAINTIFFS—RESPONDENTS

Railways Act (IX of 1890), s. 72—Risk Note Form B—Suit for damages for non-delivery—Burden of proof of loss—'Loss,' meaning of.

In a suit against a Railway Company for damages for non-delivery of part of a consignment, unless the fact of the loss is admitted by the plaintiff, it is necessary for the Railway Company, to get the benefit of the clause in Risk Note B which exempts it from liability for loss, to show that the goods are lost, or at least to show, in the first instance that the goods are not then and there in the control of the Railway Administration, so that they might have been delivered to the proper consignee. [p. 254, col. 1.]

Ghelabhai Pansi v. East Indian Ry. Co. (1), East Indian Ry. Co. v. Jagpat Singh (2) and Gopiram Behariram v. Agent, E. I. Ry. (3), followed.

There may be a 'loss' within the meaning of Risk Note B although the loss is caused by theft of the servants of the Railway Administration or its agents or by wilful neglect of the Railway Administration itself. [p. 253, col. 2.]

Appeals against the decrees of the Subordinate Judge, Bogra, dated the 5th March, 1924, affirming those of the Munsif, Second Court, Bogra, dated the 13th August, 1923.

Babu Surendra Nath Guha and Ramendra Mohan Majumdar, for the Appellants.

Mr. Sarat Chandra Ray Chowdhury, Babus Biraj Mohan Majumdar and Santi Kumar Ray Chowdhury, for the Respondents.

JUDGMENT.

Rankin, C. J.—This is an appeal by the Great Indian Peninsular Railway Company Limited against a decree whereby they have been ordered to pay compensation to the plaintiff in respect of non-delivery of part of two bales of piece-goods. It would appear that the goods in question were forwarded in two consignments delivered to the Great Indian Peninsular Railway Company at the Victoria Terminus in Bombay in November and December respectively of 1920. For the present purpose it need only be stated that these goods were consigned upon the terms of the Risk Note B—a form of note approved by the Governor-General in Council under s. 72 of the Indian Railways Act (IX of 1890).

The first question which has been raised by the Railway Company in this appeal has reference to the point decided against it in the lower Court that the Risk Note B is not applicable to the case. The contention that the Risk Note is not applicable to the case arises out of the circumstance that the person who actually tendered the goods to the Railway Company for carriage signed his name on behalf of O. Karnani in the place provided for the signature of the sender. The Courts below have held that as it is not shown that he had authority of the sender to sign his name the Risk Note is invalid and does not apply in the present case. That contention which is of great importance to the Railway Company and which no doubt accounts for this matter being brought before this Court. I do not think it necessary to decide. I will only say that it seems to me that there is much to be said on behalf of the Railway Company before such a contention can be accepted. I pass from that matter because, in my judgment, that important question does not arise at all. We ought not, therefore, to decide it.

Assuming that Risk Note B applies, the learned Advocate for the respondent contends that the judgment of the lower Appellate Court is right in this respect that the burden was on the Railway Company

independently altogether of the exception clause in the form, to show that there had been a loss of part of these two bales in the present case. Now, when one turns to Risk Note B, one finds that it is a limit put upon the general liability of the Railway Company. That general liability is not the liability known to English Common Law as the liability of a common carrier, but is the liability of a bailee as defined in ss. 152 and 161 of the Contract Act; in other words, the Railway Company is not an insurer but is under the duty of taking a certain measure of reasonable care. The purpose of Risk Note B is to provide that notwithstanding there may have been a breach of the duty to take reasonable care, the Railway Company shall not be liable for certain things except in certain special cases. The form says that the Railway Company shall not be legally liable for the following things or any of them, namely, "any loss, destruction, or deterioration of or damage to the said consignment." There is an exception which does not apply in the present case at all because to come within that exception there must be "a loss of a complete consignment or of one or more complete packages." But although that exception does not in the present case apply the language of it throws some light upon the meaning of the previous words in the form—upon the meaning, in particular, of the words "any loss" in the previous part of it. The exception speaks of a loss, "due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants," and so forth. It is clear, therefore, that as the word "loss" is used in the form there may be a loss although it is caused by theft of the servants of the Railway Administration or its agents, and there may be a loss although it is due to wilful neglect of the Railway Administration itself.

We have, therefore, to apply in the light of the language used in the exception the phrase "any loss, destruction or deterioration of, or damage to, the said consignment." If the plaintiff's claim were for damages for the Railway Company's damaging the consignment, damages for the deterioration of the goods comprised in the consignment or damages for the destruction of the consignment, then *prima facie* the contract itself would be a complete answer and the plaintiff need not get on at all unless he got on the exception clause. The plaintiff's case is for damages for

non-delivery of part of the consignments and the questions arise, first whether it is necessary that it should be shown that there has, in fact, been a loss of part of the consignments and, secondly, whether the burden of showing that there has been a loss is on the Railway Company or on the plaintiff. Both these matters are covered by decisions of Courts co-ordinate with this Court. The form says that the Railway Company is to be "harmless and free from all responsibility for any loss," and, therefore, it is *prima facie* for the Railway Company to bring itself within that warranty. It is not necessary in the present case to endeavour to define what circumstances would come under the word "loss." If, for example, the Railway Company by negligence or mistake had parted with the goods to a wrong consignee I am very far from holding that that would not be "loss" within the meaning of the section. If the Railway Company still had the goods under its control and could have produced them or if the Railway Administration had converted them to its own use as distinct from some servant of theirs converting them in wrong of his masters to his own use, again it would not appear that the circumstances would be covered by the phrase "any loss." It is, however, necessary for the Railway Company, to get the benefit of this warranty, to show that the goods are lost, at least to show in the first instance that the goods are not then and there in the control of the Railway Administration, so that they might have been delivered to the proper consignee. In my judgment, therefore, on both the propositions—the necessity of showing that there has been a loss and that the initial burden of proof is on the Railway Company the cases which I shall now refer to have to be followed.

The first case is the case of *Ghelabhai Pansi v. East Indian Ry., Co.* (1) which was a decision of Chief Justice Sir Norman Macleod and Mr. Justice Shah. That case proceeds upon certain English cases and upon a previous Bombay case decided by Mr. Justice West in 1883. It definitely lays down the principle that the burden is on the Railway Company to show that the goods have been lost. Mr. Justice West's language is this: "The natural presumption under such circumstances is that all the goods, arrived, and that the

Company was in a position to deliver them." The reasoning of that case is followed by a Division Bench of this Court presided over by Mr. Justice Suhrawardy and Mr. Justice Page in the case of *East Indian Ry., Co. v. Jagpat Singh* (2) and it was this case which was really in the mind of the lower Appellate Court which decided the present case. Again in the case of *Gopiram Behariram v. Agent, E. I. Ry.* (3), Acting Chief Justice Chatterjee and Mr. Justice Cuming held that "before the plaintiff is called upon to prove that the goods were lost by the wilful neglect of, or theft by, the Railway servants, it must be shown that the goods have been lost; and unless the fact of the loss is admitted by the plaintiff, the onus is, in the first instance, on the Railway Administration to prove that the goods have been lost and it will be then for the plaintiff to show that the loss was due to the wilful neglect of, or theft by, the Railway servants." That statement of law does not take account of the fact that the exception clause in Risk Note B, as it then stood, covered cases only where a complete consignment or package, part of the consignment, had been lost. Otherwise, it is in entire agreement with the other cases I have cited.

We have to consider whether we should depart from these authorities. In my judgment, it must be that the Railway Company seeking the advantage of the guarantee that they will be held harmless for certain things must have the duty, in the first instance, of bringing themselves within the language of that guarantee. I have considered whether the reasoning in the Bombay case and in the subsequent cases in so far as they proceed upon English cases and the Indian cases prior to the Indian Railways Act of 1890 should be discredited from on the ground that prior to 1890 in India and up to the present time in England the liability of a Railway in respect of goods in the absence of a special agreement would be that of a common carrier. No doubt, in these circumstances, it is easier to say that the burden of proof is, in the first instance, on the plaintiff. It seems to me, however, that where the general liability of a Railway Company is merely that of taking a certain measure of reasonable care it is still correct to say that

(2) 79 Ind. Cas. 126; 51 C. 615; 23 C. W. N. 1001; A. I. R. 1924 Cal. 725.

(3) 94 Ind. Cas. 702; 30 C. W. N. 209; A. I. R. 1926 Cal. 612.

(1) 63 Ind. Cas. 241; 45 B. 120.

prima facie, until certain other facts are proved, the Railway Company taking reasonable care of goods would have them at the end of the journey to deliver to the consignee. Even although the Railway Company is not any longer a common carrier in India it is, in my opinion, still right to say that the Railway Company, to get the benefit of the special contract in this Risk Note, must bring itself under the terms of the warranty and prove, unless it is admitted, that there has been a loss. In my judgment this consideration concludes the present, appeal.

It has been pointed out that in the trial Court not much attention appears to have been paid to this particular point. It is not shown to us, however, that in the plaint there was any admission that the goods had been lost and the form of the issue is such that the Railway Company is not entitled to assume that it did not have to prove that the goods had been lost. No doubt, the point in many cases—and probably in this case—is a purely technical one. It may well be that the Railway Administration would have had no difficulty at all in showing that at the time these goods should have been delivered, they were lost to the Railway Administration. The Railway Company must remember when defending suits under this Risk Note what the law is. They must take proper measures to show at all events that the goods were lost to the Railway Administration at the time when they ought to have been delivered.

In my judgment, that being so, this appeal fails and must be dismissed with costs.

This judgment governs Appeal No. 1124 which is also dismissed with costs.

Mitter, J.—I agree.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 286 OF 1924.

April 26, May 28 and June 29, 1927.

Present:—Mr. Justice Lindsay and

Mr. Justice Sulaiman.

On difference of opinion

Before Mr. Justice Mukerji.

SHYAM LAL AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

SOHAN LAL AND OTHERS—DEFENDANTS

—RESPONDENTS.

Transfer of Property Act (IV of 1922), s. 52.—Lid

pendens—Transferee, how far bound by decree—Mortgage pending litigation—Compromise decree—Mortgage-debt and part of mortgaged properties allotted to stranger—Mortgagee, whether bound by such decree.

During the pendency of a litigation concerning certain properties between A and B, A mortgaged a portion of them to C. The litigation was then compromised and under the compromise decree half of the properties mortgaged to C was given to A and the other half to B, and it was further provided that B should discharge the whole of the mortgage-debt due to C. In a suit by the representatives of C to enforce the mortgage against the mortgaged properties in the hands of the representatives of A and B:

Held, Per Sulaiman and Mukerji, J.J. (Lindsay, J., dissenting), that the mortgage was enforceable only against the half of the mortgaged properties which was held by A's representatives and was not enforceable against the other half given to B under the compromise decree. [p. 261, col. 2]

The rule of *lis pendens* is enacted for the benefit of the 'other party' to the litigation and not for the benefit of the party making the transfer. [p. 261, col. 1.]

Though a transferee *pendente lite* is a representative of the transferor and bound by the decree so far as it goes against his transferor he cannot for all purposes be treated as if he were a party to the suit. [p. 257, cols. 1 & 2; p. 258, col. 2.]

Per Lindsay, J.—A transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and, if he is bound by the decree, he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part. [p. 259, col. 1.]

First appeal from a decree of the Subordinate Judge, Budaun.

Messrs. Surendro Nath Sen, B. Malik and Harmandan Prasad, for the Appellants.

Messrs. Uma Shankar Rajpai Surendra Nath Gupta and Shabd Saran, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for sale on the basis of mortgage-deed dated the 3rd August, 1911, executed by Tori and Duli in favour of Sheikh Wahid-ud-din for Rs. 1,000 at 2 per cent. per mensem compound interest. The property mortgaged consisted of 8 *biswas* out of 18 *biswas* 10 *biswansis* *zemin-dari* share in village Urena. The present plaintiffs claimed to be the transferees of the mortgagee rights under a sale-deed dated 12th May, 1913.

It appears that in 1908 Tori and Duli had brought a suit for possession as reversioners against Damodar Das, defendant No. 2, who was in possession of the estate, alleging himself to be the adopted son of the deceased male owner. The suit was decreed by the Court of first instance and Damodar Das appealed to the High Court. While

the appeal was pending, Tori and Duli executed the mortgage-deed of the 3rd August, 1911, which is in dispute in the present case. Subsequently on the 17th March, 1913, Tori and Duli on the one hand, and Damodar Das on the other, compromised their claims. It was agreed between them that Tori and Duli would take half the share in the property and that Damodar Das would take the other half. It was also provided that Damodar Das should discharge the debt due to Wahid-ud-din and that neither Tori nor Duli nor their property should be liable therefor. Wahid-ud-din, the mortgagee, was no party to this compromise. A decree was framed in terms of the said compromise. It was after this decree that Wahid-ud-din executed the sale-deed of the 12th May, 1913, in favour of the present plaintiffs, for a sum of Rs. 1,471.

One common plea raised by all the defendants is that it was Damodar Das himself who took this sale-deed in 1913 *benami* in the name of the present plaintiffs, in order to defeat his creditors and transferees. It was pleaded that by this arrangement Damodar Das has really discharged the mortgage of 1911 which under the compromise decree he was bound to pay up.

The representatives of Tori and Duli pleaded that the mortgage being *pendente lite*, Wahid-ud-din and his representatives were bound by the compromise decree, and that inasmuch as that decree provided that the share of Tori and Duli would not be liable for the mortgage debt, the suit against them should be dismissed.

Damodar Das did not put in any written statement, but the position taken up by his representatives was that the plaintiffs not being a party to the decree, could not take advantage of it, nor could they ignore one part of the decree and try to enforce the other part. The learned Subordinate Judge has on the question of fact come to the conclusion that the purchase of 1913 was made by Damodar Das himself and the mortgage-debt has been discharged. On the question of law he was inclined to the view that "so far as the moiety of Tori and Duli is concerned, it is not absolved from liability, and so far as the other moiety is concerned, it is equally unaffected by the compromise".

The plaintiffs have appealed from the decree and urge that the whole claim should be decreed against the entire share.

[His Lordship then considered the

question of fact whether the purchase of 1913 was a *benami* transaction and after discussing the evidence disagreed with the finding of the Court below, and proceeded :—]

The next question that requires consideration is whether both or either of the moiety shares is liable to be sold. Mr. Bajpai on behalf of Ram Sarup, a transferee from Sohan Lal, son of Duli and a representative of Tori and Duli, has strongly urged that the plaintiffs being representatives of Wahid-ud-din, who was *pendente lite* transferee, are bound by the compromise decree and by all its terms. His contention is that a transfer *pendente lite* is subject to the terms of the decree that is eventually passed and further that a transferee *pendente lite* is really a representative of one of the parties, and as such is bound by the decree. He, therefore, contends that as a result of the compromise decree, the half share which was occupied by Tori and Duli should be exempt from all liability, and as directed by the decree the entire debt should fall on the half share of Damodar Das in the hands of his representatives. Strong reliance has been placed by him on the case of *Sheo Narain v. Chunni Lal* (1), and the case of *Gulzari Lal v. Madho Ram* (2), and on the remarks contained in those judgments that a *pendente lite* transferee is bound by the decree and is a representative of a party.

It seems to me that those remarks should be understood in the light of the facts of those cases. The expression "subject to the decree" or "bound by the decree" are certainly true in one sense. It would, however, not be fair to substitute these expressions in place of the words actually used in s. 52 of the Transfer of Property Act, in order to give it a meaning. What that section provides is that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein. What we have, therefore, to see is not whether the enforcement of the mortgage would in any way affect the rights of the mortgagors, Tori and Duli, but whether its enforcement would affect the rights of Damodar Das. As observed by their Lordships of the Privy Council in the case of *Faiyaz Husain Khan*

(1) 22 A. 243; A. W. N. (1900) 51; 9 Ind. Dec. (N. S.) 1193.

(2) 26 A. 417; A. W. N. (1904) 61; 1 A. L. J. 65.

v. *Prag Narain* (3), the correct mode of stating the doctrine of *lis pendens*, which s. 52 is concerned, is, as was observed by Cranworth, L. J. in an earlier case* "*pendente lite* neither party to the litigation can alienate the property in dispute, so as to affect his opponent". The transferor himself cannot complain that his rights are affected by the transfer. A grantor cannot derogate from his own grant. Section 52 is, in my opinion, not intended for the protection of transferors in a pending litigation. So far as they themselves are concerned, they are bound by their own transfers. The other parties thereto require to be protected otherwise, in the words of Turner, L. J., quoted by their Lordships, "it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail". Now Damodar Das was the party other than the transferors, Tori and Duli. It has to be seen whether the rights of Damodar Das will be affected if the mortgage is enforced against the half share of Tori and Duli. It seems to me that even if Damodar Das and his representatives be temporarily relieved of their liability by the enforcement of the mortgage against the share of Tori and Duli, their rights are in no way injuriously affected thereby. I do not think that a temporary relief of his liability is tantamount to affecting the rights of Damodar Das. If any part of the mortgaged property is retained by the mortgagors under the decree, I see no good ground for holding that such property is absolved from its liability.

The argument that the *pendente lite* mortgagee is a representative of his mortgagors and is bound by the decree, cannot be pushed to an extreme limit. The cases relied upon by Mr. Bajpai were cases where the purchaser of the property in dispute was allowed to raise objections in the execution department as a representative of all the judgment-debtors. That is quite a different matter. In such cases the property has devolved on the transferee and he is certainly a representative of the judgment-debtor *qua* that property. It is also undoubtedly true that a *pendente lite* transferee is bound by the decree so far as it goes against his transferor, but it is:

(3) 29 A. 339; 11 O. W. N. 561; 31 I. A. 102; 4 A. L. J. 344; 5 O. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 656; 2 M. L. T. 191; 10 O. C. 314 (P. C.).

* See 44 E. R. 842—[Ed.]

be a different thing to say that such a transferee should be treated for all purposes as if he were a party to the suit. Let us take an extreme case by way of illustration. A property is in dispute in a suit between A and B. While the suit is pending, A mortgages the property to C. Having transferred it, A enters into a compromise with B and on paying him some cash consideration, retains the entire property but throws the liability to pay the mortgage debt on B. The compromise specifically states that the property in the hands of A will be free from the liability of the mortgage and that B will be personally liable to pay the debt to C. Can, in such a case, A insist on C suing B on his personal liability? Can such a compromise put an end to the charge which had been created in favour of C? A transfer *pendente lite* is not absolutely void but is only voidable at the instance of the other party thereto whose rights are affected thereby. In my view, in such a case, the charge will remain alive. On the same principle I am of opinion that the mortgagees are entitled to enforce the charge against the half share retained by Tori and Duli which has now devolved on their representatives. It would be no consolation to the mortgagees to suggest that they may have a remedy against Damodar Das. That remedy, as will be shown hereafter, is not open to them, and in any case, even if it were open, the mortgaged property would be reduced to half, if the compromise decree means that a charge was to be created on the half share of Damodar Das.

As regards the moiety share of Damodar Das, I am, in the first place, very doubtful whether the plaintiffs, when their predecessor Wahid-ud-din was no party to the compromise decree, can enforce it against Damodar Das' representatives. No doubt in equity Damodar Das and his representatives are bound to pay the amount, but if a breach is committed by them, the representatives of Tori and Duli are entitled to damages. The plaintiffs cannot be deemed to be a party to the compromise so as to be in a position to take advantage of it against the Will of Damodar Das and his representatives. In the second place, I feel another difficulty in giving the plaintiffs a decree against this half share also. No doubt, the compromise itself provided that Damodar Das would be liable for the

amount and it may, therefore, be stated that Damodar Das' rights under the decree would not be affected by the enforcement of the mortgage against him. It, however, seems to me that the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli on the only ground that they are not bound by the decree so far as that interest is concerned. It is by ignoring the provisions of the decree that they can succeed against Tori and Duli. At one and the same time they cannot be allowed to take advantage of the very decree which they ignore in that way, and to enforce that decree against the representatives of Damodar Das. It would be approving and reprobating the compromise simultaneously, which cannot be tolerated. I, therefore, think that the plaintiffs' only remedy is against the representatives of the transferors of their predecessor, and they cannot be allowed to proceed against Damodar Das' representatives.

I would, therefore, decree the claim for the entire amount due on the mortgage against the half share of Tori and Duli which is now in the possession of Ram Sarup, defendant No. 3, and would dismiss the claim *in toto* against Damodar Das and his representatives.

Lindsay, J.—The facts are all set out in the judgment of my learned brother and I agree with him in finding that the Court below was wrong in holding that the assignment of the mortgage in suit was a *benami* transaction.

There remains the question of law, namely, the application of the doctrine of *lis pendens* to the facts of the case.

It is not disputed that the mortgage now in suit was executed *pendente lite* by Tori and Duli, on the 3rd August, 1911. The litigation in which Tori and Duli were arrayed against Damodar Das was terminated by a decree of this Court passed in terms of a compromise on the 17th March, 1913 (see the decree in First Appeal No. 168 of 1911).

By the mortgage of the 3rd August, 1911 an 8-*biswa* share of *Mauza Urena* was hypothecated and this share was one of the items directly and specifically in suit in the litigation concluded by the High Court decree above-mentioned. That decree declared that a moiety of this 8-*biswas* share was awarded to the appellant Damodar Das and was to remain in his possession. It was also declared that Damodar Das was

to discharge the debts incurred in favour of Shafi-ud-din (*sic*) and Jammu of Sangrampur and that neither the plaintiffs (Tori and Duli) nor their property were to be liable therefor. The name Shafi-ud-din in this decree is a mistake for Wahid-ud-din. The other half of this share and several other items of property were by the decree awarded to the respondents, Tori and Duli, subject to their discharging a debt owing to Mathura Prasad of Pilibhit. It was declared that neither Damodar Das nor his property were to be liable for this latter debt.

It cannot, I think, be seriously argued that if Wahid-ud-din the mortgagee had been a party to this litigation he would have been bound by the decree and could only enforce his mortgage against the moiety of the 8 *biswas* awarded by the decree to Damodar Das. He was not, however, a party. On the other hand he was a transferee *pendente lite* and there is, I think, ample authority for the proposition that such a transferee is as much bound by the decrees passed in the *lis* as if he had been an actual party to it.

My learned brother has quoted one of the observations made by Lord Cranworth in the well-known case of *Bellamy v. Sabine* (4). I should like to supplement this by a further quotation from the same judgment. It is as follows:—

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

It is in the sense indicated in this passage that I interpret the judgments of their Lordships of the Privy Council in *Radha-madhab Haldar v. Monohar Mukerji* (5) and *Moti Lal v. Karrah-ul-din* (6).

In the Full Bench decision of this Court, *Gulzari Lal v. Madho Ram* (2) the former

(4) (1857) 1 De G. & J. 566; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 44 E. R. 842; 118 R. R. 228.

(5) 15 C. 756; 15 I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. C. J. 211; 7 Ind. Dec. (N. S.) 1088 (P. C.).

(6) 25 C. 179; 24 I. A. 170; 1 O. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).

of these two judgments was cited by Banerji, J., who at page 463* of the report expressed himself as follows:—

"In *Radhamadhub Holdar v. Monohar Mukerji* (5) their Lordships of the Privy Council held that a person who had, during the pendency of a mortgagee's suit for sale, purchased the mortgaged property in execution of a simple decree for money was bound by the proceedings and the decree in the suit".

A still earlier decision of this Court, *Hukm Singh v. Zanki Lal* (7) laid down that a purchaser *pendente lite* being bound by the decree against the persons through whom he claimed could not be permitted to go behind the decree so as to show that there was an error patent on the face of the decree.

With these authorities behind me I take the view that a transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and, if he is bound by the decree, he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part. The principle appears to be that a person who takes a transfer from any of the parties to a pending litigation thereby puts himself in privity with the suit, and must be treated, not as a stranger to the suit, but as a party to it and consequently bound by the terms of the decree in full.

It is true that in the case now being considered the final decree which was passed by this Court was founded upon a compromise. But that fact does not interfere with the application of the doctrine of *lis pendens*. A decree based upon a compromise is just as much binding as a decree founded upon a decision upon the merits. I may refer in this connection to the Full Bench decision of the Madras High Court, *Annamalai Chettiar v. Malayandi Appaya Naik* (8). And I also note that this matter was not contested before us.

Applying the above principles to the case before me I am of opinion that the plaintiffs in this mortgage suit can enforce their mortgage only against that moiety of the property which the High Court's decree awarded to Damodar Das. Neither the latter nor his representatives who are impleaded

(7) 6 A. 508; A. W. N. (1884) 177; 4 Ind. Dec. (N. S.) 153.

(8) 29 M. 426; 1 M. L. T. 145; 16 M. L. J. 372 (F. B.).

*Page of 26 A.—[Ed.]

as defendants can complain that the enforcement of the mortgage against the property in their hands "affects" the rights of Damodar Das under the High Court's decree. On the contrary the mortgage would, in this way, be enforced in strict accordance with the terms of that decree.

On the other hand, that decree by its terms has relieved the moiety share awarded to Tori and Duli of all liability for the discharge of the mortgage-debt now sought to be enforced; it has also absolved Tori and Duli from all personal liability for this debt, and the declarations to this effect are an integral part of the High Court's decree which, for the reasons given above, is binding upon the transferee *pendente lite* to the full extent of its terms.

I cannot accept the argument that Tori and Duli or their representatives are debarred from availing themselves of these declarations on the ground that by doing so they are seeking to derogate from their own grant. They are, in my opinion, entitled to say that under the decree both they and their property stand free of all liability for this claim; and a mortgagee who takes a precarious transfer from one of the parties to a pending suit, and who knew, or must be taken to have known, that his transfer was subject to the result of the litigation then pending ought not to be heard to say that his transferor is seeking to derogate from his own grant because the decree which concludes the litigation has deprived the transferor of a portion of the property to which he could still make title at the date of the mortgage.

For these reasons I hold that the appeal should be allowed in part and that the plaintiff should be given a decree for sale against Damodar Das and his representatives in respect of the moiety share of the mortgaged property in their possession. I would dismiss the suit as against the representatives of Tori and Duli with costs.

By the Court.—The members of this Bench have differed on the question whether under the circumstances set forth above, the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli, or the half share of Damodar Das, or both, or neither. Accordingly, under s. 98 of the Civil Procedure Code we refer the question as to what reliefs the plaintiffs are entitled to in this case, to one or more of the other Judges of this Court,

whom the Hon'ble the Chief Justice may select,

The point of law was referred to Mukerji, J., and his Lordship decided as follows:—

Mukerji, J.—This first appeal was before two learned Judges of this Court for disposal. They differed on a point of law and that question alone has been referred for my opinion.

The facts involved, so far as I am concerned, are these. Two persons, Tori and Duli, claimed certain properties as belonging to one Than Chand against one Damodar Das and others. Damodar Das was the principal claimant of the property on the other side. The suit was instituted in 1908 and was decided in the then plaintiffs' favour on the 21st of February, 1911. After this decree was passed in their favour Tori and Duli mortgaged an 8-*biswas* share in the village Urena to one Wahid-ud-din, the predecessor-in-title of the present plaintiffs. A first appeal was filed by Damodar Das in this Court and it was settled by a compromise arrived at on the 7th of March, 1913. It was agreed as between Tori and Duli on one side and Damodar Das on the other that certain properties including a half share in the 8 *biswas* of Urena should go to Tori and Duli and they should discharge a certain debt due to one Mathura Prasad. Certain other properties including the other half share in the 8 *biswas* of Urena were given to Damodar Das and he agreed to discharge among other debts, the debt due to Wahid-ud-din (the name of Wahid-ud-din appears to have been wrongly given as Shafi-ud-din in the compromise). It was further agreed that, so far as the debts undertaken to be paid by Damodar Das were concerned, neither Tori nor Duli nor their properties were to be liable.

The plaintiffs have brought the suit, out of which this appeal has arisen, to recover Rs. 11,000 and odd by sale of the entire 8-*biswas* share mortgaged to Wahid-ud-din on the 3rd of August, 1911. The entire 8 *biswas* share has passed out of the hands of Tori and Duli and Damodar Das. Tori and Duli's share (4 *biswas*) is now owned by the defendant second party Ram Sarup and the share of Damodar Das is now owned by the defendants 3rd party. There are certain subsequent mortgagees as well as *pro forma* defendants in the suit. The question on which the learned Judges

differed was whether 4-*biswas* given by the compromise decree to Tori and Duli was liable in the hands of the present owners and transferees or whether the 4-*biswas* given by the compromise decree to Damodar Das was liable. The learned Judges appear to have been agreed that the entire 8 *biswas* could not be sold.

Before me, Mr. Malik contended that the entire 8 *biswas* could be sold at the instance of the plaintiffs. There is no force in this contention, for reasons to be presently stated in deciding the point referred to me for opinion.

To start with, no party who has made a transfer to another is entitled to say that the transferee has no right to the property. This is elementary law. This principle has been stretched so far as to enact a rule of law that where a person, without owning a property, purports to transfer it, he would be bound to make good the transfer, if, later he acquires that property; *vide* s. 43 of the Transfer of Property Act. It seems to me, therefore, consistent with principles that Tori and Duli, who made the mortgage, should make it good by means of any property that may be in their hands out of the property mortgaged by them. Now, is there any principle or rule of law which enables Tori and Duli or their representatives to say that by reason of certain things that have since happened they are not liable to make good their promise as contained in the deed of mortgage? The law on the point under consideration has been embodied in s. 52 of the Transfer of Property Act, which, for the purposes of the Indian Courts, contains the entire law on the subject of *lis pendens*. If s. 52 of the Transfer of Property Act should enable Tori and Duli to say that they are entitled to plead that section as a bar to the enforcement of the mortgage against any property in their hands, they will succeed, otherwise not.

Looking to s. 52 of the Transfer of Property Act it runs as follows (omitting unimportant portions):—

"During the active prosecution..... of a contentious suit..... in which any right to immoveable property is directly and specifically in question, the property cannot be transferred..... by any party to the suit..... so as to affect the rights of any other party thereto under any decree or order which may be made therein....." This rule lays down that when a piece of

immoveable property is in contest between two parties, one of the parties cannot transfer it so as to prejudice the other party if the result of the litigation is in favour of the other party. It will be noticed that the rule is enacted entirely for the benefit of the "other party" and not for the benefit of the party making the transfer. The reason seems to be clear. The party who makes the transfer is bound by it while the question is whether the successful party in the litigation, who is not the party making the transfer, is also to be bound by the transfer. The rule is that the "other party" is not to be so bound. There is, therefore, nothing in s. 52 of the Transfer of Property Act which would enable Tori and Duli to say to Wahid-ud-din, "We are not going to keep our contract and make good our word on account of the provisions of s. 52 of the Transfer of Property Act."

In various cases a transferee *pendente lite* has been described as the representative of his transferor so far as the result of the suit is concerned. This description would be perfectly good as between the transferee and the party other than the transferor. As between the transferee and the party who is not the transferor, the transferee *pendente lite* cannot claim a higher right than his transferor. In this sense, no doubt, the transferee is a representative of the transferor. But I have not come across any case in which a question as to rights may have arisen, as between the transferor and the transferee and it has been said that the transferee is a representative of the transferor. As between these two, there is no question of representation. They are parties to a contract, they are bound by the terms. In my opinion we have to look for the whole law on the subject to the provisions of s. 52 of the Transfer of Property Act alone and not elsewhere.

It will be noticed from the statement of facts made above, that Damodar Das made only a personal covenant to pay the debt due to Wahid-ud-din. He did not even say that Wahid-ud-din's debt was a mortgage debt. (I sent for the record of First Appeal No. 168 of 1911 and examined the compromise in the case). The promise on the part of Tori and Duli to Mathura Prasad's debt was purely a personal promise and so was the promise on the part of Damodar Das. Nowhere in the compromise was any property ear-marked as being

liable for the debts of Mathura Prasad or Wahid-ud-din or Jammu. It follows, therefore, that under the compromise decree Damodar Das got an absolute title to a 4-biswas share out of 8-biswas of Urena mortgaged to Wahid-ud-din. Wahid-ud-din being a transferee *pendente lite* could not touch the property which Damodar Das, being the "other party" to the litigation got under the terms of the decree. This is the reason why the 4-biswas in the hands of defendants 3rd party cannot be touched. Further, the undertaking on the part of Damodar Das to pay the debt of Wahid-ud-din was an undertaking which could not be enforced at the instance of Wahid-ud-din who was not a party to the contract or to the decree. He obtained a mortgage of 8-biswas and he could always insist on the terms of his contract being made good by his mortgagors or their representatives, so far as it lay in their power to do so.

My opinion, therefore, is that the mortgage in suit is enforceable against only those 4-biswas of Urena which are now held by the representatives of Tori and Duli and the mortgage is not enforceable against the 4-biswas share given to Damodar Das under the compromise decree.

[The case was disposed of by the Division Bench, (Lindsay and Sulaiman, J.J.) in accordance with the opinion of Mukerji, J. — Ed.]

A. N. A.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2200 OF 1924.

August 8, 1927.

Present:—Mr. Justice Mukerji
and Mr. Justice Mitter.

ARUNADOYA CHAKRABARTY AND
OTHERS—PLAINTIFFS—APPELLANTS
versus

MAHAMMAD ALI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Ejectment suit—Parties—All persons in possession, whether necessary parties—Omission to implead heir of one party—Maintainability of suit—Ejectment suit & suit for damages, difference between

Although an action for damages against one or some of several joint wrong-doers is maintainable, in an action in ejectment all persons in possession should be impleaded as defendants, and there is no distinction in principle, for the purpose of this rule, between the cases of trespassers and of tenants. [p. 263, col. 2.]

[Case-law considered.]

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two; first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants, for in execution of the decree persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree. [p. 264, col. 2.]

Where during the pendency of a suit for ejectment one of the defendants died and his heir was not brought on record:

Held, that the suit could not be maintained in the absence of such heir unless there was evidence to show that the heir was not in possession of the lands sought to be recovered. [p. 265, col. 1.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 28th June, 1924, reversing that of the Munsif, Third Court, Kishoregunj, dated the 30th April, 1923.

Babu Urukram Das Chakravarti, for the Appellants.

Babu Surja Kumar Guha, for the Respondents.

JUDGMENT.—This appeal arises out of a suit which was instituted by the plaintiffs to recover *khass* possession of certain lands on declaration of the plaintiffs' *maliki* right thereto. The plaintiffs' case was that one Rahamat Sheikh held an ordinary *jote*, that he abandoned the same and went away from the village without making any arrangements for payments of rent of the *jote* and that the plaintiffs wanted to take possession of the lands but were resisted by the defendants. Of the defendants against whom the suit was instituted only one, *viz.*, the defendant No. 5 filed a written statement and contested the suit. The substantial defence of the defendant No. 5 was that Sheikh Rahamat's sons sold a portion of the lands to the defendant No. 5 and his brothers (one of whom was the defendant No. 6) in 1316, that since the said sale the defendant No. 5 and his brothers have been in possession of the lands which they had purchased, and the heirs of Sheikh Rahamat were in possession of the remaining lands of the *jote*. The defence

thus put forward was that there was no abandonment but only a transfer of a part of the holding.

The trial Court found that there was a complete abandonment of the holding and decreed the suit except as against the defendant No. 6 who died during the pendency of the suit. He found that the defendant No. 6 had left a mother who was alive, and though the latter was not brought on the record as the heir of the defendant No. 6 the suit would not fail. The defendant No. 5 appealed from this decision. The Subordinate Judge framed three questions for determination: 1st. Is the suit maintainable against the other defendants without making the legal representatives of the deceased defendant No. 6 parties to the suit; 2nd. Was there any abandonment of the holding held by Rahamat and his successors; and 3rd. Are plaintiffs entitled to *khass* possession. He did not determine the 2nd and the 3rd questions as his answer to the 1st question was in the negative. The suit was, therefore, dismissed. The plaintiffs have then appealed to this Court.

The suit as framed in the plaint was against the heirs of Rahamat Sheikh who were the defendants Nos. 1 to 3, the purchasers who were the defendants Nos. 4 to 6, and the sub-tenants the defendants Nos. 7 and 8. It was, as has been already stated, a suit for *khass* possession.

The maintainability of the suit in the absence of the heirs of the defendant No. 6 has been sought to be justified on the footing of the liability of joint wrong-doers, it being urged that it is a joint and several liability. In actions for damages joint wrong-doers may be sued jointly or severally. The principles relating to these actions are well-settled. In Pollock on the Law of Torts, 10th Edition, page 206 they are stated thus: "Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does not matter whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice, he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong,

he cannot sue the other or the others for the same matter, even if the judgment in the first action remains unsatisfied. By that judgment the cause of action '*transit in rem judicatum*', and is no longer available. The reason of the rule is stated to be that otherwise a vexatious multiplicity of actions would be encouraged." As regards joint torts it is said in Addison's Law of Torts, 8th Edition, page 44: "All who aid or counsel, direct or join in, the commission of a tort are joint tort-feasors. 'If divers do a trespass it is joint and several at the will of him to whom the wrong is done', that is to say, he can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants." In *Thurman v. Wild* (1) and other cases it was settled that an accord and satisfaction by one wrong-doer for the whole injury done discharges all the wrong-doers. A release, therefore, given of the whole cause of action to one discharges the others the reason being that the cause of action being one and indivisible some having been released all persons otherwise liable thereto are consequently released: *Cocke v. Jennor* (2). But a covenant or agreement not to sue one of them is no defence to an action against the others: *Hutton v. Eyre* (3). If, therefore, while purporting to release one tort-feasor it reserves rights against another, it will be construed as a covenant not to sue, and not a release: *Duck v. Mayen* (4), *Rice v. Reed* (5). The rule for construing such a document was laid down in the case of *Price v. Barker* (6) where it was held that in determining whether a document be a release or a covenant not to sue the intention of the parties was to be carried out, and if it were clear that the right against a joint debtor was intended to be preserved inasmuch as such a right would not be preserved if the document were held to be a release, the proper construction where this was sought to be done was that it was

a covenant not to sue, and not a release. In *King v. Hoare* (7) Parke B authoritatively laid down—"These considerations lead us, quite satisfactorily to our own minds, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party." See also *Buckland v. Johnson* (8), *Brinsmead v. Harrison* (9) and *Kendall v. Hamilton* (10). *Brinsmead v. Harrison* (9) settled the point: that after recovering judgment against one wrong-doer, a plaintiff cannot sue the other for the same matter, even if the first action remains unsatisfied a proposition which was doubted before them. Though s. 43 of the Indian Contract Act is not perhaps quite clear whether a complete adaptation of the English rule is intended, yet *King v. Hoare* (7) has been held to apply in this country both in respect of joint debtors and of joint wrong-doers. A *fortiori* then, an action for damages against one or some of several joint wrong-doers is maintainable.

Such an action, however, is entirely distinct from an action in ejectment. At common law there were only two kinds of redress from actionable wrong. One was to take the law into one's own hands of which it has been said thus: "It is only when the party's lawful act restores to him something which he ought to have, or puts an end to a state of things whereby he is wronged, or at least puts pressure on the wrong-doer to do him right, that self-help is a true remedy... The acts of this nature which we meet with in the law of torts are expulsion of a trespasser, re-taking of goods by the rightful possessor, distress damage feasant, and abatement of nuisances. Peaceable re-entry upon land where there has been a wrongful change of possession is possible, but hardly occurs in modern experience." (Pollock on the Law of Torts, 10th Edition, page 189). Possession could be recovered from an early time, but in an action which was one of trespass in form only and in reality was a sort of a real action. Before the passing of the Common

(1) (1840) 11 Ad. & E. 453; 3 P. & D. 289; 113 E. R. 487.

(2) (1604) Hob. 66; 80 E. R. 214.

(3) (1815) 6 Taunt. 289; 1 Marsh. 603; 128 E. R. 1046; 16 R. R. 619.

(4) (1892) 2 Q. B. 511; 62 L. J. Q. B. 69; 4 R. 38; 67 L. T. 547; 41 W. R. 56; 57 J. P. 23.

(5) (1900) 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410.

(6) (1855) 4 El. & Bl. 760 at p. 777; 3 C. L. R. 927; 24 L. J. Q. B. 130; 1 Jur. (N. S.) 775; 119 E. R. 281; 25 L. T. (O. S.) 51; 99 R. R. 734.

(7) (1844) 13 M. & W. 494; 2 D. & L. 382; 14 L. J. Ex. 29; 8 Jur. 1127; 153 E. R. 206; 67 R. R. 694.

(8) (1854) 23 L. J. C. P. 204; 15 C. B. 145; 2 O. L. R. 784; 18 Jur. 775; 139 E. R. 375; 2 W. R. 565; 23 L. T. (O. S.) 190; 100 R. R. 280.

(9) (1872) 7 Q. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784.

(10) (1879) 4 A. C. 504; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 97.

Law Procedure Act, 1852 (15 & 16 Vict. c. 76) actions of ejectment were in point of form pure fictions and of these actions it is thus said in *Cole on Ejectment*, page 2: "The whole proceeding was an ingenious fiction, dexterously contrived so as to raise in every case the only real question, *viz.*, the claimant's title or right of possession, and to exclude every other, and whereby the delay and expense of special pleadings and the danger of variances by an incorrect statement of the claimant's title or estate were avoided. But it was objectionable, on the ground that fictions and unintelligible forms should not be used in Courts of Justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form. This has been attempted with considerable success in the Common Law Procedure Act, 1852." 15 & 16 Vic. c. 76, s. 118, directed that "Instead of the present proceeding by ejectment a writ shall be issued, directed to all the persons in possession by name and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty. The Act of 1852 practically retained the old form of action, divested of the fictions on which it depended. As regards the parties to be made defendants in an action of ejectment the following is what is said in *Dicey's Parties to an Action*, pages 494 and 497: "The persons to be made defendants in an action of ejectment, *i. e.*, to be named in the writ, are all the tenants in possession of the land, etc., sought to be recovered..... The persons to be named in the writ are, therefore, *all the tenants in possession, i. e.*, every person who occupies as tenant or under-tenant (or as owner), any part of the property..... All the persons in actual occupation of the land claimed, must, as already pointed out, be named in the writ and made defendants." In *Cole on Ejectment*, page 75, it is said: "The general rule on this subject is, that the action should be brought against *all the tenants in possession, i. e.*, every person who occupies, as a tenant or under-tenant, any part of the property: *Doe v. Roe* (11). *Doe v. Roe* (12), *Doe v. Cock* (13) and

Doe v. Gee (14)." In every case, however, regard must be had to the circumstances. *e. g.*, where the real intention of the action is to turn out the tenant and not the sub-tenants and the sub-tenants are numerous the latter need not be joined: *Geen v. Herring* (15). If a person in possession but not claiming through the defendant is not sued but ejected he may have the judgment set aside on being added as a party: *Minet v. Johnson* (16).

The cause of action in an action for damages is the injury sustained, while in that of action for ejectment is the detention of the property. The two causes of action are essentially distinct, and the principles applicable are radically different.

In *Halsbury's Laws of England*, Vol. 23, page 102 the principles are summarized thus: Paragraph 179,—"The proper defendant in an action of tort is the wrong-doer, or the person who is liable for the acts of the wrong doer, or to whom the liability for the injury has passed. If several persons jointly commit a tort, they may all be sued jointly for such tort, or any one or more of them may be sued separately, and if one of several wrong-doers is thus sued the plaintiff cannot be obliged to join any of the others as co-defendant." Paragraph 180.—"In an action brought for the recovery of land, all the persons who are in possession should in general be joined as defendants."

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two; first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants for in execution of the decree persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree.

It may, however, happen that the existence of a person in possession is not known to the

(11) (1836) 5 Dowl. 254.

(12) (1824) 10 Moore 493.

(13) (1825) 4 B. & C. 259; 107 E. R. 1055.

(14) (1841) 9 Dowl. 612; 61 R. R. 834.

(15) (1905) 1 K. B. 152; 74 L. J. K. B. 62; 53 W. R. 326; 92 L. T. 37; 21 T. L. R. 93.

(16) (1801) 63 L. T. 507.

plaintiff and so he is omitted, or one who is not in possession is wrongly impleaded in the action. In cases such as these as observed in *Cole on Ejectment*, pages 84-85: ".....If the name of any tenant in possession be omitted as a defendant those parts of the premises which are in his occupation cannot be recovered in that action. On the other hand, if the name of any person be inserted as a defendant, who is not actually a tenant in possession of any part of the property claimed, it will probably be necessary to obtain a Judge's order to amend the writ by striking out his name and to amend the writ accordingly." In a case where the plaintiff has alleged in the plaint that a person is in possession, and there is no question of any particular share of which he may be in possession, it is obvious that it is not possible to apply the principle embodied in the first part of this rule.

For the application of the rule that in an action in ejectment all persons in possession should be impleaded as defendants there is no distinction in principle between the cases of trespassers and of tenants who claim to hold under a title, because all actions in ejectment proceed on the assumption that the plaintiff has title and hence the right to possession and that the defendant has none. The rule that all persons in actual possession should be joined as parties has been recognized in this country, upon good authority: *Banubi v. Narsingrao* (17), *Kali Narayan Roy v. Haran Chandra Ghose* (18), *Sarat Kamini Dasi v. Chaitanya Chandra Prohoraj* (19), *Siddik Ahmed Kerani v. Azizar Rahaman Khan* (20). The principle that a suit will not be entertained where no effective decree can be passed in it is well recognized: *Haran Sheikh v. Ramesh Chandra Bhattacharjee* (21).

The result then is that the appellant's contention that the suit was maintainable in the absence of the heirs of the defendant No. 6 must fail. There has, however, been no investigation on the question as to whether the mother of defendant No. 6 is in possession and if so whether she is not in possession of any specific plot out of the land in suit. In view of the exceptional nature of

the case in which the said defendant has left only a mother surviving him we think the plaintiff should be given an opportunity of establishing that the said widow may very well be left out, on an investigation held on the lines indicated in the judgment of this Court in *Sarat Kamini Dasi v. Chaitanya Chandra Prohoraj* (19).

We accordingly set aside the decree of the lower Appellate Court and send back the case to that Court so that the plaintiff may be given such an opportunity and that on giving the defendants also a chance of producing any materials in rebuttal that they may desire to dispose of the appeal in accordance with law.

The appeal is thus allowed and the case remanded to the lower Appellate Court. Costs of this appeal will abide the result.

A. N. A. Appeal allowed: Case remanded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 212 OF 1927.

June 24, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.
GOPAL NARAYAN KULKARNI

AND OTHERS—PLAINTIFFS—APPELLANTS
versus

SANMUKHAPPA NINGAPPA ANGADI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Local Boards Act (VI of 1923), ss. 35 (2) (b), 27—Election of new President—Notice of meeting—'Circulation' of notice by post, sufficiency of—Wrongful dissolution of meeting—Right of members to elect new Chairman—Members retiring before meeting actually breaks, rights of—Decision of Chairman, finality of.

Although it is the duty of a Chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it, he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another Chairman for that object. [p. 267, col. 2.]

National Dwellings Society v. Sykes (2), followed.

Where a Chairman wrongfully dissolves a meeting, members who proceed to leave the meeting before it has really broken up and the Chairman has left the chair, do so at their peril and the remaining members are entitled to proceed with the meeting and elect a new Chairman. [*ibid.*]

King v. Gaborian (1), distinguished.

The decisions of a Chairman are not necessarily final, and if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed [thereafter was] irregular and not binding. [*ibid.*]

(17) 31 B. 250.

(18) 62 Ind. Cas. 714.

(19) 67 Ind. Cas. 290; A. I. R. 1923 Cal. 289.

(20) 99 Ind. Cas. 901; 44 C. L. J. 557; [A. I. R. 1927 Cal. 238.]

(21) 62 Ind. Cas. 425; 25 C. W. N. 249.

'Circulation' of notice of a meeting under s. 35 (2) (b) of the Bombay Local Boards Act may be effected by service through post. It is not necessary that a peon should be sent round to serve notice personally on every member. [p. 266, col. 2; p. 267, col. 1.]

Where a meeting has been properly convened and notices have been properly given, it is not left to the absolute and final discretion of a Chairman to decide whether in law the meeting has been properly convened or not. [p. 267, col. 1.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 264 of 1926, reversing the decree passed by the Joint First Class Subordinate Judge at Belgaum, in Suit No. 162 of 1926.

Mr. G. N. Thakor (with him Messrs. R. A. Jahagirdar and R. D. Belvi), for the Appellants.

Mr. O'Gorman (with him Messrs. D. R. Manerikar and H. B. Gumaste), for the Respondents.

JUDGMENT.

Marten, C. J.—In this second appeal the questions for our consideration are whether a notice of the meeting was "circulated" to the members within the meaning of s. 35 (2) (b) of the Bombay Local Boards Act, 1923, and whether the meeting was validly convened. Secondly, if so, whether the retiring President had power to dissolve the meeting, and, thirdly, whether the fact that seven members left after he had pronounced the meeting dissolved affected the subsequent proceedings in which a new Chairman was elected, and then a President for the ensuing three years elected.

Now, we are bound in second appeal by the facts as found by the lower Appellate Court, and those facts are that a notice convening the meeting was sent by post to all the members of the Board: and that it was received by all except the one member in question, viz., Mr. Majli, but it was delivered at the latter's house, though, in fact, he did not receive it. On this I would only say that the learned Judge has not expressly directed his attention to s. 114 of the Indian Evidence Act, illus. (f), whereunder a presumption would arise that the common course of business was followed in this particular case, and that as the letter was delivered at Mr. Majli's house, he would, in the ordinary course, have received it. But it is unnecessary to pursue that point. We will accept the learned Judge's view that, although the letter was delivered at his house, he in fact never received it.

I, accordingly, turn to the construction

of the material sections of the Act, to which I will shortly refer. Section 27 provides that a meeting for the election of a new President shall be called by the President of the retiring Board. The President of the retiring Board shall preside at such meeting and the new Board shall then elect its own Chairman for that meeting, and then the meeting shall proceed to elect the new President. Next, s. 35 (2) (b) provides that twenty-one clear days' notice of a quarterly meeting and fourteen clear days' notice of a special meeting, specifying certain matters shall be "circulated" to the members and posted up at the Local Board Office. Such notice shall include, in the case of a special meeting, any motion or proposition mentioned in any written request made for such meeting. Then (c) provides for a quorum and for an adjournment by the President in the absence of a quorum; (f) that all questions are to be decided by a majority of votes of the members present; (h) that any quarterly meeting may, with the consent of a majority of the members present, be adjourned from time to time; and (4) that "no act of a Board, or of any person acting as a member or as a President, Vice-President, or Chairman, shall be deemed to be invalid by reason only of some defect in the appointment of such Board, President, Vice-President, Chairman, or member, or on the ground that they, or any of them, were disqualified for the office of member, or that formal notice of the intention to hold a meeting of the Board was not duly given, or for any other such mere informality". Section 63 provides that "the service of every notice, and the presentation of every bill under this Act, on any person or to any person to whom it is by name addressed shall, in all cases not otherwise specially provided for in this Act, be effected" in the manner therein mentioned.

Our view of the construction of the Act is that s. 63 does not apply here because the service of notice for meetings of the Board is "otherwise specially provided for" in this Act, viz., under s. 35 (2) (b).

Next, turning to that last mentioned section, the view we take of the word "circulated" is that it is sufficient for the Board to circulate notices of a meeting by post, and that it is not essential that a notice should be served personally on every member. Incidentally as the members of this Board live, in many cases, at big distances from each other, it would be essen-

tial, according to the contention of the appellant, that a peon should be sent round this large District over many miles in order to serve each member of the Board personally and separately. The legislation might have provided for that, but, in our opinion, it has not done so, and in fact service by post has been hereto the recognised means by which this body has given notice to its members of the meetings. In our view that is in accordance with the true construction of the Act.

We are, therefore, of opinion here that the notice was circulated to, *inter alia*, this particular member Mr. Majli who is the only member as to whom any question of want of notice arises.

Passing to the next point, the question arises whether the President had power to dissolve the meeting which, in our opinion, was properly convened. It is said that it was his duty to see that the meeting was properly convened, and it, therefore, follows from that, that if, in his opinion, it was not properly convened he had power to dissolve the meeting there and then. One flaw in that argument, in our opinion, is that the President must, at any rate, be right on his facts. Accordingly, if, in fact, the meeting was properly convened, and notices had been properly given, it would not be left to his absolute and final discretion to say whether in law the meeting had been properly convened or not. It is unnecessary for us to say whether he had power to dissolve the meeting, supposing even one notice had not been properly given, because there is sub-s. (4) of s. 35 which, as I have already mentioned, expressly provides for want of a notice being served on an individual member of the Board. There may be other matters to be considered also in that connection, but what I do say is that if, as here, the meeting was properly convened, it does not lie on him to dissolve it forthwith.

Therefore, in my opinion, the second question should also be answered against the appellant, *viz.*, that the President wrongly dissolved the meeting.

Next, turning to the question as to whether the fact that seven members thereupon left the meeting, that again, I think, is partly a question of fact. As I read the learned Judge's judgment, the Chairman never, in fact, left his chair, or at any rate left the meeting until some time after a new Chairman was elected. Consequent-

ly, the seven members proceeded to leave this meeting before it had really broken up and before, at any rate, the Chairman had properly left his chair. If, therefore, they chose to do that, I think they could only do so at their own peril, and if in law the Chairman's act was illegal and the remaining members were entitled to proceed with the meeting and elect a new Chairman, then the retiring seven members could not complain in law.

The question seems to me, therefore, to be one entirely different from that in *King v. Gaborian* (1) where the presiding officer, *viz.*, the mayor, and also two aldermen and several burgesses left the meeting without any objection, and it was not until after that had been done that certain persons who remained in the room purported to make a new election. On the other hand, in *National Dwellings Society v. Sykes* (2) Mr. Justice Chitty held (page 162*) that it is the duty of a Chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another Chairman for that object. Counsel for the appellants says that in that case the meeting had begun and that a particular resolution had been passed. Let that be so. To my mind it makes no essential difference whether the Chairman illegally and at once declared the validly called meeting dissolved, or whether he waited till one or two or three resolutions had been passed, and then made an announcement before all the business for which the meeting had been called had been concluded.

I may also refer to *Henderson v. Bank of Australasia* (3) as illustrating that the decisions of a Chairman are not necessarily final, and that if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding.

(1) (1809) 11 East 77; 103 E. R. 933.

(2) (1894) 3 Ch. 159; 63 L. J. Ch. 906; 8 R. 758; 42 W. R. 696; 1 Manson 457.

(3) (1890) 45 Ch. D. 330; 59 L. J. Ch. 794; 2 Meg. 301.

*Page of (1894) 3 Ch.—[Ed.] 14

In the view, then, which I take on the facts of this particular case, I think the members had power to continue the meeting notwithstanding the Chairman's erroneous declaration of the dissolution; and I further think that they were entitled to elect their new Chairman, and thereafter to elect their new President for the ensuing three years in accordance with s. 27 of the Act.

I had intended to mention one case that the appellants' Counsel cited to us, viz., *Ex parte Dean, In re Dean* (4). It was cited for the proposition that the rule requiring a notice to be sent did not amount to delivery of the notice or validate the want of actual notice to the particular parties. But there it was a question of a meeting of creditors who approved of a composition deed under the then bankruptcy rules in England. The Registrar under the rules had a discretion to disregard any resolution which had been passed. The Court held that he exercised that discretion properly in that particular case, because despite an affidavit showing that notices of that meeting had been sent out to the creditors, no less than four of them deposed that in fact they never received the notices. One can quite understand that in a case of approving a composition deed, the fact that no less than four creditors (who may or may not be important ones) did not receive the notices, might very well justify the Registrar in directing that under the circumstances a second meeting should be held.

There was one subsidiary point which was raised by the Bench at the outset of the argument and that was whether this particular suit would lie under s. 9 of the Civil Procedure Code. Speaking for myself, I feel a strong reluctance to interfering with the internal affairs of important legislative or Municipal bodies more than the Court is obliged to do. Thus, as has been pointed out by Mr. Justice Pratt in *Parshuram v. Tata Industrial Bank Ltd.* (5) there is a general principle as regards, for instance, limited liability Companies that the Court will not interfere with the internal affairs of Companies or Corporations except on certain well-regulated principles generally known as the rule in *Foss v. Harbottle* (6). But, having regard to the conclusion which

we have come to on the merits, it is unnecessary to pursue that point.

Accordingly, in the view I take, I would hold that the learned District Judge arrived at the correct conclusion, and that this appeal ought to be dismissed with costs.

Crump, J.—I agree with the judgment pronounced by the learned Chief Justice, and I only wish to add a few words as regards the argument which was urged upon us that whether the Chairman was right or wrong in declaring the meeting dissolved, still the seven members who left the meeting upon the strength of that ruling (of whom the plaintiffs are two) are entitled to maintain this action because their right of franchise has been affected by what took place during their absence.

It is not very clear from the judgment of the learned District Judge precisely what he intended to find as regards the conduct of these seven persons. But, having regard to para. 61 of his judgment it would appear that he was inclined to believe that the action of these seven persons was premeditated and concerted. At all events he says that a strong inference arises to that effect. He, however, qualifies this in para. 64 of the same judgment, but he does not really depart, as I read his judgment, from the conclusion stated in para. 61. And I take it he must have meant to find that seven persons by some pre-arrangement left the meeting as soon as the retiring President propounded his ruling declaring the meeting dissolved. If that is so, of course, there would be still less reason for considering that these persons could maintain any action on the ground that their rights had suffered.

In other respects, I agree with the conclusion of the learned Chief Justice and the final order proposed.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 216 OF 1925.

July 4, 1927.

Present:—Mr. Justice Boys.

RAGHUNATH AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

Nawab Syed MUHAMMAD ALI HASAN

KHAN—DEFENDANT—RESPONDENT.

Grove—Land demised for purposes of grove—Portion of land ceasing to be grove—Landlord's right to

(4) (1880) 41 L. T. 802.

(5) 80 Ind. Cas. 75; 25 Bom L. R. 1083; 47 B. 915; A. L. R. 1924 Bom. 102.

(6) (1843) 9 Hare 461; 62 R. R. 189; 67 E. R. 199.

eject.—Breach of contract of tenancy—Contract Act (IX of 1872), ss. 39, 73.

Where an agreement between a *zemindar* and a tenant is that the tenant should have a specified area for the purposes of a grove, if the tenant either does not use a definite ascertainable portion, even a small portion, of that area for the purposes of a grove, by neglecting to re-plant for a considerable period or affirmatively uses a definite ascertainable portion, even a small portion, for some other purpose, *e.g.*, ordinary cultivation or building a house, the tenant commits a breach of the contract, and the landlord is entitled to put an end to the contract and sue for ejectment unless he has acquiesced in the continuance of the contract. [p. 269, col. 2; p. 270, col. 1.]

Mahbub Ali Khan v. Chiddan (1), *Jwala Singh v. Saheb Din Singh* (2) and *Har Sahay v. Dhanpal Singh* (3), commented upon.

Second appeal against the decree of the Additional Subordinate Judge, Farrukhabad.

Mr. *Saila Nath Mukerji*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is a suit by a *zemindar* for possession of a plot of land by ejectment of the tenant in possession on the allegation that it had ceased to be a grove, in that on the whole area of 176 acres there were only left two mangoes. Both Courts have found that on the whole area there were only remaining two mangoes, three self-planted *babul* and some 8 *berri* (plum) trees, and holding that the area had lost its character as a grove, have decreed the plaintiff's claim.

I have been pressed with the decision of two learned Judges of this Court upholding in Letters Patent Appeal a judgment of a single Judge, the case of *Mahbub Ali Khan v. Chiddan* (1). The judgment as reported was difficult to understand and there seemed clearly something wrong. I sent for the original judgment, and all ambiguity vanished when the original judgment showed that there was a clerical error in the report, 5 lines from the bottom of page 600*, where the figures "35 *biswas*" should be "15 *biswas*". A correction of the clerical error is vital in view of the remark in the judgment of the Division Bench reported at page 602*, where it is said:—"It is not correct to say that because small portions of the plots have been brought under cultivation, the lands have ceased to retain their character as groves"; and that was clearly the unexpressed basis of the judgment of Mr. Justice Mukerji after he had held that the contract was indivi-

sible. I note also that the putting into italics of the passage at page 601* is also a reporter's error.

It has been held in some cases that the *zemindar* could eject the tenant from that portion of the grove which had ceased to be used as a grove. The decision of this Court to which I have referred though it does not specifically mention these cases, is based on a principle which involves holding that such decisions are wrong.

In *Mahbub Ali Khan v. Chiddan* (1) and in the two cases relied upon therein, *Jwala Singh v. Saheb Din Singh* (2) and *Har Sahay v. Dhanpal Singh* (3), it was held, firstly, that the contract was indivisible, and secondly, that as the proportion which the land brought under cultivation bore to the land remaining covered with trees was not so great as to justify holding that the land had ceased to retain its character as a grove the whole area must, therefore, be treated as still a grove.

I entirely agree with the proposition that the area given to the tenant as a grove must be treated as a whole; that the whole was the subject of a single contract and that that contract must stand or fall as a whole. I do not find myself, however, in agreement with the view that if the proportion cultivated, or left for a considerable period without re-planting, bears only a small proportion to the whole, the whole must be treated as still a grove and the *zemindar's* suit dismissed. It appears to me that if in the circumstances of the case *Mahbub Ali Khan v. Chiddan* (1), the tenant had originally asked the *zemindar* for a contract that he might use 25 *biswas* out of the 40 as a grove, and use the other 15 *biswas* as he pleased, the *zemindar* would presumably have refused. To hold, then, that the whole must still be treated as a grove appears to me to force upon the *zemindar* a new contract. In my opinion if the agreement between the *zemindar* and the tenant was that the tenant should have the specified area for the purposes of a grove, and the tenant either does not use a definite ascertainable portion even a small portion of that area for the purposes of a grove, by neglecting to re-plant for a considerable period, or affirmatively uses a definite ascertainable portion, even a small portion, for some other purpose, *e.g.*, ordinary cultivation, or building a house,

(2) 9 O. C. 109.

(3) 32 Ind. Cas. 368; 2 O. L. J. 589.

(1) 95 Ind. Cas. 291; 24 A. L. J. 599; A. I. R. 1926 All. 519; L. R. 7 A. 268 Rev.

he has committed a breach of his contract, and the only question is, what is the remedy of the *zemindar*. I am not satisfied that it is correct to hold that because the breach of the contract was comparatively a small one, therefore, the *zemindar* has no remedy at all and in effect will have a new contract forced on him.

If, then, it is correct to hold, in the circumstances of the case, that there has been a breach of the contract, we next have to see what are the *zemindar's* remedies. The only sections of the Contract Act applicable are ss. 39 and 73. Section 39 reads:—"When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance". The *zemindar* is then entitled, if there has been a breach of the contract in regard to a definite ascertainable portion of the area, to put an end to the contract, unless he has acquiesced in the continuance of the contract. In the present case there is no finding as to the exact area in regard to which a breach of the original contract has been committed. But it is unnecessary to remand the case for a finding as to whether there is or is not a definite area, for it is manifest from the paucity of the trees left that a breach of contract has been committed in regard to the great bulk of the area.

The next question is whether the *zemindar* has acquiesced in the breach. It is his own case that for many years there has been no re-planting, and to that extent he must be held undoubtedly to have acquiesced in what has occurred in the past, and to that extent he must be held to have deprived himself of the right to any damages under s. 73, even if he had asked for them, which he has not. But I do not think that that fact debars him from now saying "I no longer acquiesce" for no equities have arisen upon the basis of which his right could now be held to be barred. This appears to me sufficient for a decision of the case. The tenant has broken his contract and the *zemindar* is entitled to put an end to that contract. In the case the breach has been committed in regard to the great bulk of the area, but on the principle which I hold to be applicable, the result would be the same if the area in regard to which

the breach was committed was comparatively small, provided that it was definitely ascertainable.

Though the principle on which I would decide these cases is not wholly in accordance with the principle on which *Mahbub Ali Khan v. Chiddan* (1); and other cases have been decided, I do not think that it is necessary for me to refer this case to a Division Bench, for there is no doubt but that their Lordships who decided the case of *Mahbub Ali Khan v. Chiddan* (1) would have arrived in this case at the result at which I have arrived.

The result is that the plaintiff's suit was, in my opinion, rightly decreed by the Court of first instance. The trial Court gave the plaintiff a decree subject to a reservation of the right of the tenant in the two mango trees remaining. It may be that as a result of the breach of his contract, in the view that I take of it, the defendant tenant would have no right to any such reservation in his favour in regard to the two mango trees, but I have no cross-objection before me and it is unnecessary for me to deal with that.

The appeal is dismissed with costs.

A. N. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 87 of 1926.

September 23, 1927.

Present:—Mr. Findlay, J. C.

MOHAMMAD ABDUL SATTAR—

PLAINTIFF—APPELLANT

versus

Musammat UMRAOBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 34 (2)—Future interest, disallowance of—Duty of Court to state reasons.

A Judge is not relieved of the necessity of giving reasons for disallowing interest *pendente lite* by s. 34 (2) of the Civil Procedure Code, and in normal cases it is highly desirable that a Judge should give his reasons for disallowing such interest. [p. 271, col. 2.]

The sole object of enacting the section is to prevent a separate suit being brought for future interest when the connected judgment and decree are silent on the point. [p. 271, col. 1.]

Appeal from the decree of the First Sub-Judge, First Class, Nagpur, dated the 30th July, 1926, in Civil Suit No. 61 of 1926.

Mr. B. V. Pradhan, for the Appellant.

Mr. R. N. Padhey, for the Respondents.

JUDGMENT.—The plaintiff-appellant has been granted a decree for Rs. 8,418-10-8.

against the three defendants-respondants as the legal representatives of one Shaikh Kalloo to whom the advances in suit had been given for trade purposes and for building a house. The defendant-respondents have been declared only liable to the extent of the assets of the deceased Shaikh Kalloo in their possession.

In the present appeal I am only concerned with the lower Court's disallowance of interest *pendente lite* and of future interest from the date of decree to the date of realization. In para. 13 of the plaint, interest at the contract rate of one per cent. per mensem during the pendency of the suit was claimed, as well as future interest at a rate to be fixed by the Court. No specific issue was framed with regard to these two items, and the judgment of the lower Court is absolutely silent as regards them. The plaintiff has, therefore, appealed to this Court for allowance of both these items of interest.

On behalf of the respondents it has been urged that as regards both items, the silence of the lower Court's judgment and decree must be read as inferring that the Subordinate Judge did exercise a discretion in the matter and exercised it in the way of disallowing either kind of interest. There can, however, be no doubt whatever that sub-s. (2) of s. 34, Civil Procedure Code, only has reference to future interest, *viz.*, interest from the date of decree to the date of payment or to such earlier date as the Court thinks fit. Even so, however, sub-s. (2) obviously finds a place in the Statute Book with the one and sole object of preventing a separate suit being brought for future interest when the connected judgment and decree are silent on the point.

The possibilities appear to me to arise as regards the attitude of the lower Court in this matter. It is perfectly possible, Judges being only human, that the Subordinate Judge intently overlooked the question of the allowance or disallowance of interest *pendente lite*, and future interest. It is equally possible that he did exercise a discretion in the matter but remained silent as to his reasons therefor. In the case of the interest *pendente lite*, this silence was unjustifiable, although it may be possibly termed justifiable, however inadvisable in the case of future interest. The mere presence of sub-s. (2) of s. 34 on the Statute Book does not necessarily imply an invitation to Judges, when they

see reason to disallow future interest, to refrain from stating these reasons, and obviously in the normal case it is highly desirable that the Judge should give his reason for disallowing such future interest. I have been referred to the remarks of their Lordships of the Privy Council in *Hiralal Ichhalal v. Desai Narsilal Chaturbhujdas* (1) but little help is to be derived from that case in view of the absence of the full judgment of the learned District Judge, to which their Lordships refer. It was possible, of course, for the plaintiff to have applied to the lower Court to repair the omission as to the disallowance of future interest, but it was not incumbent on him to take this course and I am clearly of opinion that he was entitled to come on appeal to this Court, as he has done.

As regards the disallowance of interest *pendente lite*, there is nothing whatever to show that the Subordinate Judge exercised any discretion whatever in the matter. *Prima facie* there is no reason whatever why in this case interest *pendente lite* should not be allowed at such rate as this Court thinks fit and reasonable. The debts in suit were duly incurred for legitimate purposes; the plaintiff appears to have behaved with absolute fairness throughout, and the rate of interest charged was an eminently reasonable one. It is not clear even that there was any undue delay in the filing of the present suit, the decree in which, it will be remembered, only has effect against the property left by the deceased debtor in the hands of the present respondents. Shaikh Kalloo died in June 1924, and the circumstances detailed in paras. 7 and 8 of the plaint would account for a large part of the delay of 14 months which occurred before the present suit was filed: for the comparatively long pendency of this very simple suit various needless and several futile pleas offered on behalf of the second defendant are largely responsible. It has also been suggested that, in view of the receipt (P-10), in which accounts were made up on 15th August, 1922, after a balance had been struck, the interest awarded in reality amounts to compound interest. This is, in essence, so far true, but it cannot be gainsaid that

(1) 18 Ind. Cas. 909; 37 B. 326 at p. 339; 17 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 C. L. J. 474; 15 Bom. L. R. 483; 25 M. L. J. 101; 40 I. A. 68 (P. O.).

the decision of the lower Court is correct in the interest it has awarded on the documents on record evidencing the debt, and, if the present respondents considered that the decree was wrong in this respect, it was their duty to have filed an appeal. The case, therefore, seems to me one in which the plaintiff is entitled to interest *pendente lite*, but, on the whole and in view of the amount of interest already included in the sum decreed, I fix the rate of interest *pendente lite* at 8-annas per cent. per mensem. As regards future interest also, making the most favourable assumption for the respondents, *viz.*, that the Judge of the lower Court did exercise, so to speak, a silent discretion in the matter and disallowed such interest, I am of opinion, for the same reason as I have given with regard to the allowance of interest *pendente lite*, that the plaintiff is entitled to future interest at the same rate, *viz.*, 8-annas per cent. per mensem. The decree of the lower Court will be modified accordingly by allowing interest at 8-annas per cent. per mensem on the sum already decreed from the date of suit to the date of decree and thereafter future interest will run on the whole amount due at 8-annas per cent. per mensem till realization. The defendants-respondents will bear the plaintiff-appellant's costs in the lower Court as already ordered by that Court, while in this Court the defendants-respondents will bear the plaintiff-appellant's costs in appeal in proportion to his success therein. The remaining costs in this Court will be borne by the party as incurred.

G. R. D.

Decree modified.

A. N. A.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 162 OF 1923

WITH

FIRST CIVIL APPEAL NO. 92 OF 1924.

April 21, 1927.

Present:—Mr. Justice Das and
Mr. Justice Allanson.

DURGA PRASAD TRAKUR AND OTHERS

—DEFENDANTS—APPELLANTS

versus

BASAWAN PANDEY AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—'Bakasht', meaning of—Record of Rights—Presumption of correctness, rebuttal of, by evidence of subsequent date—Civil Procedure Code (Act V. of 1908), O. XIII, r. 1—Documentary evidence—Production after first hearing—Duty of Court to exercise discretion.

The term 'bakasht' is an invention of the Survey Authorities and is used by them to denote actual cultivating possession. It does not solve the question whether the land is held as proprietors, tenure-holders, *raiyats* or under-*raiyats*. [p. 274, col. 1.]

There is no rule that the presumption of correctness of the Record of Rights cannot be rebutted by producing evidence of a date subsequent to the Record of Rights. [p. 275, col. 1.]

Order XIII, r. 1 of the Civil Procedure Code does not exclude the discretion of the Court to receive any documentary evidence which ought to have been produced at the first hearing, at any subsequent stage. [p. 276, col. 1.]

Appeal from the decision of the Subordinate Judge, Darbhanga, dated the 20th July, 1923.

Messrs. S. M. Mullick, B. N. Mittra, Sashi Sekhar Prasad Singh and K. N. Moitra, for the Appellants in No. 162 of 1923.

Messrs. Sultan Ahmad, S. K. Mitra, R. K. Jha, S. N. Rai, Janak Kishore, Ram Prasad and D. C. Verma, for the Respondents in No. 162 of 1923.

Mr. Janak Kishore, for the Appellant in No. 92 of 1923.

Messrs. Sultan Ahmad, S. N. Banerjee and S. N. Rai, for the Respondents in No. 92 of 1923.

JUDGMENT.

Das, J.—In this suit the plaintiffs claimed that 92 *bighas* 8 *cottas* 14 *dhurs* of land in Mouza Hasanpur Sangama, otherwise called Chaita T. No. 1876, are the *bakasht* lands of the *maliks* and are liable to be partitioned as such. The suit was resisted by defendants Nos. 1-5 (the defendants first party) who claimed occupancy right in 103 *bighas* 19 *cottas* 17 *dhurs* of land. The plaintiffs have 11-annas share in the proprietary interest of the mouza, and on the 24th September, 1919, they instituted proceedings under the provisions of the Estates Partition Act for the allotment to them of a *takhta* comprising their interest in the mouza. The defendants 1st party entered appearance and insisted that their rights as *kashtkars* should be maintained and preserved in the lands which are now claimed by them as their *raiyati* lands. On the 29th January, 1922, the Board of Revenue upheld the contention of the defendants and supplied the cause of action to the plaintiff for the present suit. The learned Subordinate Judge has found in favour of the plaintiffs, hence this appeal to this Court by the defendants 1st party.

At all material dates prior to the acquisition of proprietary interest in the mouza by the principal contending parties in this

suit, the *mouza* in question was owned by the following proprietors:—

1. Musammat Jighri Begum 5 annas 6 *gandas* 2 *cowris*.
2. Umatul Mehdi and after her Syed Ali Nawab 5 annas 6 *gandas* 2 *cowris*.
3. James Wilson 4 annas.
4. Ram Bahadur and others 6 *gandas* 2 *cowris* 2 *karants*.
5. Kunja Lal and others (defendants No. 22-28) 6 *gandas* 2 *cowris* 2 *karants*.
6. Lal Gobind Sahay (defendant No. 29) and Lala Raabati Sahay (defendant No. 30), sons of Narsingh Sahay 6 *gandas* 2 *cowris* 2 *karants* each.

On the 27th November, 1913, defendants Nos. 6—14 (defendants 2nd party) purchased the 4-annas interest of Mr. Wilson. On the 1st April, 1914, the plaintiffs purchased the 5 annas 6 *gandas* 2 *cowris* share of Musammat Jighri Begum. On the 11th June, 1919, the plaintiffs purchased the 5 annas 6 *gandas* 2 *cowris* interest of Ali Nawab from Sriwar Narain who had purchased the share on the 4th July, 1913. On the 31st October, 1918, the plaintiffs purchased the 6 *gandas* 2 *cowris* 2 *karants* share of Ram Bahadur. It will be noticed that the plaintiffs have purchased the interest of Musammat Jighri Begum, Syed Ali Nawab and Ram Bahadur, whereas the defendants 2nd party have purchased the interest of Mr. Wilson. The learned Subordinate Judge has found that the contest is really between the plaintiffs and the defendants 2nd party, the defendants 1st party being the *benamidars* of the defendants 2nd party in regard to the *raiyyati* interest claimed by the former in this litigation. I may mention that 71 *bighas* 3 *cottas* 12½ *dhurs* of the *raiyyati* lands are nominally in the possession of defendants Nos. 15-21. The learned Subordinate Judge has found that defendants Nos. 15-21 are the *benamidars* of the plaintiffs. On the finding of the learned Subordinate Judge, therefore, 103 *bighas* 19 *cottas* and 17 *dhurs* of these *raiyyati* lands are really in the possession of the defendants 2nd party who are the 4-annas proprietors of the *mouza* and 71 *bighas* 3 *cottas* and 12½ *dhurs* of the *raiyyati* lands are really in the possession of the plaintiffs who are the 11-annas proprietors of the *mouza*. It follows, therefore, that the plaintiffs are interested in destroying the *raiyyati* character of these lands since if they succeed in their contention,

an 11-annas share of these lands must come to them on partition.

The *mouza* was for many years in the possession of the Rewari Factory as *ticcadars*. At one time the entire 16-annas, namely, the interest of all the proprietors were the subject of the *ticcā* in favour of the Rewari Factory but in course of time some of the proprietors determined their leases in favour of the factory. The last of the leases in favour of the factory expired at the end of the *fasti* year 1319 corresponding with the 26th September 1912. The factory, however, retained possession of 175 *bighas* 3 *cottas* and 9¾ *dhurs* of land claiming occupancy rights therein which they proceeded to sell to different persons by different documents. On the 25th April, 1914, they sold 29 *bighas* 15 *cottas* 12 *dhurs* to Ramanugrah Thakur father of defendants Nos. 1 and 2. On the 8th August, 1914, they sold another block of 37 *bighas* 12 *cottas* 13 *dhurs* to Ramanugrah Thakur. On the same day sold 36 *bighas* 11 *cottas* 12 *dhurs* to Ramnandan Pandey defendant No. 3 the father of defendants Nos. 4 and 5. It will be noticed that by these transactions 103 *bighas* 19 *cottas* and 17 *dhurs* passed by the defendants 1st party. As I have said, the learned Subordinate Judge has found that the defendants 1st party are the *benamidars* of the defendants 2nd party. On the 5th June, 1915, they executed three conveyances one in favour of defendants Nos. 15-17 in respect of 39 *bighas* 18 *cottas* 4¼ *dhurs*, one in favour of defendants Nos. 18-20 in respect of 23 *bighas* 8 *cottas* 9 *dhurs* and one in favour of defendant No. 21 in respect of 7 *bighas* 16 *cottas* 19 *dhurs*. The learned Subordinate Judge has found that in respect of the transactions of the 5th June, 1915, the defendants Nos. 15-21 were acting as the *benamidars* of the plaintiffs.

In the Record of Rights which was finally published in 1897, 108 *bighas* 17 *cottas* 18 *dhurs* were recorded as *bakasht malik* in the possession of the *kothi* Rewari as *ticcadars*, 18 *bighas* 5 *cottas* 2 *dhurs* as the *kasht* of Mr. Manners who was one of the proprietors of the Rewari Factory and 65 *bighas* 5 *cottas* 14 *dhurs* as tenancy land in the names of various persons. The learned Subordinate Judge has assumed that the Record of Rights is in favour of the plaintiffs and he has come to the conclusion that the defendants have not been able to rebut the presumption of correct

ness attaching to the entry in the Record of Rights, but this is not entirely correct. 18 *bighas* 5 *cottas* and 2 *dhurs* were undoubtedly recorded as the *kasht* of Mr. Manners and it is the case of both sides that in that Survey entry Mr. Manners stands for the factory. The learned Subordinate Judge accepts the position, but he says when it, namely, the 18 *bighas* 5 *cottas* and 2 *dhurs* of land, "was in *kothi's* possession during Cadastral Survey, it cannot but be held to be *malik's* lands unless any *kashtkari* right in the land is shown by the defendants." I am of opinion that this is not a correct way of stating the position. On the entry in the Record of Rights we must assume that 18 *bighas* 5 *cottas* 2 *dhurs* were the *rai-yati* lands of the *kothi* until the contrary is established. In regard to the 65 *bighas* 5 *cottas* and 14 *dhurs* of land they are undoubtedly shown as tenancy lands. The learned Subordinate Judge says:— These lands should also be taken to be *malik's* lands unless any *rai-yati* right therein is proved by the defendants. I regret to say that I am unable to follow the arguments. So far as 108 *bighas* are concerned, the Record of Rights may be taken to favour the case of the plaintiffs, but even here the position is not as easy as it looks. The Survey Authorities were only entitled to determine the question of possession. They found that this block of land comprising 108 *bighas* was in the possession of the *kothi* which was undoubtedly in the position of *ticcadars*. This being so, they recorded the lands as *bakasht malik* in the possession of *ticcadars*. The only question which is solved by the Survey Authorities is that these lands were in the cultivating possession of the *ticcadars* but as is well-known such an entry does not solve the question whether the land was held by the *kothi* as proprietors, tenure-holders, *rai-yats* or under-*rai-yats*. The term *bakasht* is the invention of the Survey Authorities and is used by them to denote the actual cultivating possession either of the proprietor or tenure-holders as the case may be. The term was deliberately invented to avoid the responsibility of deciding the character of the possession. I am willing, however, to assume that the entry in the Record of Rights is in favour of the plaintiffs.

I now proceed to deal with the question whether the defendants 1st party have been able to establish their claim. The first

document upon which they rely is Ex. P. which is a certificate of sale dated the 24th May, 1913, granted by Ram Bahadur in Execution Case No. 7 of 1912. Ram Bahadur obtained a money-decree against the *kothi* in 1907. In execution of that decree they put up to sale and purchased four occupancy holdings of the *kothi*, namely, those covered by *khata* No. 451 (comprising an area of 18 *bighas* 5 *cottas* and 2 *dhurs* recorded as the occupancy holding of Mr. Manners in the Record of Rights) *khata* No. 613, *khata* No. 494 and *khata* No. 446. The certificate of sale definitely asserts that the *kothi* had occupancy rights in the lands sold and certifies that Ram Bahadur has purchased those rights. This document established that (1) Mr. Manners' holding was the holding of the factory and that the factory had occupancy rights in the land sold, (2) that *khata*s Nos. 451-M, 613M, 494 and 446 were the occupancy holdings of the factory. All these lands are the subject-matter of the suit and *khata*s Nos. 451 and 494 have been purchased by the defendants 1st party.

Now the plaintiffs are clearly bound by the statement of Ram Bahadur as contained in this document, for Ram Bahadur was one of the proprietors of the *mouza* at the date of the sale of the holdings in question and the plaintiffs have purchased the interest of Ram Bahadur in the *mouza*.

The next document upon which reliance is placed is Ex. 1 (5) which is a rent receipt dated the 9th February, 1914, granted by Musammat Jighri Begum to the Rewari Factory in respect of 165 *bighas* 2 *cottas* and 17 *dhurs* of *rai-yati* land. I may mention that Musammat Jighri Begum gave a usufructuary mortgage of half of her proprietary interest in the *mouza*. The rent receipt upon which reliance is placed is a receipt for the rent of 1320 and 1321 in respect of the portion which was in her *khas* possession. Musammat Jighri Begum is the predecessor-in-title of the plaintiffs and the plaintiffs are clearly bound by the recognition of the *kothi* as *rai-yats* by Musammat Jighri Begum. As I have said, the rent receipts were in respect of the rent due to Musammat Jighri Begum in 1320 and 1321, that is to say, for the period ending with September, 1914. The receipt was, however, granted on the 9th February, 1914. Mr. Sultan Ahmed contends that it is unlikely that the *kothi* would pay the rent seven months in advance but the an-

swer is that the *kothi* sold some of these lands to the defendants 1st party on the 25th April, 1914, and they were called upon to discharge their obligations to their landlords before the conveyance in question Ex. I by which some of these lands were sold to the defendants 1st party on the 25th April, 1904, recites the fact that the rent to the landlord for 1321 has been paid by the *kothi*. Mr. Sultan Ahmed contends that the defendants should have called for counterfoil rent receipts and the account books from *Musammat Jighri Begum's* office to show that the rent was in fact received by her and a receipt granted by her, but the plaintiffs have themselves purchased whatsoever interest *Musammat Jighri Begum* had in this *mouza*, and all these documents would be expected to be in the possession of the plaintiffs.

As I read the judgment of the learned Subordinate Judge, he does not reject Ex. I (5) as a fabricated document. He says the rent receipts purporting to have been given by the *maliks* are of a date subsequent to the Record of Rights. They are, therefore, not enough to establish any tenancy in the lands already recorded as proprietors' land in the Record of Rights. The argument, in my opinion, is wholly inadmissible. The Record of Rights, no doubt, raises a presumption in favour of the plaintiffs, but I know of no authority which establishes that the presumption of the correctness of the Record of Rights cannot be rebutted by producing evidence of a date subsequent to the Record of Rights. I may point out that the Record of Rights was published in 1897 and there was nothing to prevent *Musammat Jighri Begum* from recognising the *kothi* as occupancy tenants on the 9th February, 1914, which is the date of the receipt in question. A tenancy arises by virtue of such recognition and it is irrelevant to argue that unless the entry in the Record of Rights is shown to be wrong, the defendants 1st party cannot succeed in this action. The learned Judge then complains that *Ajodheya Lal the Patwari of Musammat Jighri Begum* who granted the receipt was not examined, but, in my opinion, this was not necessary since *Sant Lal Misser* proved these receipts. The learned Subordinate Judge then says that "this receipt appears to have been granted at a time when *kothi's* lease had already expired. Hence the receipt is

useless and shows nothing in defendant's favour. I regret to say that I do not follow this argument. Although the *kothi* lease as *ticcadars* had expired they were claiming to hold the land in question as their *raiya* lands. Why the receipts should be useless in these circumstances it is impossible to understand. It has been properly proved and the documents which would disprove it are presumably in the possession of the plaintiffs as the successors-in-title of *Musammat Jighri Begum*. These documents have not been produced and I cannot have recourse to speculative arguments such as those which have been used in the judgment of the learned Subordinate Judge for refusing to draw the necessary inference from this rent receipt. I hold that on the 9th February, 1914, *Musammat Jighri Begum* recognised the *kothi* as *raiya*s in occupation of 165 *bighas*; 2 *cot-tas* 17 *dhurs* of land and that such recognition is binding upon the plaintiffs claiming title through *Musammat Jighri Begum*.

[His Lordship then referred to the other documents and proceeded:—]

When all the evidence is examined the only piece of evidence in favour of the plaintiffs is the entry in the Record of Rights, and I have already suggested that it is not as favourable to the plaintiffs as it is claimed to be. But in favour of the defendants there is evidence of recognition by *Musammat Jighri Begum* by *Ram Bahadur* and last by the plaintiffs themselves. Why should we decline to give effect to such recognition merely because the entry in the Record of Rights is in favour of the plaintiffs? As I have said the entry may be perfectly right as it stood in 1897; and yet the defendants may have been recognised by the landlord as tenants many years after.

There is another point which must be considered in this connection. The defendants complain that they were precluded by the learned Subordinate Judge from offering their evidence on this point for the purpose of establishing their *kasht* rights. Now the present suit was filed on the 1st May, 1922. The issues were settled on the 6th December, 1922. On the 7th December, 1922, the defendants filed certain documents with an unstamped petition. The order passed by the learned Subordinate Judge on this petition is as follows:—Defendants file certain documents along with an unstamped petition. No

order can be passed as to its admissibility unless a petition duly stamped showing reasons of filing it late if filed. Stopping here for a moment, I may point out that the delay was only of one day, and under ordinary circumstances, it is quite possible for a party to have an idea as to what documents should be filed in the case until issues have been framed. The issues were actually framed on the 6th December, and, in my opinion, the learned Subordinate Judge should have exercised his discretion by accepting the documents on the 7th December. On the 21st December, 1922, the defendants filed those documents again with a petition stating reasons of delay. The learned Subordinate Judge passed the following order. Let them be kept with the record subject to admissibility at the time of hearing. Order XIII, r. 1 provides that the parties or their Pleaders shall produce at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and r. 2 provides that no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of r. 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof and the Court receiving any such evidence shall record the reasons for so doing. As has been pointed out, O. XIII, r. 1 does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. Now on the 21st December, 1922, the learned Subordinate Judge clearly accepted the reasons of the delay and directed that they should be kept with the record subject to admissibility at the time of hearing. In my opinion the learned Subordinate Judge clearly exercised his discretion in favour of the defendants on the 21st December and received the documents and the only point that was left open for further consideration was whether the documents were relevant. If he were not satisfied with the explanation given by the defendants he should have declined to receive the documents on the 21st December, 1922.

Now this was the position on the 21st December, 1922. The case was subsequently opened and on the 17th July the defendants tendered these documents in the

course of the examination of Sant Lal. The learned Subordinate Judge rejected the documents as filed late without any reasons. Now as I have said, they were filed in the first instance on the 7th December, 1922, the issues having been settled on the 6th December, 1922. He himself directed that the documents should be kept in the record on the 21st December, and, in my opinion, it was not open to him to reject these documents on the 17th July, 1923, not on the ground that they were irrelevant, but on the ground that they were filed late without any reason. Now, these documents are letters, rent receipts, *jama-bandies* etc., which according to Mr. Sushil Madhab Malik constitute every important evidence in his favour. All these documents were rejected by the learned Subordinate Judge with the result that all the defendants had were some of the rent receipts and the road cess return which had been filed by the plaintiffs. Mr. S. M. Mullick has tendered all these documents in evidence before us, and if the evidence already in the record did not satisfy me as to the claim of the defendants 1st party, I would in haste have remanded the case to the first Court with a direction that it should take evidence for the purpose of receiving the documents but as I am satisfied that the defendants 1st party have established their claim in this litigation, I do not think it necessary to make a direction in regard to these documents in favour of the defendants 1st party. In my opinion the defendants 1st party have established their claim and I would allow this appeal, set aside the judgment and the decree of the Court below and dismiss the suit with costs payable by the plaintiffs in both the Courts.

The appellants in the analogous appeal are the defendants 3rd party who rely upon the conveyances executed in their favour by the *Kothi* on the 15th June, 1915. On the finding arrived at in the main appeal, they are clearly entitled to succeed. The learned Subordinate Judge has found that they are the *benamidars* of the plaintiffs, but there was no issue on this point and no decision is called for so far as this question is concerned. The appeal must, therefore, be decreed.

Allanson, J.—I agree.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.APPEAL FROM ORIGINAL CIVIL SUIT No. 45
OF 1926.

January 21, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Justice Sir Charu
Chunder Ghose, Kt.IMPERIAL TOBACCO Co.—DEFENDANTS—
APPELLANTS
versus

A. BONNAN—PLAINTIFF—RESPONDENT.

Torts—Causing detention of goods by Customs Authorities, whether actionable—Suit for damages—Limitation—Limitation Act (IX of 1908), ss. 36, 49—Sea Customs Act (VIII of 1878), ss. 18, 19A—Indian Merchandise Marks Act (IV of 1889)—Wrongful institution of civil suit—Action for damages, whether lies—Wrongfully obtaining injunction, whether actionable apart from malice—Undertaking for damages, how enforced—Separate suit or application to Court—Treating suit as application—Slander of goods, when actionable—Praising one's goods as superior to another's, whether slander—Malice, what constitutes—Special averment of slanderous words, necessity of.

The plaintiff and the defendants were dealers in 'Gold Flake' cigarettes. When the plaintiff's goods arrived in Bombay and Calcutta, the defendants who had, up to then, exclusive rights of selling the said cigarettes in India applied to the Collectors of Customs in Bombay and Calcutta for orders for detention of the plaintiff's goods, on the ground among others that the importation of the said cigarettes by the plaintiff infringed their trade mark. The plaintiff's goods were accordingly detained by the Collectors. The defendants then filed two suits, one in Calcutta on the 11th May, 1922, and another in Bombay on the 22nd May, 1922. In the High Court of Calcutta the defendants obtained a temporary injunction against the plaintiff and this injunction was dissolved on the 8th June, 1922 on the plaintiff undertaking to place a certain sum in fixed deposit. In Bombay the defendants gave notice of motion for an injunction on the 23rd May, 1922, but on the plaintiff undertaking not to sell, the injunction was dissolved on the 19th June, 1922. The defendants' suits were finally dismissed by the Privy Council. Thereafter, on the 21st January, 1925, the plaintiff filed a suit against the defendants for damages, (a) for wrongfully and maliciously obtaining orders of detention from the Collectors, (b) for wrongfully and maliciously prosecuting the civil suits, (c) for similarly obtaining an injunction against the plaintiff, (d) for having applied for an injunction in the Bombay Court and compelled plaintiff to give an undertaking not to sell, and (e) for publishing various statements slandering the plaintiff's goods:

Held, (1) that the plaintiff was not entitled to any damages for detention by the Collectors as there was no mis-statement or malice on the defendants' part, and as the cause of action for such a claim was further barred by limitation under Art 36 of Sch. I of the Limitation Act; [p. 280, col. 1.]

(2) that the plaintiff was not entitled to damages for the institution of the civil suits inasmuch as the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause will not support a subsequent action for malicious prosecution; [p. 285, cols. 1 & 2.]

Quartz Hill Gold Mining Co. v. Syre (9) and *Sorrell v. Smith* (15), relied on.

(3) that the plaintiff was not entitled to damages for injunction apart from any special undertaking given by the defendants inasmuch as apart from malice or want of probable cause a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights; [p. 281, col. 1.]

Bhut Nath Pal Mistry v. Chandra Benode Pal Chowdhury (2), not followed.

(4) that the plaintiff was entitled to enforce an express undertaking for damages given by the defendants to the Court in the former suit at the time of the granting of the injunction, even though his proper remedy would have been to have applied to that Court to enforce the undertaking, and not by way of a separate suit; [p. 282, col. 2.]

(5) that the plaintiff could not seek for any relief in the suit in respect of his damages relating to the injunction proceedings in the Bombay Court in view of the consent order and undertaking in that Court and that this claim also was further barred by limitation; [p. 281, col. 1.]

(6) that the plaintiff was not entitled to recover any damages on account of slander of goods inasmuch as the defendants had stated that their goods were superior to those of the plaintiff, with a view to push their own business and not with the direct object of injuring the plaintiff's business. [p. 288, col. 1.]

White v. Mellin (21), *Lyne v. Nicholls* (25) and *Dunlop Pneumatic Tyre Co. Ltd. v. Maison Talbot* (26), relied on.

Per Rankin, C. J.—An undertaking to the Court in a suit is not such an undertaking as amounts to contract with the other party, nor does it ground any action at Common Law. It is to be enforced by application to the Court to which it was given and in the suit or proceeding in which it was given. The Court ought to be asked to enforce the undertaking within a reasonable time but there is no statutory period of limitation for enforcing the same. [p. 281, col. 2.]

Where an independent suit is necessary a mere application may have to be dismissed; but where the plaintiff has adopted a more formal and elaborate procedure than he should have adopted in applying to the correct Court, no lack of jurisdiction is involved and the question becomes one of costs and of discretion. [*ibid*]

Threats to litigate or threats to boycott are unlawful only where the purpose of the threat is "wilfully and ultroneously to injure the trade of another" as distinct from the purpose to forward one's trade. [p. 286, col. 2.]

If the words are uttered to an individual and repetition is not intended except to a limited extent general loss of custom cannot ordinarily be a direct and natural result of the limited slander. [p. 289, col. 1.]

Per C. C. Ghose, J.—In an action for damages for slander of goods the precise words complained of must be set out in the statement of claim; it is not sufficient to allege that the slanderer used such and such words or to that effect. [p. 294, col. 1.]

Appeal against the decree of Mr. Justice Pearson, dated the 25th January, 1926, in Suit No. 210 of '19 5, and reported as 94 Ind. Cas. 444.

Messrs. L. P. E. Pugh and W. W. K. Page, for the Appellants.

Messrs. C. Bagram and S. C. Mitter, for the Respondent.

JUDGMENT.

Rankin, C. J.—This suit was instituted in January, 1925, for the recovery of about seven and half lacks of rupees as damages for a variety of acts done by the defendant Company. It was stated in the plaint that no part of the cause of action arose before February 1922.

The plaintiff towards the end of 1921 bought a large quantity of "Gold Flake" cigarettes on the terms that they should not be sold in Great Britain. The goods were two years old, they were made up in packets or cartons of tin, and 25,000 cigarettes in their cartons were packed, in a strong tin lined case. This brand of cigarettes is very well-known as having originally been the manufacture of W. D. & H.O. Wills of Bristol whose successors in business are the British American Tobacco Company Limited. The goods so bought by the plaintiff had (under a temporary arrangement necessitated apparently by the war) been manufactured in America and were part of a very large number of cigarettes which had originally been intended for troops but which were now being disposed of. They had been manufactured by the British American Tobacco Company Limited itself and were thus genuine 'Gold Flake' cigarettes and not counterfeit. The plaintiff bought them cheap at eight or nine shillings per thousand.

His case is that he contracted to buy 860 cases being $21\frac{1}{2}$ million cigarettes, that he disposed of some (apparently 194 cases) in Egypt and elsewhere, and that early in 1922 he came to India not merely to dispose of 666 cases already contracted for but also with a view to establish a continuing market in these War stocks of which further supplies in very large quantities were available or would become available.

Now "Gold Flake" cigarettes were and are sold in large quantities in India by the defendant Company which is a "subsidiary" or "associated" Company of the British American Tobacco Company Limited, the latter Company holding at least 80 per cent. of its share. The defendant Company had in 1910 acquired the business and trade mark rights of the British American Tobacco Company Limited so far as India, Burma and Aden are concerned. For years it alone had been selling Gold Flake cigarettes in India and its price to dealers was

Rs. 36 per thousand. It obtained its goods from the British American Tobacco Company in Great Britain though it had itself the right to manufacture. It sold fresh goods of British make taking back from dealers any unsold goods that were old and unlikely to be sound. It brought out its "Gold Flake" cigarettes not only in tin lined cases but in sealed tins of fifty packet in such cases.

The plaintiff's venture was a very promising one. He could afford to sell at a price far below the defendant Company's price of Rs. 36 per thousand. If he could dispose at a start of some 16 million cigarettes at Rs. 20 per thousand he would do very well for himself and if he could continue so to do he would do very well indeed. There were, however, at least two danger spots. So long as the public would regard his merchandise as good Gold Flake cigarettes they would prefer his article because of the price. But old cigarettes do not "stand up to the monsoon" so well as might be wished and when once the tin lined case was opened, if not before, there was certain to be deterioration after June. That was one risk. The second was this. It was all very well to throw the defendant Company out of the Indian market despite their purchase of the Gold Flake trade mark and business but the defendant Company might conceive themselves entitled to object and this might mean litigation. How far either of these risks had been considered by the plaintiff in advance it is difficult to say. Whether they were considered in combination I do not know at all.

The venture began well. The plaintiff having arrived in Bombay on the 7th February 1922, with samples sold no less than 220 cases to a Bombay firm Messrs. Irani Hormuz Sheriar and Company at Rs. 23-8 per thousand. His Counsel on this appeal has referred to the correspondence passing between the offices of the defendant Company at Calcutta and Bombay and between them and their London advisers as showing that he was "tearing their trade in Gold Flake cigarettes to shreds." It seems to me that at first the defendant Company's advisers in India did not appreciate this partly because they thought the goods would not last but in fact it is clear that the matter was one of great importance to the defendant Company. Mr. Abbott's letter of 15th March, Mr. Macnaghten's cable received on 5th April and the cable of

10th April (which has been ruled out by the learned Judge for reasons which I do not appreciate) show what happened. The Company's Solicitors in India did not think they could do anything. Mr. Macnaghten in England advised that they could. He knew all about the defendant Company's trade marks and in a matter of this sort and of this importance it was most reasonable to take advice in London. It was after all a question of Trade Mark Law and Mr. Macnaghten was their legal adviser. It seems idle to suggest that the plaintiff has a grievance because the defendant Company took advice from him.

The defendant Company decided to take steps to establish that the plaintiff's scheme was an invasion of their rights. They thought it wise to take a formal assignment of the marks by way of perfecting their equitable title under the Indenture of 1910 and this was not completed till the 10th May, 1922. Meanwhile they applied under the Sea Customs Act to the Collector of Customs at Calcutta and at Bombay on 12th April and 1st May. The applications are in evidence and state that the goods are liable to confiscation because "we consider that the importation of the above goods into India is an infringement of our trade mark." Indemnity bonds were given to the Collectors in the usual course and letters written to the plaintiff asking for an assurance that the goods would not be sold in India and threatening legal proceedings to restrain this. Matters really stood over to abide the result of an interview between the plaintiff and the defendant Company's Directors which took place on the 8th May. Suits were filed by the defendant Company in Calcutta on 11th May and in Bombay on 22nd May. On 2nd May, 1922, the Collector of Customs at Bombay ordered the detention of the goods till 1st June as the defendant Company said there was an infringement of their Trade Mark and in order to enable them to file a suit. On the 3rd May plaintiff's Solicitors objected and after taking advice from the Government Law Officer the Collector released the goods by his letter of the 5th May.

The Collector of Customs Calcutta did nothing till 22nd April when he wrote the clearing agents Samuel Fitzee and Company asking what they had to say. On 11th May an *interim* injunction had been obtained from the Court. From an order recorded by the Collector upon an-

other matter—the assessment of the plaintiff's cigarettes for duty—we know exactly how he dealt with the case. He was under no misapprehension as to the fact that the plaintiff's goods had been manufactured by the British American Tobacco Company and were in that—the ordinary—sense genuine, but he thought there was a *prima facie* case for holding that the trade mark imported that the goods were the defendant Company's and that accordingly its use by other dealer was *pro tanto* a counterfeit. This contention is certainly far-fetched and indeed erroneous and the goods were not really within the provisions of the Sea Customs Act, s. 18 at all. The relevant clause speaks of "goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889." Any detention in Calcutta after 11th May was by virtue of the *interim* injunction of that date. The detention under the Sea Customs Act was from 1st to (say) 7th May in Bombay and from 12th April to 11th May in Calcutta.

The chief importance of this matter lies in the fact that the learned Judge thinks that the defendant Company in applying for detention of these goods under the Sea Customs Act were acting maliciously. It is clear that the facts as to the origin of the goods were made quite clear to the Collectors of Customs and were not in any wise misstated in either application, both of which gave—as the ground—"infringement of our trade mark rights." But it is said that if one looks at cl. (d) of s. 18 of the Act it is apparent that the defendant Company were maliciously accusing the plaintiff of a criminal offence and fraud, and were asking for a detention to which they knew they had no right.

It is desirable to add that there do not appear to be any regulations under s. 19-A of the Sea Customs Act but proceedings of the character now in question are governed in practice by certain "Instructions for the observance of Customs Officers" published under authority of the Government of India in The Merchandise Marks Manual. As I read these instructions they provide that if the 'informant' is willing to give an indemnity bond the Collector unless he is of opinion that there is clearly no reasonable cause for detention will detain the goods for a month in order to allow of a

suit being brought and if a suit is instituted will detain them until a final decision by the highest Appellate Court to which the matter is taken.

The learned Judge has held that the plaintiff cannot now recover damages against the defendant Company for the detention of his goods by the Collectors of Customs at Bombay or Calcutta. In his opinion Art. 26 of the Limitation Act applies and Art. 48 does not apply. Section 24 of the Limitation Act does not assist the plaintiff here—if only because it is impossible to hold that the special damage flowing from these detentions in May and June 1922 did not result before the end of that year. The only contention, therefore, which need be referred to is that urged upon us by the plaintiff's Counsel that Art. 49 applies because though the detention was by the Collectors, nevertheless, the defendant Company moved them to detain and are responsible for the detention as for their own act. In my opinion this argument fails whether as construction of Art. 49 or otherwise. It is quite true that "all persons in trespass who aid or counsel, direct or join are joint trespassers." *Petric v. Lamont* (1); but the wrong done by the Collectors here is that being lawfully in possession of the plaintiff's goods they wrongfully, i.e., contrary to their duty refused to deliver possession to him and so their possession became unlawful. This is what is contemplated by the concluding words of the first and third columns of Art. 49. But this cannot possibly be predicated of the defendant Company who never had possession of the goods. I think, therefore, that the learned Judge was right in holding that this cause of action is time-barred under Art. 36.

The defendant Company filed two suits against the plaintiff—one in this Court and one in the High Court of Bombay. The Calcutta suit was filed on 11th May, 1922, and an *interim* injunction was on that day obtained *ex parte* from Mr. Justice Greaves restraining the plaintiff from removing from Bond or dealing with 100 cases lying with the Customs. The defendant Company gave an undertaking in damages. On the 8th June the motion for an interlocutory injunction was disposed of in the presence of both parties. The plaintiff undertook to deposit Rs. 20,000 (less certain charges)

in fixed deposit in the Alliance Bank and the *interim* injunction was dissolved. There is no suggestion of any false statement or suppression made by the defendant Company on this occasion. Indeed, on asking to be referred to the affidavits I am informed that they were not even put in evidence in the present case. The suit came on for hearing promptly. It was heard by the same learned Judge whose decree in this case is now under appeal and was dismissed by him on 18th July, 1922. An appeal to this Court was dismissed on 10th April, 1923, and an appeal to His Majesty in Council shared the same fate on 13th May, 1924.

The suit in Bombay was filed on 22nd May, 1922, and notice of motion for an injunction was given for 2nd June. It was heard on 19th June—that is after the injunction given in Calcutta had been dissolved. On the 19th June the matter was settled by cross-undertakings: The plaintiff undertook pending the hearing not to sell any cigarettes then in Bombay or to arrive in Bombay and the defendant Company undertook in damages. The plaintiff's undertaking not to sell was discontinued by order of the Court on 2nd August, 1922, (soon after the Calcutta suit had been dismissed by the trial Judge) on his agreeing to keep an account, and this undertaking to keep an account came to an end by order of 20th September, 1923, by which time the appeal in Calcutta had been dismissed). The suit was abiding the result of the Calcutta case and the appeals therein and was dismissed on 10th November, 1924, after the decision of the Privy Council in that case.

The plaintiff says that these suits were brought maliciously and without probable cause and that he is entitled to damages accordingly; including, as I understand, damages for the harm done to his business by the litigation which discouraged dealers from buying goods which might land them in trouble. He says further that in this suit, and apart altogether from the defendant Company's undertakings in damages, he can in these circumstances recover damages in respect of the Calcutta injunction and of his own undertaking not to sell given to the Bombay Court. It has further been maintained on his behalf—more particularly on the authority of *Bhut Nath Pal Mistry v. Chandra Benode Pal*

(1) (1842) 1 Car. & Marsh. 96.

Chowdhury. (2), that so far as the Calcutta injunction is concerned, the obtaining of it was an act in the nature of trespass to property and it is not necessary for the plaintiff to prove malice or any want of probable cause.

At least two of these contentions appear to me to be wrong. The plaintiff has (if he has not lost it by delay) the right to apply to the High Court of Bombay to give him damages pursuant to the cross-undertakings given to that Court on 19th June, 1922. In no other way can he get damages for carrying out his own undertaking whether the suit was or was not malicious or an abuse of process. I agree entirely on this point with the learned Judge.

That, apart from malice or want of probable cause, a plaintiff can recover damages in an independent suit (and apart from any undertaking given by the defendant), upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights—this too is a proposition I dissent from. It is to be found in the case cited but it proceeds upon a misunderstanding of such cases as *Clissold v. Cratchley* (3) which are cases where trespass was committed and the defendant unsuccessfully set up as his justification an order of the Court which was disregarded because it was irregularly obtained by the defendant. To speak of an injunction as on a par with such a case as being an act "in the nature of trespass to property," is merely to obscure matters by a false analogy or else to beg the question. Section 95 of the Civil Procedure Code is rendered almost absurd by such a doctrine.

On the 11th of May, 1922, when the *interim* injunction was obtained in Calcutta restraining the plaintiff from removing from bond or selling or disposing of 100 cases of cigarettes then lying with the Customs, the defendant Company gave an express undertaking in damages. This was an undertaking to the Court and the character of such an undertaking has been discussed in the case of *Smith v. Day* (4). It is not such an undertaking as amounts to contract with the other party, nor does

it ground any action at Common Law. It is to be enforced by application to the Court to which it was given and in the suit or proceeding in which it was given. The right to ask for an enquiry as to damages thereunder may be lost by delay but there is no rule that an enquiry must be asked for when the injunction is dissolved or when the suit is decided: *Ex parte Hall*, *In re Wood* (5). It is clear now that although the granting of an enquiry as to damages is a matter upon which the Court exercises its judicial discretion, it is not necessary that the party aggrieved by the interlocutory injunction should show that his opponent suppressed material facts or otherwise obtained the injunction by improper means: *Griffith v. Blake* (6). In the present case the plaintiff before taking action waited until the defendant Company's appeal had been disposed of by the Privy Council but he commenced this suit promptly thereafter. This in substance satisfies the general rule that "the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted." See *Ex parte Hall*, *In re Wood* (5). No limitation is provided by Indian Statute Law for an application to enforce an undertaking given to the Court. It is, I think, clear that the plaintiff has brought an independent suit when for this purpose he should not have done so but this Court has jurisdiction to treat his suit as though it were an application made in the previous suit since it happens that both proceedings are in the same Court and have been dealt with by the same Judge. Where an independent suit is necessary a mere application may have to be dismissed; but where the plaintiff has adopted a more formal and elaborate procedure than he should have adopted in applying to the correct Court, no lack of jurisdiction is involved and the question becomes one of costs and of discretion. If the plaintiff had launched an application in the previous suit and asked that it should stand for hearing until the matter had been finally decided in appeal, he would have taken a very reasonable course. I consider also that in

(2) 16 Ind. Cas. 443; 16 C. L. J. 34.

(3) (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409.

(4) (1882) 21 Ch. D. 421; 31 W. R. 187; 48 L. T. 54.

(5) (1883) 23 Ch. D. 644 at p. 651; 52 L. J. Ch. 907; 49 L. T. 275; 32 W. R. 179.

(6) (1884) 27 Ch. D. 474; 53 L. J. Ch. 965; 51 L. T. 274; 32 W. R. 833.

this case an inquiry as to damages could not have been refused as there is every reason to think that the interlocutory injunction would interfere with his chance to sell his cigarettes. [*cf. Graham v. Campbell* (7)].

For these reasons it hardly appears to be necessary for the decision of this case that we should discuss the proposition that if A maliciously and without probable cause brings a suit against B and without suppression of facts, mis-statements or other improper means, obtains an interlocutory injunction, an action will lie at Common Law for the damage done to his business by the injunction. But I think it right to say that this proposition is one to which I refuse assent. I respectfully agree with the observations of Fletcher, J., in *Mohini Mohan Misser v. Surendra Narain Singh* (8) and with the decision in that case. It is the duty of a Judge before granting an injunction to satisfy himself that the plaintiff is not without reasonable and probable cause—indeed to satisfy himself, that it will stand a higher test. Unless the malice of the plaintiff results in some form of mis-statement or leads the plaintiff to suppress some fact or facts it was his duty to lay before the Court, I have much difficulty in seeing how the granting of the injunction is causally related to the plaintiff's act or state of mind. The present case is probably unique in that no attempt is made to prove what was laid before the Court or that it contained any element of falsity. The granting of an injunction is a judicial act in the fullest sense: it is not a ministerial order or an order of course or mesne process or a necessary incident of any particular jurisdiction. The *Quartz Hill Gold Mining Co. v. Eyri* (9) is not really directed to the present question but to the question whether a plaintiff has a cause of action from the mere bringing of a suit or other proceeding. I observe that in one well-known text book (Clerk and Lindsell on Torts, 7th Edition, page 654) it is suggested that the observations in that case (at page 684) made by Brett, M. R., show that in no case can a person who has maliciously and

unreasonably set the law in motion absolve himself from the consequences which he invited and brought to pass, by the suggestion that their immediate cause was a mistake on the part of the Judge. On this view doubt is thrown upon *Daniels v. Fielding* (10). A careful perusal of the learned Judge's argument in criticism of what Martin, B., said in *Johnson v. Emerson* (11) leads me to think that this is a misunderstanding of what he said. His point is that damage to credit results from the mere present action of a bankruptcy petition and that Martin, B., has failed to notice this special feature of that kind of petition. Of the proposition imputed to him I think it quite likely that he would have thought as of Martin, B.'s doctrine—its fault is that it is too large.

There is nothing in the second subsection of s. 95 of the Code or in Art. 40 of the First Schedule of the Limitation Act, 1908, which is inconsistent with what I have already said. These indeed are curious places in which to expect to find the law as to the conditions upon which a suit for damages caused by an injunction is sustainable, and it cannot be disputed that upon some conditions such a suit is competent as where an injunction has been procured by fraud.

For reasons already given I think, however, that it is within our power to make an order such as would have been more properly asked for by an application in a previous suit. But as a large body of evidence has been taken in this case and as the plaintiff has sought the judgment of the Court as to the amount of damages to which he is entitled, I propose that in ordering the inquiry this Court should give a decision upon one important matter for the guidance of the officer conducting the inquiry. I refer here to the question whether or not the plaintiff can as part of the damages caused by the injunction, recover damages for loss caused to him by the cancellation of two contracts for the purchase of cigarettes from Messrs. Venis and Company. In para. 18 of the plaint the plaintiff says that the Army and Canteen Board cancelled 258 cases of cigarettes by reason of which he was put to a loss of Rs. 1,09,549. In para. 16 he

(7) (1878) 7 Ch. D. 490 at p. 494; 47 L. J. Ch. 593; 38 L. T. 195; 26 W. R. 236.

(8) 26 Ind. Cas. 296; 42 C. 550 at p. 556; 21 C. L. J. 68; 18 C. W. N. 1189.

(9) (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 429; 31 W. R. 668.

(10) (1846) 16 M. & W. 200; 4 D. & L. 329; 16 L. J. Ex. 153; 153 E. R. 1159; 73 R. R. 453.

(11) (1871) 6 Ex. 329; 40 L. J. Ex. 201; 25 L. T. 337.

says that 160 cases, portion of 220 cases which he had contracted to sell in Bombay have not been shipped to India, but in Ex. O as the summary of his claim which the learned Judge has acted upon, he definitely states of these 160 cases also that they were cancelled by sellers in England. Now it appears that the cancellations relied upon are cancellations made by the plaintiff himself and not by his sellers. On the 17th of May, 1922, he wrote to Messrs. Venis and Company "Regarding my order of the 24th December for five million cigarettes, I very much regret to inform you that owing to an injunction served upon me by Messrs. Imperial Tobacco Co. of India Ltd., here which restrains me from importing these goods, I shall not be able to take delivery of the cigarettes and, therefore, please cancel same and oblige." On the 6th June, 1922, he wrote to Messrs. Venis and Co., "I am in receipt of your letter of the 16th May for which I thank you. I note that you can still make arrangements for the delivery of the goods. But I regret to inform you that owing to an injunction brought against me by the Imperial Tobacco Co. in India, I am restrained from importing these goods and they have commenced proceedings against me. Therefore I regret I cannot accept your kind proposition. Thanking you for the same." This is said to refer to 6 million cigarettes. Now the Calcutta injunction was granted *ex parte* on the 11th of May and referred only to 100 cases then lying with the Customs. The injunction was dissolved on the 8th of June. As I understand the reasoning of Brett, L. J., in *Smith v. Day* (4) damages to be paid by virtue of an undertaking are not necessarily confined to proximate and natural damages but may be enlarged either by reason that the opposite party had notice of all the circumstances or by reason that the case is one for the giving of exemplary damages in view of fraud or malice. But it is to my mind reasonably clear that in respect of neither cancellation was the plaintiff's conduct rendered reasonable by the *ex parte* injunction; as to the 100 cases in Calcutta, the plaintiff did not even wait to see what view the Court would take when he appeared to put his case before it. The Court in fact dissolved the injunction on the 8th June. The plaintiff's conduct may well have been reasonable in the sense that he now saw that he was involved in litigation about questions of "Trade Mark"

law or by reason of the fact that he was not prepared to peril too much upon his chances of success. His claim that the contracts were cancelled against him is anything but candid and I am of opinion that this matter ought not to be canvassed again at the enquiry which we direct. It is upon this condition only that I am prepared to direct such enquiry.

I turn now to consider whether the plaintiff is entitled to damages by reason of the mere bringing and prosecution of the suits in Calcutta and Bombay. I do not doubt that the existence of this litigation came readily and quickly to the notice of the trade. I do not doubt that the agents of the defendant Company informed their customers in the trade and the persons whom they employed to canvass for orders, of the facts that they had started these proceedings. I do not doubt either that some dealers refused to buy the plaintiff's goods because they did not wish to offend the defendant Company; others because the defendant Company would refuse to deal with them or to deal with them on the same favourable terms as before; others because they anticipated that they too might become involved in litigation if they dealt in plaintiff's goods; others again because they were definitely informed that the defendant Company were prepared to assert their rights to prevent the plaintiff's cigarettes being sold in India by bringing whatever suits were necessary to establish and enforce their alleged right. The learned Judge has held "that the defendant Company made full use of the litigation in Bombay and Calcutta with its attendant threat of trouble to others as an obstruction to the plaintiff and as a deterrent." He has further held that the suits "were throughout designed as a disparagement of the plaintiff's goods and an obstruction to the unfettered exercise of his rights as a trader, of which I have no doubt the Company made the fullest use the whole time of the litigation lasted and whenever occasion so required." These observations of the learned Judge are to be coupled with his finding that the defendant Company were actuated by malice and that their case had no reasonable or probable cause.

These findings taken broadly make an impressive case of hardship and oppression. It is, however, necessary to remember that while the plaintiff might have been well entitled to seize the opportunity afforded by the existence of war stocks, to drive the de-

defendant Company out of the market, he was not in law entitled to rely upon the defendant's passivity in the face of his laudable endeavour the defendant Company were certainly entitled, if they chose, to protect themselves by refusing to deal at all with any person who sold the plaintiff's goods. This complaint may be put upon one side. The rest of this formidable indictment may, I think, be examined under two heads: The first head is the bringing of the suits; the second is the question of threats. As regards the bringing of the suits I think the relevant authorities are *Savile v. Roberts* (12) and *Quartz Hill's case* (9) already cited to which I would add *Wren v. Wield* (13), *Pitt v. Donovan* (14). The recent case of *Sorrel v. Smith* (15), although the immediate subject-matter is illegal combination or conspiracy, is I think particularly valuable because it takes account of the right of a rival trader to forward or defend his trade and it examines the notion of malice in connection therewith.

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is the leading element in *Quartz Hill's case* (9). That question is a question of the remoteness of the damage. The mere institution of the proceedings may having regard to their character involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case "the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution.....The Counsel for the plaintiff Company have argued this case with great ability, but they could not point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on

the ground that it was brought maliciously and without reasonable and probable cause." *Quartz Hill's case* (9). Lord Bowen in saying this had clearly before his mind that incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; and Brett, M. R., in deciding that a petition to wind up a Company was within the exception mentioned in *Savile v. Roberts* (12), stated "the present case, therefore, is reduced to this question, namely: is a petition to wind up a Company more like an action charging fraud or more like a bankruptcy petition." If injury to the fair fame of a person is not for this purpose a consequence of an action charging fraud, it is impossible to contend that injury to his business is, in such a case as the present, a consequence of the mere bringing of the suit.

The second question which arises in cases of this sort is as to what is meant by malice. When we turn from criminal prosecutions to civil cases special consideration is here necessary. A prosecutor has no right to employ the process of the Criminal Court save for the purpose of vindicating public order and justice. If there is no reasonableness in his charge, that of itself raises at least a suggestion that he is acting from some other motive and that he is serving some private end in an oblique and improper manner. This may be mere spite or it may be something quite different such as the desire, by abuse of the criminal process to obtain money or other properties or to induce the person prosecuted to come to a compromise. Now in a civil suit the obtaining of money or property or the assertion of valuable rights is the declared object of the plaintiff. He is entitled, if he thinks that he has chances of success, to put the matter to the test and in this way it is daily experience that Courts of Law are invited to do things which it would be most unreasonable for them to do. When two people are competing for the same market success on the part of the one necessarily involves injury to the other except indeed the market be capable of expansion so as to admit them both. Holt, C. J., in *Savile v. Roberts* (12) in dealing with the second "objection" gives this answer: "There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has

(12) (1697) 1 Ld. Raym. 374; 91 E. R. 1147.

(13) (1869) 4 Q. B. 730; 10 B. & S. 51; 38 L. J. Q. B. 327; 20 L. T. 1007.

(14) (1813) 1 M. & S. 639; 14 R. R. 535; 105 E. R. 238.

(15) (1925) A. C. 700; 94 L. J. Ch. 347; 133 L. T. 370; 69 S. J. 641; 41 T. L. R. 529.

a right, he may sue an action.....If then the law will permit a man to make a false claim out of a Court of Justice, (i. e., outside a Court of Justice) *a fortiori* when he proceeds to assert his right in a legal course." In *Wren v. Wiold* (13) Blackburn, J., stated "that an action may be brought under such circumstances as to render it morally wrong and injurious in fact, is certain, though the authorities leave it in doubt whether, under any circumstances, the person so sued can recover damages for the vexation and annoyance caused to him by the false suit." He refers to the case reported in Maynard's Long Quinto, "that for bringing a suit so manifestly wrongful to the defendant's own knowledge, an action might be maintained." He refers to a case of *Sir G. Gerard v. Dickenson* (16) where the defendant had brought a suit alleging against her own knowledge that a certain lease, which was a forgery and which she knew was a forgery gave her title to the land. It is clear from his judgment that the furthest limit to which Blackburn, J., was prepared to go was that "if a man sue me in a proper Court, yet if his suit be utterly *without ground of truth, and that certainly known to himself*, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill-practice." The case before him was one in which the defendant had warned persons who had purchased or were intending to purchase machines from the plaintiff, that the machines sold by the plaintiff were infringements of the defendant's patents and that if they used the machines he would claim royalties and should take legal proceedings. The actual decision was as follows: "If, therefore, the plaintiffs had given evidence, on which the Jury might properly find that the defendant made the communication to the intended purchasers *mala fide*, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiff, or on which the Jury might have properly found that the defendant did not (to use Lord Holt's phrase) so much as fancy he had a right, but, as Lord Hobart says, knew certainly that his claim was utterly without

ground of truth, we are inclined to think that it would have been proper to leave that evidence to the Jury in support of the plaintiff's allegation that the defendant's letter was false and malicious." In the judgment of Lord Cave, L. C., in *Sorrell v. Smith* (15) it is stated in effect that there is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him. This, however, is guarded by a proviso to the effect that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. Of malice the Lord Chancellor stated this: "In some cases 'malice' is postulated as an element in the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connection. But there is a tendency to interpret 'malice' as connoting personal enmity or spite or some other evil motive, and as such a motive is neither an essential element in the offence nor conclusive of the offence having been committed, it seems better to forego the use of the word."

I propose in view of these authorities to consider in the light of the judgment of the learned Judge whether the defendant's suit was brought with the knowledge that it had no chance of success and for purposes other than the purpose of endeavouring to establish in Courts of Law that the defendant Company had the right to object to the plaintiff's importations and whether the defendant Company's desire was to injure the trade of the plaintiff as distinct from the desire to forward or defend its own trade. It is suggested that the defendant Company's case was essentially absurd because the plaintiff Company's cigarettes had been made in America by the successors of W. D. and H. O. Willis of Bristol. Two cases have been cited to us which I think dispose of this contention, *Imperial Tobacco Co., (Newfoundland) Ltd., v. Duffy* (17) and *Dunlop Rubber Co. v. Booth & Co.* (18). It is necessary, therefore, to see whether it can be imputed to the defendant Company that their superior

(17) (1918) A. C. 181; 87 L. J. P. C. 50; 118 L. T. 259; 35 R. P. C. 12.

(18) (1926) 43 R. P. C. 139.

(16) (1390) 4 Co. Rep. 18a; 76 L. R. 903.

officers were well aware that they had no case for claiming that their assignment of all the Indian rights in the Will's trade mark, should carry a similar consequence. It cannot I think be contended on a perusal of the proceedings at the trial or in appeal that the defendant Company were treated by the Courts as persons advancing an idle claim. The case offered no little scope for dispute upon the principles of law applicable. Nor was it one in which the careful sifting of somewhat numerous and complicated considerations was unnecessary. The learned Judge who tried the case gave a very clear analysis of the whole matter but I do not find in his judgment dismissing the suit an indication that he found the decision of it to be noticeably free from difficulty. In matters of trade mark law the Directors of a Company are necessarily in the hands of their legal advisers. In this case they had received from the Solicitors in India, advice to the effect that the law was against them. Their legal experts in London took another view for the reason, as I think that they failed fully to appreciate the consequences in India of the lack of statutory title to a trade mark. These consequences have in the course of the case been worked out with reference to s. 22 of the Trade Marks Act, 1905 which authorises the "splitting up" of a trademark territorially. In any view the burden of proof lies heavily upon the plaintiff to show that the defendant Company were persuaded that Mr. Macnaghten was wrong and the Indian Solicitors were right. In deciding appeal to the Courts of Law they must have known not merely that they were committing themselves to some expense but that they were taking the risk of an adverse decision which might affect them seriously in future. If the learned Judge has meant to find that the defendant Company throughout the whole history of the litigation was intentionally riding for a fall, that they were not really endeavouring or hoping to establish by a judicial decision the right which they claim, but well-knowing that they would ultimately lose, brought the actions for the sole purpose of obstructing plaintiff in the exercising of rights which they knew to be his, I respectfully differ from his conclusion. It certainly was, not merely the object, but the declared purpose of the defendant Company to prevent the plaintiff from selling these cigarettes in India. The plaintiff had

at least several opportunities for considering whether the case made against him was transparently hollow. One was when he gave his undertaking to the Bombay High Court; another was when he decided to cancel the two contracts with Venis & Co. already mentioned. I do not know what transpired on the 8th of June, 1922, before Mr. Justice Greaves, but his order puts the plaintiff upon terms as to making a deposit with the Alliance Bank as a condition of dissolving the *ex parte* injunction. I will assume for the present purpose that in applying to the Collector of Customs the Directors acted *mala fide* in the sense that they claimed a relief to which they knew that they had no right. Even so it is a different question whether in taking steps to approach a Court of Law for the decision of their claim, they knew that they had no right whatever or were merely suing to serve an oblique and improper purpose. The plaintiff has, in my opinion, wholly failed to show that either suit was brought *mala fide*, without belief that the defendant Company had any reasonable cause or from oblique motives other than a motive to make their case good in furtherance of their own trade interests. I do not see that their case, though it turned out to be bad and has been overruled for reasons which I do not presume to challenge, was in any way such as to make it wrong or unreasonable for them to lay it before the Court.

With regard to the allegation that the defendant Company maliciously threatened to harass the plaintiff's customers with vexatious litigation, I do not know what threats in particular if any the learned Judge has considered to be proved and I fail to find this allegation in the plaint. It appears to me that what I have already said is sufficient to dispose of any question as to threats—whether threats to litigate or threats to boycott, as such threats are unlawful only where the purpose of the threat is "wilfully and ultroneously to injure the trade of another" as distinct from the purpose to forward one's trade: *Sorell v. Smith* (15).

The plaintiff further claims damages for what is sometimes shortly called "slander of goods," i. e., for statements false, made maliciously or without lawful occasion, and causing him special damage.

Paragraph 11 of the plaint pleads this cause of action as follows: "The defendant Company through its officers, servants

and agents throughout India rumoured and caused to be rumoured and circulated statements to the effect that the Gold Flake cigarettes imported by the plaintiff were inferior in quality and otherwise than they represented to be, and they were otherwise than in a sound and good merchantable condition and that they were inferior to those by the defendant Company, that they were not genuine Gold Flake cigarettes, and that the plaintiff had no right to import and sell them as such."

The allegation of special damage refers to all the other grievances as well as to this, *viz.*, the injunction, the detention by the Customs, and two suits, etc. Paragraph 12 states: "By reason of the aforesaid conduct and acts of the defendant Company, its servants, agents, etc., the plaintiff failed to find a market for the cigarettes imported and arranged by him to be imported into India and agents and dealers refused to purchase and sell or advertise or expose for sale the said cigarettes imported by the plaintiff as aforesaid with the result that by reason of the said wrongful and malicious acts and conduct of the defendant Company, the plaintiff was put to considerable loss and expenses particulars whereof are hereinafter set out." Speaking roughly the special damage for which he claims is his whole loss by reason of the failure of his venture.

The pleadings disclose no particulars of the time when, person to whom, or by whom the alleged "rumours" were set on foot—in fact no particulars of publication whatsoever nor any specific statement what on any occasion was actually said. No particulars were applied for.

The trial took place in November, and December, 1925. In July, 1925, the plaintiff examined one witness on commission in Bombay and in August, 1925, another before this Court *de bene esse*. From the evidence of the former Merwan Hormusji Irani the defendant Company got before trial notice of two occasions on which slander of goods was said to have been uttered. In the evidence of the latter (a dismissed servant of the defendant Company called Carr) I cannot see that there is any indication of or reference to any slander now relied upon or anything else that looks like slander of goods. The defendant Company in August examined *de bene esse* Mr. Abbott their Chairman and I see in his cross-examination no reference to any other slanders

uttered by him or in his presence save a reference to one of the two occasions already mentioned. The witnesses examined by the defendant Company in July on commission in Bombay are asked nothing about slanders.

At the hearing in December, 1925, the plaintiff called nine witnesses including himself. The plaintiff's evidence-in-chief upon this part of the case forms questions 258 to 266 and contains only the most harmless hearsay. The only witnesses called to speak to any question of slander of goods are Ardeshir Khodadad, Kali Pada Roy, N. N. Chakrabarti and M. N. Jarvar. The learned Judge deals specifically with two only of the alleged slanders—one said to have been uttered by Carr to Khodadad in March or April 1922 and another said to have been uttered by Mr. Ryan and Akhil Pal in July 1922 to Kali Pada Roy and his partner's father N. N. Chakrabarty.

On the hearing of this appeal it appeared to us that this part of the case as presented by the pleadings was not at the time of the trial in a fit condition to be tried and that it would be as well to require a statement from the plaintiff of particulars of those slanders which he claimed to have proved. Accordingly particulars were filed alleging 13 several publications five of which were, in our opinion, afterthoughts in no way within para. 11 of the plaint and dealt with neither by cross-examination nor by the learned Judge as substantive counts in the case. The attempt made was intelligible in view of the plaintiff's difficulties as to limitation. These five new counts are based upon letters and the charge is that the defendant Company published them to their typists and staff, to the Collector of Customs and the Imperial Bank. It seems reasonably clear that neither Counsel nor the learned Judge at the trial were aware that they were assisting at the investigation of any such case. In my opinion these counts must be disallowed altogether. They appear to amount to be a contention that for the defendant Company even to claim that the plaintiff's goods infringed their trade mark rights was an actionable wrong.

There remain eight allegations of slander of goods and it is our duty to examine each in the light of the findings of fact come to by the learned Judge. As I read his judgment the only finding of untrue statements made by any one for whom the defendant Company can be responsible is

that while it is true that the plaintiff's goods were old and true, that his packing was inferior to the defendants, the defendant Company's servants when warning dealers that these were not the goods of the defendant Company "impressed on dealers a non-existent difference in the quality of the goods." This seems to be a slender foundation for an action of this character brought against a rival trader and I am not surprised that learned Counsel for the plaintiff is not quite content with it.

[His Lordship then referred to the evidence and proceeded:—]

With regard to these allegations of slander of goods, as the defendant Company did not choose to apply for particulars I am quite prepared to hold that the plaintiff may found upon any occasion as to which he made a substantive case at the trial including the occasion spoken to by M. M. Jarvar who was his last witness called, provided always that the case made comes fairly within para. 11 of the plaint. But I am not prepared to allow the plaintiff to pick out new cases from the correspondence or from answers given in cross-examination by the plaintiff's witnesses.

It will be observed that all the occasions on which slander of goods is specified except the twelfth and thirteenth (which refer to letters, dated 1st and 14th January, 1924, sent to the Imperial Bank) are occasions in 1922. The learned Judge has held that they are covered by Art. 36 of the Limitation Act and are time-barred. But he says that it is "a fair inference to draw from the evidence that the statements alleged and complained of continued to the extent already mentioned to be repeated within two years before suit." Accordingly, as I understand, part of the damages which he awards is awarded for false and malicious statements made by persons unknown to persons unknown upon occasions and at times as to which the only information is that they were subsequent to January 1923. All that is known as to the content of these statements is that they affirmed "a non-existent difference in the quality of the goods." What is supposed to be known as to the special damage, caused is still more difficult to understand. Because, though the learned Judge has disallowed the claims in respect of detention of goods by the Collectors of Customs at Bombay and Calcutta, in respect of the undertaking given by the

plaintiff to the High Court of Bombay and in respect of all alleged slanders of goods prior to January, 1923, he has in the end awarded damages on the basis of compensation to the plaintiff for the whole of his loss of profit on all the cases destined for the Indian market which he had contracted to buy, i. e., 666 cases. I am not quite sure what the figure of Rs. 23-8 represents but I think it is intended as the average price which the plaintiff could have obtained if the defendant Company had never in any way claimed that he was infringing their trade mark rights or that their own goods were superior in quality to his.

With all respects to the learned Judge I cannot assent to this way of dealing with the case so far as it is a case of slander of goods. The defendant Company is doubtless responsible for the statements of agent or servant acting "within the scope of his authority" (in the wide sense given to that phrase by modern law) provided that they were false statements made maliciously or without lawful occasion. In the present case malice is on any view an essential and I do not understand how malice or falsity or special damage can be attributed in the *vogue*.

As the question of special damage enters into questions of limitation I desire to observe that no single one of the slanders referred to in the plaintiff's particulars filed in this Court is within the doctrine of *Ratcliffe v. Evans* (19). Proper particulars would have shown in each case the loss of the particular customer or dealer to whom they were spoken or some other really specific damage flowing from the publication to him: *Leatham v. Rank* (20).

The statements here founded on are not statements printed in a newspaper or made at an auction or to the public or to a fluctuating and transitory class of persons unknown to the plaintiff. Neither the nature nor the circumstances in any case require the admission of evidence of general loss of business as the natural and direct result produced. It is in order to get out of the requirement of alleging and proving actual temporal loss with certainty and precision in each case that the plaintiff here claims to multiply by an imaginary number whatever he has proved. In my opinion he has proved no specific instance.

(19) (1892) 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794; 40 W. R. 578; 56 J. P. 837.

(20) (1912) 57 S. J. 111.

But let it be assumed that he has proved three or six instances all within limitation. One dealer refuses to buy, another cancels his purchase, another goes on buying as before. "If the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot ordinarily be a direct and natural result of the limited slander" [cf. *Ratcliffe v. Evans* (19).] Proof of a conspiracy to slander the plaintiff's goods, proof of twenty slanders part of a course of conduct, proof of orders to a group of servants to go out uttering slanders throughout a market—this might bring a case to the same level as a case of publication in a newspaper and require the Court as a matter of common sense to let in evidence of general loss of business. But where is the necessary proof? The case is not a case of conspiracy or illegal combination as learned Counsel for the plaintiff expressly concedes. If the number of specific instances proved does not show slander broadcast what is the evidence to contradict the evidence of Abbott and of Selfe? Is it the evidence of the dismissed servant Carr? or Jawar's evidence—not put to Carr of what Carr said to him? Carr's evidence in cross-examination is that practically it was left to them to do what they liked so long as they did nothing wrong. He does also say that he was told to tell the dealers that the plaintiff's goods were old stock from the army and were inferior in quality. This last element does not appear in his statement as to what he actually said to the dealers. It seems, however, highly reasonable to suppose that if the defendants Company were selling fresh stock from England with a superior form of protection from the weather and were asking Rs. 36 per thousand they would represent to dealers that these goods were better than the plaintiff's, who charged a bare three-quarters of their price. Otherwise they could hardly hope to sell their cigarettes at all. I pass over the statements of the plaintiff to the customs on the question of duty. That the question is one of opinion is clear enough. Sheriar says he gave some of plaintiff's cigarettes to two or three customers to test them and that he relied on their opinion and his own also. He does not smoke himself but he did not think there was any difference between plaintiff's and defendant's cigarettes. He would not pay the same price for goods two years old as for fresh

goods. Carr says the plaintiff's cigarettes were absolutely sound and marketable when they first came to Bombay. Khodadad says the quality was equal. Das says he had no complaints. Bonnan Sheriar says they were fresh goods and saleable and he had no complaints. Kali Pada did not compare them with the defendant's but says they were of good quality and condition and sold easily. Chakrabarti says some customers would choose the one and some the other. The assistant from Samuel Fitze & Company says they thought the plaintiff's goods to be sound in condition and quality and when they sold they had no complaints. Jawar who says he is an expert asked how the plaintiff's goods compared with the defendants' replied "Not much difference" and "Practically the same." It was put to Mr. Abbott in cross-examination that at the previous trial an experienced dealer gave evidence that the plaintiff's cigarettes were the better. He says it is a question of opinion and that ordinarily dealers and smokers would not detect the difference at once. His letter to London on 10th May, 1921, said the plaintiff's goods were in surprisingly good condition but "they smoke rather nastily in our opinion." On this evidence I fail to see why a claim that the fresher and dearer goods were better should not come within the principle that trade competition is no wrong or why malice should be imputed to the defendant Company's servants for their efforts to persuade dealers that their article was superior: *White v. Mellin* (21) and *Hubbuck & Sons v. Wilkinson Heywood & Clark* (22). In "slander of goods" the burden of proof of falsity is on the plaintiff and, in my opinion, he fails to prove this statement to be false.

In these circumstances I do not propose to discuss the question of limitation as to this head of claim but, in my opinion, s. 24 and Art. 36 give the plaintiff two years from the accrual of special damage.

In my judgment this appeal should be allowed. Treating this suit as an application in Suit No. 1610 of 1922 for an inquiry as to the sum to which the plaintiff is entitled as damages for loss caused to

(21) (1895) A. C. 154; 64 L. J. Ch. 308; 11 R. 141; 72 L. T. 334; 43 W. R. 353; 59 J. P. 628.

(22) (1899) 1 Q. B. 86; 68 L. J. Q. B. 34; 79 L. T. 429; 15 T. L. R. 29.

him by the injunction granted therein on 11th May, 1922, we should order that such inquiry be held in the said suit by the Official Referee and direct that in ascertaining the said sum the Official Referee do not include any loss accruing to the plaintiff by reason of the cancellation of the contracts referred to in the plaintiff's letters of 17th May, 1922, and 6th June, 1922, to Messrs. Venis & Co. *Quoad ultra* the suit should be dismissed. The plaintiff must pay to the defendant Company (1) their costs of this appeal and also (2) their costs of the suit before the learned Judge less a sum of Rs. 300 which we assess as the reasonable costs of an application for an inquiry as to damages.

It is desirable to make clear that except for the direction just mentioned as to the cancelled contracts the question of the amount of damage caused by the injunction is at large. The figure of Rs. 238 mentioned by the learned Judge was arrived at on a footing which is not consistent with our decision and the Official Referee will be in no way bound by it.

The inquiry should be treated as an urgent reference.

C. C. Ghose, J.—This is an appeal against a judgment delivered by my learned brother Mr. Justice Pearson on the 25th January, 1926, by which he held that the plaintiff was entitled to recover damages from the defendant Company on account of certain wrongful and malicious acts alleged to have been done by the latter.

The facts giving rise to the litigation, out of which the present appeal has arisen, are to be found, among other things, in Ex. DD, being the judgments delivered, in a previous litigation between the parties, by Mr. Justice Pearson on the 18th July, 1922, by the late Chief Justice and Mr. Justice Richardson on the 10th April, 1923, and by their Lordships of the Judicial Committee of the Privy Council on the 13th May, 1924. It will, therefore, and also in view of the judgment just delivered by my Lord, not be necessary for me to state in detail herein the facts involved in the present appeal, except in so far as may be necessary.

In the action in which the said judgments were pronounced, the present appellants sought to restrain the plaintiff from selling in India a well-known brand of cigarettes, namely "Wills' Gold Flakes" which, for many years, they alone, as as-

signees of the trade-mark and goodwill for India, had been importing into and selling in India. It appeared that the present plaintiff having bought as surplus War stock, over 21 millions of the said cigarettes cheaply in England from purchasers from the manufacturers (who had granted to the present appellants the sale rights for India) was able to undersell in India the present appellants. It was held in that litigation that the sale by the present plaintiff in India of the said cigarettes involved no breach of contract, misrepresentation, or infringement of the rights of the present appellants, and that it had not been shown that the latter had acquired any independent reputation as importers of the said cigarettes. Their Lordships of the Judicial Committee held confirming the judgments delivered in this Court that the present appellants' suit was not maintainable. [See *Imperial Tobacco Co. of India, Ltd. v. Albert Bonnan and Bonnan & Co.* (23).]

On the 28th, February, 1922, and on the 8th March, 1922, the first lot of the plaintiff's goods arrived in Bombay and Calcutta respectively and he sold certain cases to dealers. Thereupon the present appellants who had, up to then, exclusive rights of selling the said cigarettes in India, applied to the Collectors of Customs in Bombay and Calcutta for orders for detention of the plaintiff's goods, on the ground, among others, that having regard to the trade history of the appellants' cigarettes and the acquisition by them, as purchasers of the goodwill in India of the business with which the trade-mark "Wills' Gold Flakes" was associated, the importation of the said cigarettes by the plaintiff (who was not one of the appellants' customers) infringed their trade mark. The plaintiff's goods were accordingly detained by the Collectors of Customs in Bombay and Calcutta. This was done in order to allow the appellants an opportunity of having the matter adjudicated upon in the Civil Courts.

Thereafter, two suits, one in this Court and another in the Bombay High Court were filed on the 11th and 22nd days of May, 1922, respectively. On the first mentioned date, application having been

(23) 80 Ind. Cas. 1013; 51 I. A. 269; A. I. R. 1924 P. C. 187; 26 Bom. L. R. 683; 2 Pat. L. R. 230; 47 M. L. J. 69; (1924) M. W. N. 602; 20 L. W. 495; 51 C. 892; 29 C. W. 81 (P. C.).

made by the appellants an *interim* injunction was issued by this Court restraining the plaintiff, his servants and agents, from disposing of certain cases of cigarettes then lying with the Customs Authorities in Calcutta. The application for injunction was disposed of by this Court in the presence of both sides on the 8th June, 1922, when, it appearing that the present plaintiff had placed a sum in fixed deposit of Rs. 20,000 into the Alliance Bank of Simla, it was ordered that the *interim* injunction referred to above should stand dissolved. It was stated in the order of the 8th June that the present plaintiff's claim for damages, if any, owing to the *interim* injunction having been granted was reserved. In the Bombay suit the present appellants gave notice of motion on the 23rd May, 1922, for a similar injunction against the present plaintiff. The application in the Bombay Court was disposed of on the 19th June, 1922, when the present plaintiff, who was the defendant, having given an undertaking not to dispose of or in any way deal with the cigarettes then in Bombay or to arrive in Bombay, the application stood over by consent of parties till the hearing of the suit. Subsequently, by an order of the 2nd August, 1922, the then defendant's undertaking of the 19th June, 1922, was vacated, as he agreed to keep an account of the sale of the contents of the cases of cigarettes mentioned in the plaint in the Bombay suit, without prejudice to the rights of the defendant, if any, to claim damages consequential on the order of the 19th June, 1922.

On the 21st January, 1925, the plaint in the present suit was put on the file and in it the present respondent complained that certain acts which had been done by the present appellants were malicious and wrongful and he accordingly claimed damages for seven and half lacs of rupees. The acts complained of are referred to in paras. 6 to 11 of the plaint, and they may be classified as follows:—

(a) Wrongfully and maliciously applying to the Collectors of Customs in Bombay and Calcutta and obtaining from them orders for detention of the plaintiff's goods.

(b) Wrongfully and maliciously instituting and prosecuting suits against the plaintiff in the High Courts in Bombay and Calcutta,

(c) Wrongfully and maliciously obtaining an injunction against the plaintiff from this Court as referred to above.

(d) Wrongfully and maliciously giving notice of motion for an injunction against the plaintiff in the Bombay High Court in which proceeding the plaintiff was made to give an undertaking on the 19th June, 1922.

(e) Wrongfully and maliciously publishing various statements slandering the plaintiff's goods.

Mr. Justice Pearson held that the conduct of the appellants in regard to the proceedings before the Collectors of Customs in Bombay and Calcutta was malicious and without reasonable and probable cause. He also held that in filing the two suits in Bombay and Calcutta and in proceeding with them as they did, the appellants acted maliciously and without reasonable and probable cause. He found that the appellants did make and circulate statements slandering the plaintiff's goods, and he finally came to the conclusion that the plaintiff had suffered damages by reason of the said acts on the part of the appellants. According to Mr. Justice Pearson, the plaintiff started off very well in Bombay in the matter of the sale of his cigarettes, but instead of finding a fair field for his goods, he found himself faced with obstruction after obstruction, maliciously raised by the appellants' courses of delay, disparagement of his goods, assertion of unfounded rights—all of which interfered with the plaintiff's right to trade in his goods in the ordinary way. In short, Mr. Justice Pearson came to the conclusion that in this case the appellants had acted *mala fide* and with ulterior motive from beginning to end. He, therefore, directed an enquiry for ascertainment of damages sustained by the plaintiff under heads Nos. 1 to 5, both inclusive, in Schedule A to the plaint on the basis of an uniform rate of Rs. 23-8 per thousand cigarettes.

The appellants' case has been elaborately argued and I propose to examine whether the plaintiff's said claims for damages are sustainable in law or on facts. To start with it appears that in respect of claim (a), the orders for detention of the plaintiff's goods in Bombay and Calcutta by the Collectors of Customs was made under the provisions of the Sea Customs Act (Act VIII of 1878) under the usual indemnity from the appellants on the ground

that the goods which the plaintiff had imported into India bore a counterfeit trade mark. Whether they bore a counterfeit trade mark or not, it is quite clear that the provisions under the Sea Customs Act are in some cases to be read with the provisions of the Indian Merchandise Marks Act (Act IV of 1889) relating to false trade description and that they are intended not only for the protection of manufacturers and merchants against the piracy of their marks, but also for the protection of the public against the supply of goods of an inferior or unknown quality under cover of a well-known brand. As I read the provisions of the Sea Customs Act, as amended by the Merchandise Marks Act, it is clear that although ordinarily action thereunder is taken upon information received from the manufacturer or merchant aggrieved; there is nothing to prevent the Customs Officers from acting upon their own initiative. The sections of the Sea Customs Act which were referred to at the hearing before us are ss. 18 and 19-A. The appellants might have taken an exaggerated view of their rights, but it appears that the Customs Officers really proceeded in this matter to act in accordance with the instructions for the observance of Customs Officers appearing on page 11 of the Merchandise Marks Manual (1925) issued by the Government of India. Be that as it may, what happened in this case was this. The appellants were and are the successors in India of Messrs. Wills, who were the original manufacturers of Wills' Gold Flake cigarettes. The business of Messrs. Wills in course of time changed hands and was eventually acquired by the British American Tobacco Co., Ltd., who became the owners of the several trade marks of Messrs. Wills' several brands of cigarettes, including the trade mark of the Gold Flake cigarettes. In India, the sale of Gold Flake cigarettes was in the hands of the British American Tobacco Co. (India) Ltd. The two Companies were separate and distinct, and the last named Company acted as sellers and distributors in India of the products of the former Company. The appellants entered into an arrangement with the two Companies referred to above sometime in 1910, the effect of which was that the appellants thenceforward carried on business in India as sellers and distributors of the goods manufactured by the British American Tobacco

Co. Ltd., including the Gold Flake cigarettes, in place of the British American Tobacco Co. (India) Ltd.. They (the appellants) really purchased the Indian business. A formal assignment of the goodwill of the business carried on in India by the first-named Company with all trade marks used in the said business, including the trade mark relating to Gold Flake cigarettes was executed in favour of the appellants on the 11th April, 1922, and it was completed sometime in May, 1922. It appears on the evidence that at first the appellants were doubtful as to whether they were at all entitled to apply to the Collectors of Customs in Bombay and Calcutta for orders for detention of the plaintiff's goods; but shortly before the 12th April, 1922, they received certain advice from their Solicitor in London to the effect that the plaintiff's goods, labelled as they were, were infringements of the trade mark of the Gold Flake cigarettes and, therefore, a violation of the right which was in the appellants. There are two telegrams from the London Solicitor Mr. Macnaghten; one is dated the 4th April, 1922, and the other dated the 10th April, 1922. This last telegram was not admitted in evidence in the Court of first instance. The reasons for the exclusion of this telegram from the record do not appear on the record itself and are not appreciated. Obviously it was a material document and, in my opinion, should have been admitted in evidence. It has been used before us at the hearing of this appeal and it should be on the record. It appears from the two telegrams referred to above that it was thought by the professional advisers in London of the defendant Company, *i. e.*, by experts in trade mark law that there were substantial grounds for approaching the Collectors of Customs in Bombay and Calcutta with a request for detention of the plaintiff's goods. The appellants then proceeded to take action.

The grounds urged in the requests made to the Collectors of Customs in Calcutta and Bombay are set out on pages 123 and 140 in Part II, Vol. I of the Paper-Book and they are as follows:—

"We consider the importation of the above goods into India as an infringement of our trade mark in W. D. & H. O. Wills' brand of Gold Flake cigarettes. We have been manufacturing and marketing the brand for many years past and have lying

and well-established 'sole right to the mark in India. Our packet label bears the words, 'this label is issued by the Imperial Tobacco Co. of India, Ltd., successors in India to W. D. & H. O. Wills.'" On these applications being made, orders for detention of the plaintiff's goods were passed by the Customs Authorities. The goods in Bombay were released from detention by the Collector on the 5th May, 1922, the detention having been for a very brief period, i. e., from the 1st May, 1922. As regards the goods in Calcutta, they were detained from the 12th April, 1922, to the 19th June, 1922, when the order for release was passed by Mr. Lloyd, Collector of Customs in Calcutta. The detention in Calcutta from the 11th May was really by virtue of the injunction issued by this Court.

Now the first question which arises for consideration is whether the present plaintiff has, on the evidence before us, substantiated his contention that the statements made to the two Collectors of Customs were untrue in fact, that the said statements were made maliciously, and, without reasonable and probable cause and that he has suffered special damage thereby [see the case of *Nemi Chand v. Wallace* (24).] From what has been stated above, in my opinion, there cannot be any doubt that the appellants did really believe in what they had stated to the Customs Authorities and that there was no mis-statement of fact on their part. On the evidence on record, both oral and documentary, I am not prepared to say that the appellants had made statements to the Collectors of Customs which were untrue in fact and untrue to their knowledge, or had acted maliciously in the proceedings before the said Collectors. The plaintiff has, in my opinion, entirely failed to bring his case within the rule laid down by the Court of Appeal in the case of *Nemi Chand v. Wallace* (24). So much on the evidence; but the plaintiff's claim on this head is bound to fail for another reason, namely, that it is, having regard to the dates set out above, barred by limitation under Art. 36 of the First Schedule to the Limitation Act, as was indeed held by the learned Judge at the bottom of page 528 of the Paper Book, Part I. It was urged that Art. 49 applied to this part of the plaintiff's case. In my opinion, Art. 49 does not apply at all; the

detention of the plaintiff's goods was not by the appellants.

I will now deal with claim (e), which is referred to in para. 11 of the plaint, which runs as follows: "The defendant Company through its officers, servants and agents throughout India rumoured and caused to be rumoured and circulated (statements) to the effect that the Gold Flake cigarettes imported by the plaintiff were inferior in quality and otherwise than they were represented to be, and that they were otherwise than in a sound and good and merchantable condition and that they were inferior to those sold by the defendant Company, that they were not genuine Gold Flake cigarettes and that the plaintiff had no right to import and sell them as such." The learned Judge's finding on this point is summed up in the following words: "Undoubtedly the Company's servants were going round warning dealers that they would not be responsible for the plaintiff's goods. There is no harm in that and they could properly employ the whole of their organization in broadcasting it to the dealers. There seems to be no doubt, however, that they went further and wrongly impressed on dealers a non-existent difference in the quality of the goods, and also made full use of the litigation in Bombay and Calcutta with its attendant threat of trouble to others as an obstruction to the plaintiff and as a deterrent. That is a clear impression which I retain after hearing the evidence." The learned Judge further added, in dealing with the question of limitation raised on behalf of the defendant Company as an answer to this part of the plaintiff's claim, the following,—"In so far as the cause of action may be slander of title or slander of goods the limitation would be either one year under Art. 25 or two years under Art. 36: the latter is, in my opinion, applicable in the circumstances for I think the action would be on the case. Nevertheless I think it is a fair inference to draw from the evidence that the statements alleged and complained of, continued, to the extent already mentioned, to be repeated within two years before suit, particularly having regard to the continuance of the previous suits which throughout were designed as a disparagement of the plaintiff's goods and an obstruction to the unfettered exercise of his rights as a trader, of which I have no

doubt the Company made the fullest use the whole time the litigation lasted, and whenever occasion so required. I am not prepared to say that in any view of the matter the Company is excused by the principle that a trader is entitled to protect his own property and his own interests because I think in this case there was *mala fides* and ulterior motive from the beginning until the end." It will be seen from the above that the learned Judge laid particular stress on the pendency of the previous suits for founding his conclusion that slander of the plaintiff's goods had been going on.

Now, in an action for damages for slander of goods the precise words complained of must be set out in the statement of claim; there are many authorities that it is not sufficient to allege that the slanderer used such and such words or to that effect. Has this rule been complied with in the present instance by the plaintiff? In my opinion para. 11 of the plaint offends in every way against this cardinal rule; and it is surprising that the defendant Company should not have insisted in the Court of first instance on full and sufficient particulars being furnished to them before the pleadings were closed, in respect of the matters alleged or suggested in para. 11 of the plaint. However, at the hearing before us, learned Counsel on behalf of the plaintiff has furnished us with a number of particulars of the statements complained of and we have been taken through them.

It is said that Mr. Selfe, who was employed in the Bombay office of the defendant Company stated to certain people in Bombay, whose names are given, that the plaintiff's cigarettes were inferior in quality to the defendant Company's cigarettes, that they were "kharab" that they were old and not fit for sale. It is further said that Mr. Abbott had also used similar language in respect of the plaintiff's cigarettes. Now all this is said to have taken place between August and May 1922. Between March or April and August 1922 Mr. Carr, who was employed in the Bombay office, is alleged to have stated to a dealer named Khodadad that the plaintiff's goods were not genuine and that if Khodadad dealt in the same, he would suffer loss. It is further alleged that in July, 1922, one Akhil Paul, a servant of the appellants, stated to one Kalipada

Roy that the plaintiff's cigarettes had been purchased at auction and that if he sold them he would incur loss. There is also the statement alleged to have been made to one Naren Chakrabutty that the plaintiff's cigarettes were not genuine and that he would have difficulty in selling them. Now, the written instructions to the Bombay office of the defendant Company which were given on the 23rd March, 1922, and which must have been present in the minds of the officers in the employ of the appellants (and these must have been the instructions given in the Calcutta office) were as follows:—"Please warn all dealers that these goods are not put on the market by us and that we cannot accept responsibility in any way whatsoever for goods which do not bear our name." Abbott has given evidence in this case and he has categorically denied that in talking to the witness, Sheriar about the plaintiff's cigarettes he had said anything at any time beyond this, namely, that the plaintiff's cigarettes were not the defendant Company's and that the defendant Company would not be responsible for them. Mr. Selfe has also given evidence and like Mr. Abbott he has also categorically denied that he ever made any remarks about other people's goods. Mr. Milles stated also that all that he did was to warn dealers that the goods were not of the defendant Company's manufacture and that the latter did not accept any responsibility for them. The conversations alleged to have taken place between the witness Carr and Khodadad have not been relied upon by the learned Judge and it is, therefore, unnecessary for me to refer to them. As regards the statements said to have been made to Kalipada Roy and Naren Chakrabutty, I see no reason why I should not accept the evidence of Akhil Paul and Mr. Ryan. I find that the plaintiff has not made out any case as regards the said alleged statements. Nor do I think that the plaintiff has made out any case about the alleged conversations between Carr and Rustom. The other statements complained of, were in the written complaints to the Collectors of Customs in Calcutta and Bombay, the letter to Messrs. Samuel Fitz & Co. dated the 19th April, 1922, and the letters to the Imperial Bank of India, Calcutta and Bombay, dated the 1st and 14th January, 1924, respectively. In these cases also the plaintiff has not made out any case at all. Now, to succeed in an action for slander

of goods, the plaintiff must allege and prove (1) that the statement complained of was made of and concerning his goods; (2) that it was false; (3) that it was published maliciously, *i. e.*, with the intention of injuring him and (4) that he has suffered special damage thereby. A trader is entitled to commend his own goods and state that they are better than the goods of another and if he does so, no action will lie against him, whatever damage may ensue from such statement [see *White v. Mellin* (21)]. It is otherwise where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior in quality to his own, but goes further and makes an untrue statement of fact about his rival's goods—for example, where he states that they are rotten or unmerchantable. In such a case like this, an action on the case will lie, provided it can be proved that such statement was published maliciously and that special damage has ensued [see *Lyne v. Nicholls* (25)]. It is not malice if the object of the trader is to push his own business. To make the act malicious it must be done with the direct object of injuring the other person's business. Therefore, the mere fact that it would injure that other person's business is no evidence of malice [see *Dunlop Pneumatic Tyre Co., Ltd v. Maison Talbot* (26)]. This being the state of the authorities, I have carefully scrutinized the evidence of Sherier and Khodadad and of the other witnesses on the side of the plaintiff taken along with the evidence of the officers of the defendant Company and I have come to the conclusion that no statements in slander of the plaintiff's goods were made by the officers of the defendant Company which would give rise to a cause of action. I am not unmindful that it was alleged on the plaintiff's side that the plaintiff's goods were said to have been described by Mr. Selfe and officer of the defendant Company, on one occasion as being 'kharab' or unmerchantable; but I am unable to place any reliance on that piece of evidence. In what context was the word used, if used at all? I have grave doubts if it was at all used. The learned Judge says that the statements alleged and complained of continued to be repeated within two years before suit. Where is the evidence in

support of this statement? It is possible and indeed likely that the appellant gave instructions to their officers to see that their rights are protected so far as the market was concerned; but I do not find on the evidence that lying reports about the plaintiff's goods were made by the Company's officers or were authorised by them, if ever made or that they were repeated from time to time within two years before suit. Therefore, on the facts I must hold that the plaintiff has failed to make out any case whatsoever in support of his claim (e), as set out in para. 11 of the plaint. His claim for damages must also be held to be barred under s. 24 and Art. 36 of the Limitation Act.

I now proceed to consider the case set up by the plaintiff under claim (b), as set out above, *viz.*, wrongfully and maliciously instituting suits against the plaintiff in the High Courts in Bombay and Calcutta. On behalf of the appellant it has been contended before us on the authority of the case of *Quartz Hill Gold Mining Co. v. Eyre* (9) that no action would lie against the defendant Company for having brought the suits in the Bombay High Court and in this Court referred to above. Brett, M. R., in that case observed as follows:—"I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice."

Bawen, L. J., observed as follows:—

"I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action. To speak broadly, and without travelling into every corner of the law, whenever a man complains before a Court of Justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious legal proceedings have been accompanied by damage express or implied

(25) (1906) 23 T. L. R. 86.

(26) (1904) 20 T. L. R. 579 at p. 581.

The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the doctrine laid down by Holt, C. J., in *Savile v. Roberts* (12). He there said that there were three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. '(1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between *Sir Andrew Henley and Dr. Burstal*: *Raym.* 180... (2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action..... (3) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself.' It is clear that Holt, C. J., considered one of these three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bring-

ing of the action. Apply the second head of damage, namely, those injuries which are done to the person: the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the existence of which will support such an action as this, is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the Judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore, the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. 'I do not say that if one travels into the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to show that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution. It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The Counsel for the plaintiff Company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reason-

able and probable cause. And although every Judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise Judge who sits to administer justice must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the Counsel for the plaintiff Company have put forward."

In this case it is contended on behalf of the appellants that when they instituted the suit in this Court and in Bombay in 1922, they had a perfectly genuine and reasonable case which they could present to the Court [see in this connection *Imperial Tobacco Co. (Newfoundland) Ltd. v. Duffy* (17); and *Dunlop Rubber Co. v. Booth & Co.* (18)] and it was never suggested at any time that the actions brought by the appellants in this Court and in the Bombay High Court were malicious. It is quite true that the actions did not succeed; but it is contended that mere dismissal of a suit is no evidence whatsoever of there being no reasonable and probable cause for the institution thereof. It is further urged that all that the appellants did was to take steps for the purpose of protecting their trade in which they had been engaged for a number of years and where their cigarettes had acquired an enduring reputation and that in circumstances like these, malice will not be imputed. [see *Sorell v. Smith* (15)]. On behalf of the plaintiff it has been argued that the right of a defendant to institute a regular suit for compensation after the termination of certain previous proceedings, is clearly recognized in s. 95, sub-s. (2) of the Code of Civil Procedure and that in India the matter is not concluded by the authority of the case of *Qurtz Hill Gold Mining Co. v. Eyre* (9). It is not disputed, however, that in such a suit for compensation, one of the ingredients which the plaintiff must prove is malice, in addition to the facts required to be proved by s. 95 of the Code of Civil Procedure [see the case of *Nanjappa Chettiar v. Ganapathi Goundan* (27)]. In this case, whether the matter is looked at from the point of view indicated in *Qurtz Hill Gold Mining Co. v. Eyre* (9) or from that referred

to in s. 95, Civil Procedure Code, the present plaintiff must, in my opinion, fail on the facts. On the evidence on record which I have read and re-read, I can find no trace of malice or of want of reasonable and probable cause on the part of the present appellants, in instituting the suits in this Court and in the Bombay High Court. They had received expert professional advice from London that they had a fair case to go to Court with, having regard to the authorities on the subject, and in these circumstances and without more it is difficult to see why the appellants' suits in Bombay and Calcutta should have been described as malicious. On this conclusion it is not necessary for me to refer to the question of limitation; but if I had to pronounce an opinion on the question of limitation, I should be prepared to hold that the plaintiff's claim for damages under this head is barred by Art. 36 of the Limitation Act.

I next come to the question whether the plaintiff has made out his case under claim (d). The facts in connection with this branch of the case have already been set out by me in an earlier portion of this judgment and I need not, therefore, refer to the same here. It appears to me that having regard to the consent order of the 19th June, 1922, in the Bombay suit, and having regard to the undertaking in the Bombay suit, the plaintiff cannot seek any relief in this Court in respect of any claim he may have for damages. Further, if he had any case under this head, it is barred by limitation.

There now remains for me to consider the question whether the plaintiff is entitled to any relief under claim (c). The plaintiff relies upon the case of *Bhut Nath Pal Mistry v. Chandra Benode Pal Chowdhury* (2). In my opinion that case lays down the proposition that an injunction is in the nature of trespass to property in terms far too broad and I am unable to agree with it. Now, the plaintiff is seeking to recover damages that had accrued to him by reason of the temporary injunction granted at the instance of the appellants in the suit in this Court. In the proceedings in which the temporary injunction was issued, an undertaking was taken from the appellants to compensate the plaintiff for any loss that might arise by reason of the injunction. Such an undertaking is on the authorities to be

(27) 12 Ind. Cas. 507; 35 M. 598; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. T. 1052.

enforced by an application to the Court which granted the injunction [see *Smith v. Day* (4)]. In that case Jessel, M. R. observed as follows:—

"But the Court has a discretion, and before it will grant damages it must be satisfied that the injunction was improperly obtained, and that the defendant reasonably abstained from going on with his building, and that under all the circumstances damages ought to be given. It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial, a perpetual injunction is granted. The Court in such a case has a discretion whether, under all the circumstances, the defendant ought to have damages in respect of the interlocutory injunction having been improperly granted, though a perpetual injunction is granted at the trial. Then, again, the Court must have regard to the amount of damage; if it be trifling or remote the Court would not be justified in directing an enquiry as to damages, though the injury might not be so remote that an action would not lie. Then again the time at which the application is made is material. Having regard to the decisions, we are not entitled to say that the application for an inquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper time. The application may be made when the injunction is dissolved, but if made then it probably will be ordered to stand over till the trial. If made by motion subsequently to the trial, the party moving is subject to some disadvantage; for the application is one which should be made speedily, and not after the Court has forgotten the circumstances." [See also *Griffith v. Blake* (6).]

It would, therefore, appear, that the enquiry into damages can be and is ordinarily had by means of an application to the Court which originally granted the temporary injunction. In this case, the proceedings, as will be seen from what has been stated above, did not finally terminate until the 13th May, 1924. The present plaint was filed on the 21st January, 1925. It is contended, however, on behalf of the plaintiff that he is not limited to making an application in the suit in which the temporary injunction was granted for enquiry into damages; but that he has an independent

right to bring a suit for compensation and that such right exists is clearly recognised by the terms of Art. 42 of the Limitation Act. The procedure on the Original Side for this Court, being what it is, I think the proper course for the plaintiff should have been to make an application to the Court which granted the temporary injunction and ask for an enquiry into damages. The plaintiff, however, has not been guilty of unreasonable delay in coming to this Court with his present plaint and I think, in the circumstances of this case and for the reasons given by the learned Chief Justice the plaintiff in this suit may be treated as an application for enquiry into damages that might have been sustained by the defendant by reason of the temporary injunction issuing from this Court. The result, therefore, is that, in my judgment, on all the claims except claim (c) the plaintiff must fail and that as regards claim (c) there should be an enquiry into damages as indicated above. What the nature of those damages should be has been indicated by the learned Chief Justice and it is not necessary, therefore, for me to refer to it.

I, therefore, agree with the learned Chief Justice as regards the order which he proposes to make.

A. N. A.

*Appeal allowed:
Enquiry ordered.*

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 8 OF 1927.
July 19, 1927.

Present:—Mr. Justice Ross and
Mr. Justice Allanson.

Kumar KAMAKHYA NARAIN SINGH—
OPPOSITE-PARTY—APPELLANT

versus

RAMSARAN LAL AND ANOTHER—
PETITIONERS—RESPONDENTS.

*Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47—
House and homestead forming part of raiyati holding,
whether saleable.*

The house and homestead of an insolvent in which he holds a *raiya*-interest cannot be sold in insolvency proceedings in view of the provisions of s. 47 of the Chota Nagpur Tenancy Act. [p. 299, col. 1.]

Appeal against an order of the Judicial Commissioner, Ranchi, dated the 28th September, 1926.

Mr. Abani Bhusan Mukharji, for the Appellant,

Mr. Bankim Chandra De, for the Respondents.

JUDGMENT.

Allanson, J.—This appeal by a creditor is directed against an order of the Judicial Commissioner of Chota Nagpur holding that the house and homestead lands of an insolvent cannot be sold by the Receiver in view of the provisions of ss. 46 and 47 of the Chota Nagpur Tenancy Act. The house and lands are recorded as part of a *rai-yati*-holding in the Record of Rights and, if the insolvent has a *rai-yati* right in them, there can be no doubt that they cannot be sold in the insolvency proceedings in view of the provisions of s. 47 of the Act. The difficulty really has arisen because the house is of an unusual size. It would appear that the insolvents were formerly substantial *zemindars* holding a tenure under the Ramgarh Wards Estate, and the house was built by their ancestors during that period. Since then the tenure has been resumed. A presumption of correctness attaches to the entries in the Record of Rights and no evidence has been placed before us to show that that entry is wrong. Not only are these lands entered as part of a *kaimi rai-yati* holding but they have since been assessed to rent under s. 85 of the Chota Nagpur Tenancy Act.

It was argued that the lands have now vested in the Receiver, and that s. 47 of the Act would have no application, but the provisions of that section are quite clear, that it is only in certain circumstances which have no application in the present case that the Court can pass any decree or order for the sale of the right of a *rai-yat* in his holding.

The appeal is dismissed with costs.

Ross, J.—I agree.

A. N. A.

Appeal dismissed.

ODUH CHIEF COURT.

SECOND RENT APPEAL NO. 22 OF 1927.

September 16, 1927.

Present:—Mr. Justice Hasan.

BALKARAN DUBE—DEFENDANT

—APPELLANT

versus

HAR BILAS AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108, cl. (15)—Usufructuary mortgage—Decree for possession in favour

of mortgagee—Failure to get actual possession and mutation—Right of mortgagor to maintain suit for profits.

Where a usufructuary mortgagee in spite of a Civil Court decree in his favour and formal delivery of possession in pursuance thereof has not obtained entry of his name in the Revenue Records and actual possession of the share mortgaged, the mortgagor can maintain a suit for profits under s. 108, cl. (15) of the Oudh Rent Act.

Second appeal passed by the District Judge, Gonda, in Rent Appeal No. 71 of 1924, dated the 2nd May, 1927, confirming that of the Court of the Assistant Collector, First Class, Gonda, dated the 30th September, 1924.

Mr. S. N. Roy, for the Appellant.

Mr. Radha Krishna, for the Respondents.

JUDGMENT.—This is the defendant's appeal from the decree of the District Judge of Gonda, dated the 2nd of May, 1927, affirming the decree of an Assistant Collector of the First Class of the same place, dated the 30th of September, 1926. The suit, out of which this appeal arises, was for the recovery of a share of profits under s. 108, cl. (15), of the Oudh Rent Act, 1886.

In support of the appeal two points were urged: (1) That the plaintiffs had no title to recover the profits in suit because about 15 years ago they made a usufructuary mortgage of their share in favour of one Bhagwat Shukul and (2) that there is no evidence in proof of the collections made by the appellant having been in excess of his own share in the joint estate.

As to the first point, the Courts below have found that the mortgagee in question in spite of a Civil Court decree in his favour about 15 years ago and formal delivery of possession in pursuance thereof never obtained an order of entry of his name in the Revenue Records and is not in possession of the share in question. This being so, the plaintiffs' title remains where it was.

As to the second point, the chief evidence on which the finding of the Courts below as regards the amount of collections rests is the statement of the village *Patwari*. According to the lower Courts this *Patwari* is not a very reliable witness but the Courts below have accepted his evidence as enough for the reason that there is no evidence to the contrary. The second ground of attack also fails.

The appeal is dismissed with costs.

G. H.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No 315
OF 1925.

August 3, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Mallik.**KAMALA PROSAD SUKUL—**

PLAINTIFF—APPELLANT

versus

CHANDRA NATH PARAMANIK

AND OTHERS—DEFENDANTS—RESPONDENTS.

Mesne profits—Joint trespassers—Suit for mesne profits—All trespassers, whether necessary parties—Decree against all—Appeal—All defendants, whether necessary parties—Effect of decree against some—Torts—Joint wrong-doers—Suit for contribution.

In an action for mesne profits against co-trespassers while it is open to the plaintiff to proceed against one or some or all of several co-trespassers at his own choice, once a decree has been obtained, it is the decree in its entirety that may be challenged on appeal, and so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal against the others. [p. 301, col. 2.]

[Case-law referred to.]

Though as a general rule the liability of joint wrong-doers in tort is joint and several, this is not an inflexible rule which needs no relaxation according to the view that is taken of the jointness of the act on facts which constitute the wrong. [*ibid.*]

[Case-law discussed.]

Appeal against the decree of the District Judge, Rajshahi, dated the 12th of September, 1924, affirming that of the Subordinate Judge, Rajshahi, dated the 28th of June, 1923.

Mr. Sarat Chandra Roy and Babu Krishna Kamal Moitra, for the Appellant.

Dr. Sarat Chandra Basak, Babus Jatindra Mohan Choudhury and Jatindra Nath Sanyal, for the Respondents.

Babu Biraj Mohan Majumdar, for the Deputy Registrar.

JUDGMENT.—This appeal arises out of a final decree determining mesne profits. The proceedings followed a decree for possession with mesne profits in favour of the plaintiff and against a very large number of defendants who belong to two classes, *viz.*, the landlord-defendants and the tenant defendants. The plaintiff has appealed, but some of the defendants of the latter class are not before us, one of them not having been made a party to the appeal and three others having died and an application to substitute their heirs in their places not having been allowed as it was filed out of time. The

decisions of the Courts below assessing the amount of mesne profits are concurrent.

A preliminary objection has been taken as to the maintainability of the appeal in view of the defect of parties noticed above. This objection will have to be dealt with first.

The claim for mesne profits is one to recover damages for the previous occupation of the land and under the present procedure it can be joined with the action for the recovery of the land. In the present case it was so joined and a decree entitling the plaintiff to mesne profits was passed against all the defendants in the suit. In the proceedings relating to the ascertainment of mesne profits, a certain sum was assessed by the trial Court and the decree passed on the basis of the said assessment has been upheld by the lower Appellate Court. The object of the plaintiff in preferring this appeal is to vary the amount so assessed. His ground is that the assessment has been made on a wrong principle.

An action for mesne profits is in origin an action of trespass. It is, therefore, regulated by these broad principles which apply to and are now well-settled as being applicable to actions for damages against wrong-doers. In such actions joint wrong-doers may be sued jointly or severally.

In Pollock on the Law of Torts, 10th Edition, page 206 the principles are stated thus: "Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does not matter, whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice, he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied. By that judgment the cause of action '*transit in rem judicatum*' and is no longer available. The reason of the rule is stated to be that otherwise a vexatious multiplicity of actions would be encouraged." As regards joint torts it is said in Addison's Law of Torts, 8th Edition, page 44; "All who aid or

counsel, direct or join in the commission of a tort are joint tortfeasors. 'If divers do a trespass it is joint and several at the will of him to whom the wrong is done', that is to say, he can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants." In *Thurman v. Wild* (1) and other cases it was settled that an accord and satisfaction by one wrong-doer for the whole injury done discharges all the wrong-doers. A release, therefore, given of the whole cause of action to one discharges the others, the reason being that the cause of action being one and indivisible having been released, all persons otherwise liable thereto are consequently released [*Cocke v. Jennor* (2)]. But a covenant or agreement not to sue one of them is no defence to an action against the others [*Hutton v. Eyre* (3)]. If therefore while purporting to release one tortfeasor it reserves rights against another, it will be construed as a covenant not to sue and not a release [*Duck v. Mayeu* (4), *Rice v. Reed* (5)]. The rule for construing such a document was laid down in the case of *Price v. Barker* (6) and is to the effect that the meaning would turn upon the intention to be gathered as to whether the right against a joint-debtor was intended to be preserved or not. In *King v. Hoare* (7) Parke, B. authoritatively laid down: "These considerations lead us, quite satisfactorily to our minds, to the conclusion that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy for the same debt or tort against another party [See also *Buckland v. Johnson* (8), *Brinsmead v. Harrison* (9), *Kendall v. Hamilton* (10).]

(1) (1840) 11 Ad. & E. 453; 3 P. & D. 289; 113 E. R. 487.

(2) (1724) Hob. 66; 80 E. R. 214.

(3) (1815) 6 Taunt. 289; 1 Marsh. 603; 128 E. R. 1046; 16 R. R. 619.

(4) (1892) 2 Q. B. 511; 62 L. J. Q. B. 69; 4 R. 38; 67 L. T. 547; 41 W. R. 56; 57 J. P. 23.

(5) (1900) 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410.

(6) (1855) 4 E. & B. 760 at p. 777; 3 O. L. R. 927; 24 L. J. Q. B. 130; 1 Jur. (N. S.) 775; 119 E. R. 281; 25 L. T. (O. S.) 51; 99 R. R. 734.

(7) (1844) 13 M. & W. 494; 2 D. & L. 382; 14 L. J. Ex. 29; 8 Jur. 1127; 153 E. R. 206; 67 R. R. 694.

(8) (1854) 23 L. J. O. P. 204; 15 O. B. 145; 2 O. L. R. 784; 18 Jur. 775; 139 E. R. 375; 2 W. R. 565; 23 L. T. (O. S.) 190; 100 R. R. 280.

(9) (1872) 7 O. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784.

(10) (1879) 4 A. C. 504; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 9.

Brinsmead v. Harrison (9) settled the point that after recovering judgment against one wrong-doer, a plaintiff cannot sue the other for the same matter, even if the first action remains unsatisfied a proposition which was doubted before them. Though s. 43 of the Indian Contract Act is not perhaps quite clear whether a complete adaptation of the English rule is intended, yet *King v. Hoare* (7) has been held to apply in this country both in respect of joint debtors and of joint wrong-doers.

If these principles are applied to an action for mesne profits against cotrespassers the position is clear that while it is open to the plaintiff to proceed against one or some or all of several cotrespassers at his own choice, once a decree has been obtained it is the decree in its entirety that may be challenged on appeal and not otherwise; for so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal as against the others.

The question of the maintainability or otherwise of the appeal may be considered from another point of view, namely, as being dependent upon the question whether there is a right of contribution amongst the defendants *inter se* because if there is such a right, the decree, on the appeal if it varies that from which the appeal has been preferred will affect the rights and liabilities of those parties who are not before the Court and will produce an inconsistency on the record which is not permitted by law.

No doubt, as a general rule the liability of joint wrong-doers in tort is joint and several, but it is not an inflexible rule which needs no relaxation according to the view that is taken of jointness of the act or acts which constitute the wrong. Mookerjee, J., in an elaborate judgment in the case of *Ram Ratan Kapali v. Aswini Kumar Dutt* (11), in which he has exhaustively dealt with the question, has observed thus: "It cannot be laid down as an inflexible rule that in every case of tort, the Court is bound to pass a joint decree against the wrong-doers making

(11) 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 842.

each jointly and severally liable for the whole amount decreed.....In cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable." In that case it was held that in respect of mesne profits which accrue during the pendency of a suit for possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees should be apportioned according to the share of the profits intercepted by each. This decision has been dissented from by Page, J., in the case of *Promode Nath Roy v. Secretary of State for India* (12). With great respect, however, I venture to think that the judgment of Mookerjee, J. carefully read appears to except from the general rule cases in which the tortfeasors are *not really joint* and are, therefore, persons to whom the rule does not apply and, in my opinion, therefore, the judgment is unexceptionable. *Merryweather v. Nixan* (13) was a case in which one S brought an action against two persons for an injury done by them to his reverend estate in a mill, in which was included a count in trover for the machinery belonging to the mill and having recovered £840, he levied the whole upon one of the said two persons, and one of them then sued the other for a contribution of the moiety, as for so much money paid to his use. The plaintiff was nonsuited. Lord Kenyon, C. J., said "that he had never before heard of such an action having been brought, where the former recovery was for a tort: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit: and that this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." The rule has been modified in collision cases. [*The Frankland* (14), *Austin Friars*

Steamship Co. v. Spiller & Bakers Ltd. (15). Relying upon *Palmer v. Wick Steam Shipping Co.* (16) it has been said in more decisions than one that the rule will not be extended. The rule has been said by very high authority as having been too widely laid down and it has been said that it is to be taken with the qualification that *it will hold if the nature of the case is such that the plaintiff must be presumed to have known that he was doing an unlawful Act.* [See Pollock on the Law of Torts, 10th Edition, page 207, referring to the dicta of Lord Herschell in *Palmer v. Wick Steam Shipping Co.* (16); Per Bruce, J., in *The Englishman and The Australia* (17) and *Burrows v. Rhodes* (18). See also *Adamson v. Jarvis* (19)].

In this country the doctrine has not been applied in cases of contribution regarding mesne profits where the parties were not wilful tortfeasors, *Bishnu Charan Roy v. Bipin Chandra Roy* (20) and doubt has been entertained whether it applies to this country at all [*Nihal Singh v. Collector of Bulandshahr* (21)]. When wrong-doers have acted under a *bona fide* claim of right and had reason to suppose that they had a right to do what they did, contribution *inter se* may be allowed [*Sreeputty Roy v. Laharam Roy* (22); *Suput Singh v. Imrit Tewari* (23); *Kishna Ram v. Rakmini Sewak Singh* (24); *Mahabir Prasad v. Darbhanga Thakur* (25)]. There has been cases in which the liability of co-trespassers for mesne profits has been apportioned where their shares are capable of being determined, e. g.; *Makund Singh v. Saraswati Bibi* (26).

On behalf of the appellant it was contended that in the present case it has already been found that all the defendants acted in concert and consequently

(15) (1915) 3 K. B. 586; 84 L. J. K. B. 1958; 20 Com. Cas. 342; 31 T. L. R. 535.

(16) (1894) A. C. 318; 6 R. 245; 71 L. T. 163.

(17) (1895) P. 212 at pp. 216 to 218; 64 L. J. Adm. 74; 11 R. 757; 72 L. T. 203; 43 W. R. 670; 7 Asp. M. O. 605.

(18) (1899) 1 Q. B. 816; 68 L. J. Q. B. 515; 63 J. P. 532; 48 W. R. 13; 80 L. T. 591; 15 T. L. R. 286.

(19) (1827) 4 Bing. 66; 12 Moore 241; 5 L. J. C. P. (o. s.) 68; 130 E. R. 693; 29 R. R. 503.

(20) 25 Ind. Cas. 729; 18 O. W. N. 622.

(21) 33 Ind. Cas. 165; 38 A. 237; 14 A. L. J. 275.

(22) 7 W. R. 384; B. L. R. Sup. Vol. 687.

(23) 5 O. 720; 6 O. L. R. 62; 2 Ind. Dec. (N. S.) 1066.

(24) 9 A. 221; A. W. N. (1887) 31; 5 Ind. Dec. (N. S.) 581.

(25) 51 Ind. Cas. 697; 4 P. L. J. 486; (1919) Pat. 289.

(26) 51 Ind. Cas. 98; 29 O. L. J. 245.

(12) 99 Ind. Cas. 428; 53 O. 992 at p. 1007; 31 O. W. N. 112 at p. 123; A. I. R. 1927 Cal. 182.

(13) (1799) 8 T. R. 186; 101 E. R. 1337; 16 R. R. 810; 1 Sm. L. C. (12th Ed.) 443.

(14) (1901) 70 L. J. P. 42; (1901) P. 161; 84 L. T. 395; 17 T. L. R. 419; 9 Asp. M. O. 196.

Merryweather v. Nixan (13) should be applied in all its integrity and no question of contribution can possibly arise. In support of this contention reliance has been placed upon certain findings in the judgments declaring the plaintiff's right to *khas* possession and mesne profits. I have carefully examined these findings but I am unable to hold that they were ever intended to be treated as findings decisive of the question. The question never arose for determination in the suit as it is obviously a question between the defendants *inter se* and there was no issue raised for its effective determination.

The result then is that the appeal is no longer maintainable. In that view the appellant's contention as to the propriety of the principle on which mesne profits have been calculated need not be considered.

The appeal is dismissed with costs.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2334 OF 1924.

November 17, 1926.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Agha Haidar.

RAMSARN DAS AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

BHAGWAN SINGH AND OTHERS—

PLAINTIFFS, GOPAL SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Mortgagee's right to compensation for improvements.

A mortgagee in possession is not entitled to claim compensation for value of improvements effected by him on the mortgaged property, unless they are of a permanent character and add to the saleable value of the property. [p. 304, col. 2.]

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 30th May, 1924.

Lala Badri Dass, R. B., for the Appellants.

Messrs. Dev Raj Sawhney and Bal Kishan, for the Plainiffs-Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the mortgagors for possession by redemption of certain property which had been mortgaged to defendants Nos. 1 and 2, on payment of a sum of Rs. 5,500. The mortgagees were let into

possession and the period mentioned in the mortgage deed was three years. The mortgagees were to realise the profits of the mortgaged property and to appropriate it in lieu of interest after paying the Government Revenue.

The date of the mortgage was the 25th of August, 1911, and the present suit was instituted on the 22nd December, 1922. The main defence of the defendants for the purposes of this judgment is to the effect that the mortgagees had not been put into possession of the mortgaged property during the first three years of the mortgage, although they admit that they have received the profits for the first two years. They, therefore, claim profits for one year. They further plead in para. 2 of their written pleas that "with consent of the mortgagors they have effected repairs to a *ghair abad* well and had got two pipes set up therein at a cost of Rs. 600." They claim this sum for having made improvements upon the property. They further plead that they had planted some orange trees on the land at an expense of about Rs. 600 or Rs. 700 and they ask to be reimbursed for that outlay. They also say that they reclaimed certain *banjar* land by spending about Rs. 1,000 and claim this sum also from the plaintiff. There were certain other pleas which do not seem to have been pressed and which need not be noticed by the Court. The trial Court decreed the plaintiffs' suit but went on to hold that they must pay, in addition to Rs. 5,500, the mortgage-money, a further sum of Rs. 1,550 being the estimated profits for the year during which possession was withheld from the mortgagees by the mortgagors.

The defendants mortgagees have come up in appeal to this Court challenging that part of the decree of the Court below which has refused to allow them the costs of the alleged improvements and the expense incurred by them in planting orange trees and in reclamation of the land. The plaintiffs have filed a cross-appeal in which they challenge the finding of the Court below as to the sum of Rs. 1,550.

The learned Counsel for the defendants-mortgagees did not seriously press his case as regards the alleged planting of orange trees and the reclamation of *banjar* land, but he strenuously argued that the mortgagees were entitled to the costs incurred in the so-called improvements,

effected by them by executing certain borings in the *ghair abad* well. It is unfortunate that the contesting defendants' Pleader did not clearly define his position as regards the alleged improvements and has led evidence in a somewhat haphazard manner. At first he put forward the case of the repairs having been effected with the consent of the mortgagors but afterwards goes on to suggest the general plea of improvement in the same paragraph.

In the evidence produced by the defendants, they attempt to make out a case both of consent and of improvement. The trial Court has very properly decided as a fact that no consent by the mortgagors has been established. On the general question of improvement the Court has also decided against the contesting defendants. The Transfer of Property Act (IV of 1882) does not apply to the Punjab and so we need not consider the provisions of that Act. We are thrown back upon the general principles of law so far as it applies to the question of improvements effected by a mortgagee while in possession. According to the old English authorities a mortgagee was not entitled to be recouped for any improvements that he might make upon the mortgaged property unless he obtained the consent of the mortgagor beforehand. "But the tendency of later decisions appears to be more favourable to the mortgagee in this respect, and it has been laid down that, *prima facie* a mortgagee who has expended money in improvements is entitled to an inquiry whether the outlay has increased the value of the property and to be allowed such outlay so far as the value is proved to have been increased thereby." *Vide* Coote on Mortgages, Vol. II, 1924 Edition, page 1225. The leading authority on subject is the well-known case of *Shepard v. Jones* (1). It lays down that the improvement for which the mortgagee can claim to be compensated at the time of the redemption of his mortgage must be a lasting and permanent improvement. It must have increased the saleable value of the property and it must be a reasonable sum the payment of which would not make the redemption of the mortgage by the mortgagor difficult or impossible. This is nothing but ordinary

justice that the increase in the price of the property should not go into the pocket of the mortgagor without his reimbursing the mortgagee whose money was instrumental in raising the price of the property. The law is also very succinctly put by Mr. Fisher in his well-known work on Mortgages, *vide* paras. 1782 and 1783 of Fisher's Law of Mortgages; see also the cases reported as *Nijalingappa Nijappa Halgatti v. Chanabasawa Satavirappa Nesari* (2) and *Rikhi Kesh v. Jwala Sahai* (3). Thus the law is clear and well-settled. Let us apply the law to the proved facts of the case.

Now, there is no evidence on the record to show that the improvement was a lasting one or that it materially increased the saleable value of the property. The alleged improvement, according to the mortgagees consisted of making some holes in the bottom of a *ghair abad* well. An official was examined as a witness on behalf of the mortgagees. He stated the borings were done in 1917 and that the pipes inserted in those borings worked for four or five years. Now, the suit was brought in 1922, so that the effect of the improvement must have been exhausted before the time the suit was actually filed in Court. After the removal of the pipes or their decay in the ordinary process of nature there would only remain a hole in the soil at the bottom of the well. The walls of this hole in course of time are bound to bank in after the removal or decay of the pipes. We have thus no evidence on the record to show that the improvement was of a lasting nature and such as would increase the value of the property and permanently add to its utility. This being so and the plea of consent being rightly decided by the trial Court against the mortgagees, we think that the decision of the Court below on this point was right and accordingly we dismiss the defendants-mortgagees' appeal with costs.

Now remains the question of the cross-appeal filed by the plaintiffs-mortgagors. We are satisfied on the evidence that the mortgagees were not given possession by the mortgagors during the years 1911, 1912 and 1913. The defendants-mortgagees admit that they received the profits for two years from Nand Singh, one of the

(1) (1882) 21 Ch 469; 47 L. T. 604; 31 W. R. 306.

(2) 47 Ind. Cas. 751; 43 B. 69; 20 Bom. L. R. 695.
(3) 52 Ind. Cas. 562; 78 P. R. 1919.

mortgagors, and we think that the mortgagees are entitled to the profits of the year 1913-14. We, therefore, affirm the decree of the trial Court on this point and dismiss the plaintiffs-mortgagors' appeal with costs.

A. N. A.

*Appeal dismissed.***ODDH CHIEF COURT.**

SECOND CIVIL APPEAL No. 185 OF 1927.

October 24, 1927.

Present:—Mr. Justice Pullan.

JAGAN *alias* JAGANNATH AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

Pandit JAGDISH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Easement—Right of easement against land owned by Government in occupation of lessee—User for 60 years, whether essential.

An easement cannot be claimed against Government unless the claimant has established user for 60 years even though the land over which the easement is claimed is in the occupation of a lessee.

Appeal against the decree of the Additional Subordinate Judge, Sultanpur, dated the 21st March, 1927, confirming that of the First Munsif in addition to strength at Sultanpur, dated the 30th October, 1926.

Messrs. Hyder Husain and A. C. Mukerji, for the Appellants.

Messrs. A. P. Sen, R. D. Sinha, H. K. Ghosh and G. H. Thomas, for the Respondents.

JUDGMENT.—The point raised in this appeal was not one which was considered by the Court below. Briefly the plaintiff's claim now is that he can assert an easement over land which admittedly belongs to Government, although he has not established user for 60 years, on the ground that the land was in the occupation of a lessee. In the lower Courts the plaintiff set up the case that he had been in occupation of the land as a right of way for a period of 60 years but he failed to establish his case. He has, therefore, fallen back on the plea that it was not necessary for him to establish a period of more than 20 years. But it was admitted throughout that the whole *mohalla* is the property of Government and the Municipal Board is managing this property on behalf of the Secretary of State,

It makes no difference to the ownership of land whether it is or is not leased out to a tenant. It is against the land, and thereby its owner, that a right of easement can be claimed. In my opinion s. 15 of the Easements Act is conclusive on this question and, although I am not aware of any authority on the point other than the decision of a Single Judge of the Allahabad High Court reported as *Narain Das v. Behari Kahar* (1), I have no hesitation in holding that this suit has been rightly decided by the Courts below and I dismiss the appeal with costs, which will be proportioned between the contesting respondents.

A. N. A.

Appeal dismissed.

(1) 78 Ind. Cas. 844; A. I. R. 1924 Lah. 724.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 7-B OF 1927.

September 23, 1927.

Present:—Mr. Kinkhede, A. J. C.

KISAN GHULE—PLAINTIFF—APPELLANT

versus

PURANSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 163—Account books—Inspection by adversary, effect of—Suit not based on account books—Failure to produce—Adverse inference, whether can be drawn.

Under s. 163 of the Evidence Act a person, whose account books have been inspected by the opposite party may require the latter to tender them as evidence of both parties. Such account books need no further proof and are admissible and should be admitted *in toto*. [p. 306, col. 1.]

In a suit based on a bond or a mortgage and not on account books, it is not permissible to the Court to draw an adverse inference from the plaintiff's failure to produce his account books, unless the other party has called upon him to produce them and he has refused to comply with the demand. [p. 306, col. 2.]

Appeal from the decree of the Special Sub-Judge, First Class, Akola, dated the 23rd December, 1926, in Civil Suit No. 32 of 1926.

Mr. A. V. Khare, for the Appellant.

Mr. G. G. Hatwalne, for the Respondents.

JUDGMENT.—I have confined the arguments to grounds Nos. 8, 9 and 10 of the memorandum of appeal as I thought that the trial of the case has been very improper and full of irregularities of procedure.

The suit was based on a mortgage and

not on account books but plaintiff desired to tender his relevant account book entries as evidence and, therefore, mentioned them as pieces of evidence in his list of reliance. The defendants taking advantage of this mention applied for inspection of plaintiff's account books with a view to extract their defence out of them. The plaintiff protested but notwithstanding his protest the inspection was allowed and the defendants took inspection and filed an additional written statement admitting some and disputing certain other items entered in the books. But they did not make their defence intelligible by filing extracts of the relevant entries to which the same related.

It was the duty of the Court to examine the defendants further as regards the disputed items and call upon them to produce extracts of accounts on which they relied in support of their contention and then ask the plaintiff to admit or deny the defendants' assertions and to produce such extracts of accounts as may be necessary. The procedure laid down for discovery of documents was followed but only partially. Nobody seems to have also cared to look into the provisions of s. 163 of the Evidence Act and see for himself whether in the circumstances of this case it has any application. Under that section it was the plaintiff's duty to have required the defendants, who had taken inspection, to tender the account books as evidence of both parties. Having taken inspection of plaintiff's books of account the defendants took the risk of making them evidence of both parties in the case. In fact they needed no further proof and were admissible and should have been admitted *in toto*: cf. *Mahomed Khan v. Abdul Rahman* (1) and *Rajeswari Kuar v. Rai Bal Krishan* (2). Failure on his part to avail himself of this privilege has landed the plaintiff into a difficulty and has entailed a dismissal of his claim.

Then again, even though the plaintiff pointed out the omission of the Court below to examine him in answer to the defendants' additional rejoinder filed after taking inspection of plaintiff's books of account, the Court below failed to rectify its own mistake; and tried to technically shift the error on to the shoulders of the plaintiff. This has naturally ended in a disaster to the plaintiff's cause. The Court ought to have

re-opened the case, and examined the parties for focussing the points of controversy between them and given them opportunity to substantiate their respective cases.

Then a third defect of procedure which I think is very flagrant was to draw an adverse inference against the plaintiff for non-production of his account books, even though he sued upon a bond or mortgage and not on the account books. Such an inference is not permissible unless the other party has called upon the plaintiff to produce such documents and the latter has failed to comply with the demand. Here he had complied with the demand of the defendants and produced his account books for their inspection and they had in fact taken the inspection and "extracted" their "defence out of them". It is urged by plaintiff that the defendants have taken full notes or extracts of the entries relating to their dealings with the plaintiff but have kept them back. I have only to draw the lower Court's attention to the observations of their Lordships quoted in *Mulla's Civil Procedure Code*, 8th Edition at page 527 under the heading "Non-disclosure of documents—Presumption". The appellant has produced some extracts of his accounts in this Court. They have been placed on record. They will have to be compared with the originals and perhaps supplemented; the defendants will also have to be called upon to say what they may choose to say as regards their relevancy and genuineness if they challenge it. If they persist in denying the debit items, the plaintiff must be given the chance of corroborating them by the evidence of persons who know anything about them. As held in *Rajeswari Kuar v. Rai Bal Krishan* (2) " * * * it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff and extract from them just such items as proved matters of defence * * * and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right * * *"

I do not think it will serve any purpose to keep the case pending on my file and call for findings, as the defects in the procedure which the Court below is ordered to remedy are such as necessitate further pleadings and trial. Fresh pleadings and issues will have to be recorded and framed; it is, therefore, desirable to re-open

(1) 5 Bom. L. R. 380.

(2) 9 A. 713 at pp. 718, 719; 14 I. A. 142; 5 Sar. P. C. J. 80; 5 Ind. Dec. (N. S.) 912 (P. C.).

the case wholly rather than only partially. I, therefore, remand the case for fresh decision after further trial in accordance with law.

The costs of this appeal shall be costs in the cause, the appellant shall have refund of the Court-fee paid on the memorandum of appeal.

G. R. D.

Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 594 OF 1925.

July 1, 1927.

Present:—Mr. Justice Dalal.

GANGA NARAIN AND OTHERS—PLAINTIFFS
—APPELLANTS
versus

MANIK LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 58, 79—Landlord entering upon tenant's land—No forcible or unlawful ejectment—Tenant's right to treat landlord as sub-tenant—Suit for ejectment under s. 58, maintainability of.

Where a landlord without forcibly or unlawfully ejecting his tenant enters upon the tenant's land, the tenant is entitled to treat him as a sub-tenant and sue for his ejectment under s. 58 of the Agra Tenancy Act. Section 79 of the Act applies only where the landlord ejects the tenant forcibly or unlawfully.

Jagadeo Singh v. Ali Hammad (1), applied.

Second appeal from a decree of the District Judge, Cawnpore.

Mr. S. N. Seth, for the Appellants.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.—I have considered the ruling in the case of *Jagadeo Singh v. Ali Hammad (1)* and think that it has been rightly applied to the circumstances of the present case by the learned District Judge of the lower Appellate Court. The suit was brought by an occupancy tenant against *zemindars* of the village for their ejectment on the allegation that they were his sub-tenants. The Assistant Collector took the view which would suggest itself to most men that if the landlord took possession, he ejected the occupancy tenant, and the tenant was bound to sue for ejectment under s. 79 of the Tenancy Act (II of 1901) which permits of a very short period of limitation. In the present case, however, the occupancy tenant accepted the landlords, who were squatters as his sub-tenants and sued under s. 58 of the Tenancy Act for their ejectment. Having regard to

the view taken by this Court in the ruling quoted above, I am of opinion that the occupancy tenant was at liberty to take such action. The landlords did not state in their written statement that they had unlawfully ejected the plaintiff. They simply put forward such a case as a supposition that if the landlords are in possession, the tenant should be considered to have been ejected unlawfully. It may be repeated that the defendants did not put forward any case of having ejected the plaintiff unlawfully. Their main claim was that they were *zemindars* of the village and *khudkasht* cultivators of the land. The Assistant Collector dismissed the suit. There was an appeal by the plaintiff. At first sight it may be thought that no appeal lay to the Civil Court. The defendants, however, claimed to be *zemindars*, and *khudkasht* cultivators of the land, and as they put forward a claim to proprietary title as against the allegation of sub-tenancy put forward by the plaintiff, a question of proprietary title was raised, and the appeal did lie to the District Court.

It is true that a contract of sub-tenancy between the plaintiff and the defendants was not proved. It appears to be the law however, as understood in this Court, that an occupancy tenant was at liberty to treat a squatter as a sub-tenant and sue him as such. The fact that the squatter happened to be a landlord would not make any difference in my opinion. A landlord can be the landlord of the tenant and may recover rent from him, but at the same he may become a sub-tenant of the tenant and pay rent to the tenant. What appears to me to have been done in this case is that the landlords colluded with and started cultivation with the sub-tenant of the occupancy land, and, when they were asked to pay the rent, they turned round and claimed to be the *khudkasht* holders. This is a very insidious method of ejecting an occupancy tenant, and should not be permitted. If the defendants had put forward a plea of having unlawfully and forcibly ejected the plaintiff, and had proved such a plea, different circumstances would have arisen, and the decision may have been different. On the pleadings I am of opinion that the lower Appellate Court was correct. I dismiss this appeal with costs.

A. N. A.

Appeal dismissed,

**MADRAS HIGH COURT.
FULL BENCH.**

REFERRED CASE No. 13 OF 1926.

September 16, 1927:

Present:—Sir William Watkins Phillips,
Kt., Officiating Chief Justice, Mr. Justice
Ramesam and Mr. Justice Beasley.
THE COMMISSIONER OF INCOME-TAX,
MADRAS—REFERRING OFFICER

versus

R. E. MAHOMED KASSIM ROWTHER
OF R. E. MAHOMED KASSIM
ROWTHER AND CO., NAGAPATAM—
ASSEESSEE.

Income Tax Act (XI of 1922), s. 10 (ix)—Agreement for payment of share of profits without liability for losses—Construction—Payment out of profits—Liability to be deducted—Contract Act (IX of 1872), s. 239.

A number of persons entered into an agreement with another by which each of them was to have a certain share in the profits of the business conducted by the latter when ascertained at the end of the two years during which it was to be in force, without any liability in case of loss. The complete control of the business was retained by the person in whose favour the agreement was executed and he contributed the whole capital and was also to have the power of altering the shares:

Held, (1) that the transaction was not a partnership agreement; [p. 308, col. 2.]

(2) that the payments made to them out of the profits could not be deemed to be expenditure incurred solely for the purpose of earning such profits under s. 10 of the Income Tax Act and were not liable to be deducted for purposes of assessment of income-tax. [p. 308, col. 2; p. 309, col. 1.]

Case stated under s. 66 (2) Act XI of 1922 by the Commissioner of Income-tax, Madras, for the decision of the High Court on the following questions:—

1. "Whether in the circumstances of this case there was a genuine and valid partnership.

2. "If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable income the portion of the profits which was to be paid to the employees as wages."

Mr. M. Patanjali Sastri, for the Referring Officer.

The Advocate General and Mr. E. Vinayaka Rao, for the Assessee.

JUDGMENT.

Phillips, Offg. C. J.—The first question referred is "whether there was a genuine and valid partnership." This depends upon the construction of the agreement dated the 11th of April, 1922, executed by 33 persons in favour of the petitioner. The

petitioner has been treated as the sole proprietor of his firm and been assessed accordingly, and he contends that these 33 persons who have executed the agreement of April 1922 (Ex. A.) are his partners in the business. The Commissioner has found that this agreement does not constitute a partnership agreement and we entirely agree. Apparently there is a provision that each of the executants is to have a certain share in the profits of the business when ascertained at the end of the two years during which it is to be in force. No provision is made for their liability in case of loss and the complete control of the business is retained by Muhammad Kassim, who contributed the whole capital. Not only is he to have the control of the business but even persons holding power-of-attorney from him are to have the same power. The executants agree to be bound by Muhammad Kassim's orders and the orders of those holding his power-of-attorney and also agree that, if they contravene the provisions of the agreement, they can be dismissed. The proprietor has also the power of altering the shares. On these facts, it is clear that this is not a partnership agreement and that these 33 persons were merely the employees of Muhammad Kassim and were entitled to certain shares in the profits when ascertained at the end of the two years.

The second question runs as follows: "If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable income the portion of the profits which was paid to the employees as wages?" The petitioner claims to deduct the shares payable to the employees under s. 10 (ix) of the Indian Income Tax Act, which runs, "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." The Income-tax Commissioner has held that it has not been shown that the shares were paid out of the capital in the Madras branches of the petitioner's firm and that there are merely some entries in the accounts of the head office at Klang in the Federated Malay States. Apart from this, we think it is clear that this expenditure does not come within the meaning of s. 10 (ix). Such expenditure is to be set off against the profits earned in the year and it must be incurred "solely for the purpose of earning such profits or gains." It

is possible to say that payments out of profits really constitute expenditure incurred solely for the purpose of earning such profits? The amount of the expenditure depends on the amount of the profits and, consequently, it is impossible to hold that it was expenditure incurred solely for the purpose of earning those profits.

It is contended by the learned Advocate-General that expenditure must be deemed also to include liability and that, inasmuch as these payments were in the nature of wages of which payment was deferred, they, equally with wages, should be deducted and, to hold otherwise, would produce the anomaly that part of the wages of the firm might be deducted and another part not. This may be anomalous, but it must be remembered that income-tax is calculated on profits and when the tax has been calculated the expenditure on the deferred wages has not been incurred. In fact, it might not even be incurred if the proprietor chose to break the agreement, and certainly it cannot be deemed to be expenditure incurred for the purpose of earning such profits. It is not the expenditure that has led to the profits being earned, but it is a promise that such expenditure would be made in the future that has possibly produced those profits. Rule 3 (1) of Sch. D of the English Income Tax Act, 1918, prescribes that "in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of any annual interest, or any annuity or other annual payment payable out of the profits or gains." This is very specific and would include the payment out of profits in the present instance. Similarly, if some of the working partners are to get a share in respect of capital put in by them, any payment to them as interest on that capital cannot be deducted under s. 10 (iii) of the Indian Income Tax Act. In view of the language of the section which is very clear, we think it is unnecessary to refer to the cases cited before us and hold that, although it may possibly work hardship in a few cases, the payments to these working partners out of the profits cannot be deducted under s. 10 (ix). Petitioner will pay costs including Counsel's fee of Rs. 250.

Ramesam and Beasley, J.J. agreed.

V. N. V.

A. N. A. Reference answered accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 5 of 1927.

July 4, 1927.

Present:—Sir George Claus Rankin,
Kt., Chief Justice, and Mr. Justice
Mitter.

CHUNI LAL MANDAL—DEFENDANT—
—APPELLANT

versus

HIRA LAL MANDAL AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Counsel and client—Compromise by Counsel in excess of authority—Restrictions on Counsel's authority not known to other party—Compromise, whether can be set aside.

In a partition suit on the motion of the Counsel of the parties a consent decree was passed fixing the shares of the parties and referring the matter of accounts to a particular person. Subsequently one of the parties applied for vacating the decree alleging that she had given specific instructions to her attorney that certain matters in the case should not be referred. The Court found that the authority of the Counsel was in fact restricted and vacated the decree :

Held, that in view of the fact that the decree was a consent decree involving a reference to a particular individual named by the parties, the Court was justified in re-opening the case when it found that the Counsel had no authority to consent to such a decree, even though the other parties had no notice of the restriction of the Counsel's authority. [p. 2310, col. 2.]

Neale v. Gordon Lennox (4), followed.

Appeal against an order of Mr. Justice Chotzner, dated the 22nd January, 1927.

Mr. N. C. Chatterjee, for the Appellant.
Messrs. J. N. Majumdar and A. Dutt,
for the Respondents.

JUDGMENT.

Rankin, C. J.—In this case the defendant Chuni Lal Mandal complains of an order made by Mr. Justice Chotzner whereby he set aside an order previously made by him the effect of which was to declare certain shares of parties by consent in a partition suit, to appoint Mr. H. K. Mitter, Barrister at-Law, to partition a certain estate and to direct Mr. H. K. Mitter to take certain accounts and to make certain enquiries.

There were three parties to this suit—two brothers and their mother. The mother is said to be siding with the plaintiff Hira Lal and there appear to have been great many steps in the various disputes in which these parties unfortunately seem to have taken part one against the other. We are not at the moment concerned with anything which happened prior to the date the 15th of December, 1926, when this par-

tition suit came on for hearing. It seems to be a suit in which both parties were liable to account as having various intrusions with the estate left by the father. Defendant Chuni Lal's case was that there was a large quantity of money and valuables in a certain iron safe in the house where Hira Lal and his mother lived and he was desirous of establishing that he was entitled to a certain share of these. In these circumstances, when the suit came on for hearing before Mr. Justice Chotzner, the first thing which happened was that the plaintiff was called on his own behalf as a witness and it was while the plaintiff's evidence was being taken that the incident happened with which we are now concerned.

That the issues which were settled by the learned Judge were fairly complicated there can be no doubt, and the question of the amount of money that was to go to the brothers and to the mother involved accounts and enquiries of a somewhat difficult character. Mr. A. K. Roy who appeared for Chuni Lal took the point that it was waste of time before the learned Judge to go into evidence on the part of the plaintiff or anybody else as to the various details of the accounts as it was quite obvious that in this case there would have to be an order directing the taking of accounts and accordingly he suggested that a Court Officer should be appointed. Somebody else suggested that a particular named Advocate Mr. H. K. Mitter should be appointed, the intention being that he would act as Commissioner of Partition and also as the person to whom the accounts and enquiries should be referred; in other words, he should be appointed as a special referee. In the end what happened was that Mr. J. N. Mitter—the learned Counsel—who appeared for the mother accepted the suggestion that Mr. H. K. Mitter should be appointed and Mr. Mitter was appointed accordingly as appears from the consent decree passed by the Court.

That decree having been made purporting to be a consent decree the lady moved the learned Judge to set that aside. She made the case that she had given certain specific instructions to her attorney who had passed them on to her Counsel. These instructions were directed to the question whether an arbitration or a reference to some person other than an officer of the Court should be agreed to. It may be

mentioned that the parties had had previous experience of disputes being referred to arbitration and that it had been disastrous. Her case was that she had given express instructions that certain things were not to be referred in any way and she gave evidence to that effect herself. She filed an affidavit and her Solicitor also filed an affidavit to the effect that he had specific instructions not to consent to any private arbitration or reference to any private individual of matters in dispute in the suit without getting tried by the Court certain questions, and further not to consent until another suit in which his client was the plaintiff was agreed to be tried along with the present suit and all charges made against her by Chuni Lal Mandal in his written statement and by his Counsel in her cross-examination were withdrawn.

Now, it is quite true, as Mr. Chatterjee in a very careful and able argument before us has pointed out that at first sight a good deal of suspicion attaches to a story of this sort. That suspicion is not lessened by the fact that the attorney's affidavit does not give any dates. But the matter does not stop there because the learned Judge at the time when he considered the lady's application to set aside the previous decree had before him Mr. Mitter—the learned Counsel who had consented on behalf of the lady. Mr. Mitter informed the Court from his place at the Bar that in consenting to the terms proposed he was under a misapprehension as to the authority which had been conferred upon him by his client. He said that he was acting under the impression that he had full power to deal with all matters connected with the present litigation but that that impression was mistaken and he had only a restricted authority. In these circumstances, the learned Judge has acted upon the basis that this story of limited authority of the learned Counsel is a true story. I am not prepared to reverse that finding.

The main argument of Mr. Chatterjee before us has been upon the principle which is to be found in certain cases which he has cited, that if special restriction is put upon the general and apparent authority of a Counsel to effect a settlement of matters in a suit, that restriction will not be binding on the other side unless it is communicated to him; in other words, every person is entitled to presume, till it is said to the contrary, that learned Counsel has a general

authority. For that proposition certain cases have been cited to us *Strauss v. Francis* (1) re-affirmed in the case of *Welsh v. Roe* (2) and the Calcutta case of *Askaran Choutmal v. E. I. Ry. Co.* (3) decided by my learned brother Mr. Justice Page. On the other hand, we have to consider the case in the House of Lords—the well-known case of *Neale v. Gordon Lennox* (4).

The first thing we have to ask ourselves here is what was the nature of this order. In so far as it is complained of, it is complained of because it is an order referring to a private individual—an Advocate of this Court—certain matters of account which were involved in the suit itself. It may be perfectly in the right of the learned Judge to refer matters of account to an officer of Court or to somebody else if he thinks it necessary; but in this particular case the reference was, by consent, to a particular named individual, and in these circumstances we have to consider whether the learned Judge was right in being satisfied that the reference in all these matters of account to this particular individual by consent was a reference which should stand after it had been discovered that the learned Counsel who had consented to it had done so contrary to his client's instructions. I do not want to put this case on its facts too high, and I do not think that it can be put as high as the case of *Neale v. Gordon Lennox* (4) from the point of view of the interest of the lady client. This is not a case in which the aspersions upon the lady's character were a very prominent feature of the suit. It is not a case in which it would be at all unreasonable for the lady to agree to the proposition put forward as, indeed, the learned Judge thinks. But, on the other hand, if it is really true that the lady had objected to these important matters of account (from her point of view) being referred to private arbitration and to a private referee and if that was done by mistake of her Counsel, I am not prepared to hold that the learned Judge was wrong in taking steps to see that the suit should proceed in the ordinary way. If any order of reference can be made

without the lady's consent it can still be made notwithstanding that this appeal is dismissed. I say nothing whatever upon that aspect of the case. I do not think that there was any lack of jurisdiction on the part of the learned Judge to make the order which he has made. I do not think that it is open in a case of this sort to the appellant Ohuni Lal to say that he will hold the other parties to this bargain at all costs whether the Court thinks fit to do so or not. In my judgment the position is that the learned Judge has chosen the better course. He dealt with it as a case of the same essential type as *Neale v. Gordon Lennox* (4), and it certainly is a case in which the order of reference which the Court has made involves that the Court's assistance is being asked in the sense in which Lord Halsbury referred to that matter in his speech in the House of Lords in the case of *Neale v. Gordon Lennox* (4).

On the whole, I am of opinion that this appeal should be dismissed with costs.

Mitter, J.—I agree.

A. N. A.

Appeal dismissed.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 80 OF 1927.

September 16, 1927.

Present :—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

BALA PRASAD—PLAINTIFF—

APPELLANT

versus

B. N. W. RAILWAY COMPANY, THROUGH THE AGENT OF THE SAID RAILWAY COMPANY, GORAKHPUR—DEFENDANT—

RESPONDENT.

Railways Act (IX of 1890), s. 77—Letter to Agent threatening to sue for price—Notice—Suit for damages against carrier—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 31.

A consigned four boxes to B by Railway. Upon the goods reaching the destination B refused to take delivery as one of the boxes was not his and contained goods of a value considerably less than the goods consigned to him and insisted on taking open delivery, which was at first refused. On 16th July, 1923, B wrote a letter to the Agent mentioning the facts and intimating his intention to claim the price. Open delivery was subsequently allowed.

Held, (1) that the letter was a sufficient notice under s. 77 of the Railways Act; [p. 312, col. 2.]

(2) that the suit was one against a carrier for compensation for non-delivery of goods and limitation began to run from the date on which open delivery was permitted. [p. 313, col. 1.]

(1) (1866) 1 Q. B. 379; 6 B. & S. 365; 35 L. J. Q. B. 133; 12 Jur. (N. S.) 486; 14 L. T. 326; 14 W. R. 634.

(2) (1918) 87 L. J. K. B. 520; 118 L. T. 529; 62 S. J. 269; 34 T. L. R. 187.

(3) 88 Ind. Cas. 413; 52 C. 386; 29 C. W. N. 566; A. I. R. 1926 Cal. 696.

(4) (1902) 1 A. C. 465; 71 L. J. K. B. 939; 87 L. T. 41; 41 W. R. 140; 66 J. P. 757.

Appeal against a decree of the First Additional District Judge at Barabanki, dated the 18th November, 1926, reversing that of the Subordinate Judge, Barabanki, dated the 23rd September, 1925.

Dr. J. N. Misra and Mr. Ali Zaheer, for the Appellant.

Mr. G. N. Mukerji, for the Respondent.

JUDGMENT.—The facts out of which this second appeal arises are as follows. The plaintiff-appellant Bala Prasad is a trader with a fairly large business in the Barabanki District. On the 17th April, 1923, four boxes were consigned to him from Moti Hari Railway Station on the Bengal and North Western Railway to the Barabanki Railway Station which is also on the Bengal and North Western Railway. The consignment arrived somewhere before the 28th of April. The plaintiff consignee, on inspecting the consignment, asserted that although three of the packages were a portion of the consignment, as consigned, the fourth package was not a portion of the consignment and he refused to take ordinary delivery and demanded open delivery. The Station Master under the rules was not competent to give him open delivery and his requests to obtain open delivery were at first of no avail. We find that on the 16th July, 1923, the plaintiff-appellant sent the following letter to the Agent, Bengal and North Western Railway, Gorakhpur and the Secretary of State for India in Council through the Deputy Commissioner of Barabanki (he took the latter course to cover the possibility of the claim being considered to be a claim against a State Railway) and sent copies to other interested parties. The letter is as follows:—

“Sir,

“Moti Hari to Barabanki Parcel Way Bill No. 2854 of 17th April, 1923, four boxes. The above consignment lies undelivered at Barabanki Railway Station till now although about three months have elapsed since it reached here. Instead of four bales of consignment only three are present and the remaining one appears not be addressed to me and changed in transit. I wrote several times to the Traffic Inspector and Station Master asking for delivery of so much of the goods as are mine, after noting its condition and also requested, if they thought proper, an open delivery but no delivery has been made as yet, either open or otherwise, putting me to an enormous loss. The Station Master says that he will not give de-

livery without instructions from the higher authorities.

“I request you, therefore, to arrange for delivery by the 23rd instant, for I will leave this place on the same date, else I am sorry I will be obliged to claim full price with interest, etc.”

After further correspondence open delivery was taken by the plaintiff-appellant on the 22nd September, 1923. He asserted that when the consignment was opened it was discovered that although three of the boxes were his boxes the fourth box was a box which had never been consigned to him and which contained goods of a value considerably less than the goods which had been consigned to him. He accordingly instituted a suit against the Railway Company on the 22nd September, 1924 (the 20th and 21st September were close holidays) for Rs. 2,191-7-0 damages. The Company contested his claim on a variety of grounds. It asserted that the suit was bad for want of notice under s. 77 Act IX of 1890 and that the suit was also barred by limitation. It was further asserted that the box in question was the box which had been consigned to the plaintiff. Evidence was called on both sides. The learned Subordinate Judge in a very careful and reasoned judgment decided the suit in the plaintiff's favour for Rs. 1,841-8-0 certain interest and costs. The learned Additional District Judge reversed the decree deciding only one point. He found that the suit was bad for want of the issue of a notice under s. 77. The present appeal is filed.

In respect of the ground on which the lower Appellate Court has allowed the appeal and dismissed the suit it is sufficient for us to say that in the first place we are not satisfied that any notice was necessary under the provisions of s. 77. This was clearly a suit against a carrier for compensation for non-delivery of goods. It was by no means certain that there had been any loss, destruction or deterioration. The goods may still be in possession of the Railway Company. But it is sufficient to say that if such a notice were required the letter of the 16th July, 1923, is, in our opinion, an absolutely sufficient notice. We do not agree with the learned Additional District Judge in his views. We do not consider the letter in the least vague and we consider it a perfectly good business notice. We, therefore, reverse the decision of the lower Appellate Court. It is then open to us to return the appeal to

the lower Appellate Court for decision of the points which it has not yet decided. We consider, however, that it would be very unfair to the plaintiff-appellant if we took that course. Nearly two years have already elapsed since he instituted the suit and we consider that he is entitled to as speedy a decision as possible. Therefore, as the evidence on the record is sufficient for the purpose we propose under the provision of s. 103 of the Code of Civil Procedure and O. XLI, r. 24 to determine all the points which the lower Court has left undetermined. The first of these points is the point of limitation. We consider that this was a suit against a carrier for compensation for non-delivery of goods. The time from which the period began to run was the period when the goods ought to be delivered. That date we consider to have been the 22nd September, 1923, the date when the Railway at last permitted open delivery. The plaintiff-appellant was entitled to open delivery and was well within his rights in refusing to take anything short of open delivery. We are satisfied upon the evidence that the first opportunity he had of obtaining open delivery was on the 22nd September, 1923, and we, therefore, take the limitation as having commenced from that date. The suit was thus within limitation.

The next question which we have to decide is the question of fact, which was decided by the learned Subordinate Judge in the first and seventh issues. We have very little to say here. We have been through the evidence and through the careful judgment of the learned Subordinate Judge and we are satisfied that the view which he has taken on the evidence is absolutely correct. We agree with him that a box consigned to the plaintiff-appellant never reached him and that the missing box contained the articles which the plaintiff-appellant asserts it did contain. We find that the damages allowed by the learned Subordinate Judge are the correct damages. As a result we allow the appeal, restore the decree of the learned Subordinate Judge as it stands and direct that the Railway Company, pay its own costs and those of the plaintiff-appellant in this Court and the Court below.

G. H.

A. N. A.

*Appeal allowed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1733 OF 1923.

June 22, 1927.

*Present:—*Mr. Justice Tek Chand and
Mr. Justice Agha Haidar.

SARU KHAN—PLAINTIFF—APPELLANT
versus

JAN MUHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Plaintiff's right to appeal for benefit of all—Punjab Courts Act (VI of 1918), s. 41—Second appeal—Judgment in Appellate Court not proceeding on pleas—Interference—Evidence—Findings and evidence adduced in Revenue Courts, admissibility of, in subsequent civil suit—Co-tenants—Joint occupancy tenant dying sonless—Devolution of tenancy.

Order XLI, r. 4, Civil Procedure Code, authorises one of the plaintiffs to an action in which other co-plaintiffs are also interested to appeal for the benefit of the latter only if they are made parties to the appeal. [p. 314, col. 1.]

Ambika Prasad v. Jhinak Singh (1), Balkaran Lal v. Malik Namdar (2) and Balaram Pal v. Kanysha Majhi (3), followed.

A judgment of the Appellate Court which does not proceed upon the pleas of the parties is liable to be set aside in second appeal. [p. 315, col. 1.]

When a joint occupancy tenant of a common holding dies sonless his rights in the tenancy lapse to his co-tenants. [p. 314, col. 2.]

Findings in ejectment proceedings before the Revenue Authorities and the evidence led in those cases cannot be relied upon as evidence in subsequent proceedings in a Civil Court. [p. 315, col. 1.]

Second appeal from a decree of the District Judge, Amritsar, dated the 25th April, 1923, reversing that of the Munsif, First Class, Amritsar, dated the 2nd November, 1921.

ORDER.

Tek Chand, J.—(June 15, 1927).

—Three persons, Saru Khan, Piru Khan and Amir, descendants of one Hakim, instituted the suit out of which this second appeal arises for possession of land, alleging that the occupancy rights in the land were acquired by their ancestor Hakim and that they were entitled to hold the tenancy, and that the defendants, who are the descendants of Nawab, brother of Hakim, had no right to be in possession of these rights. The suit was decreed in favour of all the three plaintiffs by the trial Court. On appeal by the defendants, the learned District Judge dismissed the suit with costs in both Courts.

Against the appellate decree of the District Judge a second appeal has been preferred to this Court and in the memorandum of appeal Saru Khan, plaintiff No. 1, alone has been shown as the appellant. The contesting defendants Jan

Muhammad and Sheru and Kartar Singh and Sher Singh, who were *pro forma* defendants, were made respondents. The other two co-plaintiffs, namely, Piru and Amir, were not impleaded as parties to the second appeal. To the memorandum of appeal, however, was added at foot note by Mr. Amar Nath Chopra, the learned Advocate, who had preferred the appeal on behalf of Saru Khan, that the appeal was for the benefit of all the plaintiffs.

On the case coming up for hearing before us to-day Mr. Kishan Dayal for the respondents raised a preliminary objection that it was not competent to Saru Khan to appeal on behalf of all the other co-plaintiffs without making those co-plaintiffs parties to the second appeal as respondents. In reply reliance is placed on O. XLI, r. 4, and it is argued that Saru Khan could appeal on behalf of the other co-plaintiffs, without joining them as parties to the appeal. That rule, however, authorizes one of the plaintiffs to an action, in which other co-plaintiffs are also interested, to appeal for the benefit of the latter, only if they are made parties to the appeal. The proposition is too obvious to require discussion. Authority for it will be found in *Ambika Prasad v. Jhinak Singh* (1), *Balkaran Lal v. Malik Namdar* (2) *Jitendranath Chatterji v. Jhaku Mandar* (3) and *Balaram Pal v. Kanysha Majhi* (4). We, therefore, hold that Saru Khan was not entitled to appeal on behalf of Piru and Amir plaintiffs.

Mr. Amar Nath Chopra, however, states that he omitted to implead these two persons as parties under the erroneous belief that under O. XLI, r. 4, Civil Procedure Code, it was not necessary for him to implead them as parties. He has now frankly admitted his mistake and asks us that we should exercise our powers under O. XLI, r. 2J, Civil Procedure Code, and implead Piru and Amir, plaintiffs as respondents to the appeal. After hearing Mr. Kishan Dayal for the respondents we are of opinion that it is not desirable to decide the case in the absence of the other plaintiffs and we think this to be a fit case in which we should exercise our powers under O. XLI, r. 20, Civil Procedure Code. We, there-

(1) 71 Ind. Cas. 321; 45 A. 286; 21 A. L. J. 91; A. I. R. 1923 All. 211.

(2) 78 Ind. Cas. 637; A. I. R. 1924 All. 873; L. R. 5 A. 279 Civ.

(3) 66 Ind. Cas. 780; 3 P. L. J. 456; A. I. R. 1922 Pat. 4.

(4) 53 Ind. Cas. 548.

fore, direct that Piru and Amir be made respondents to the appeal. Mr. Amar Nath Chopra undertakes to communicate with these two persons so that they may be present or be represented before us at the next hearing.

As the case is a very old one, we are not inclined to adjourn the case for a long time. We accordingly direct that it be placed before us as No. 1 on the list on Monday the 20th of June, 1927. As the adjournment is caused by an omission on the part of the appellant to implead these two persons as parties, we allow Mr. Kishan Dayal Rs. 32 as costs of the adjournment, which must be paid by the appellant on or before the next date of hearing.

Mr. Amar Nath Chopra, for the Appellant.

Mr. Kishan Dial, for the Respondents.

JUDGMENT.

Tek Chand, J.—The main facts of the case are given in our order of the 15th of June, 1927, which should be read as a part of this judgment. By that order we decided to implead Piru and Amir plaintiffs as respondents to the appeal under O. XLI, r. 20, Civil Procedure Code, and Mr. Amar Nath Chopra for Saru Khan appellant undertook to communicate with these two persons and to produce them to-day. Amir has appeared to-day and is present in Court. He states that Piru died sonless more than 2 years ago. This fact is admitted by Mr. Amar Nath Chopra for the appellant and by Jan Muhammad the contesting respondent who is also present in person. As Piru deceased claimed to be a joint occupancy tenant of a common holding and as he has died sonless, his rights in the tenancy lapse to his co-tenants, namely, Saru Khan appellant and Amir respondent both of whom are already on the record. It is, therefore, not necessary to adjourn the hearing of the case to implead the heirs, (if any), of Piru deceased as respondents. Piru's name will be struck off the record.

On the merits the second appeal can be disposed of very briefly. The plaintiffs came into Court alleging that their ancestor, Hakim, had acquired the occupancy tenancy in question, that they were in possession of these occupancy rights but that on a notice issued by the defendants, they had been wrongly ejected by order of the Revenue Authorities. They, therefore, sued to recover back possession of the land comprised in the occupancy tenure. The de-

defendants resisted the suit on the plea that the occupancy tenancy in question was not acquired by Hakim but that it was acquired by Sher Khan who was the father of Hakim and of Nawab Khan, the grandfather of the contesting defendants. The plaintiffs in their replication denied that the occupancy rights were acquired or that the land was ever occupied by Sher Khan. The Sub-Judge found against the defendants' contention and held that on the materials on the record it could not be held that the land was occupied by Sher Khan. In their grounds of appeal before the learned District Judge the defendants reiterated their contention that Sher Khan, the common ancestor of the parties, had held possession of the land. The learned District Judge, however, gave no finding on this point. On the other hand, he held that though the occupancy rights were held by Hakim alone in the Settlements of 1852 and 1865, and that after the death of Hakim for some reason or other the plaintiff's line decided "to pool the occupancy land of the family" and that it was in pursuance of some arrangement that the occupancy rights were transferred by the plaintiff's branch of the family to the defendants. This, however, is an entirely new case which the learned District Judge has set up in appeal for the defendants but which he was not entitled to do. No such arrangement was put forward in the written statement, nor was any issue framed on it. As pointed out already the defendants' main plea was that the occupancy rights had been acquired by Sher Khan. The learned District Judge does not discuss the point at all. His judgment in so far as it proceeds on grounds not put forward in the pleas, cannot be supported.

The learned District Judge further bases his judgment on the decision of the Revenue Assistant dated the 17th of June, 1920, in a suit brought by Amir plaintiff to challenge a notice of ejectment issued by the defendants in regard to the land in suit. He also relies upon the evidence that was led before the Revenue Authorities in that litigation and also in certain previous litigation. Now, there can be no doubt whatever, that neither the findings in the ejectment proceedings before the Revenue Authorities nor the evidence led in those proceedings could be legally relied upon in this case. Mr. Kishan Dial for the respondents has very properly conceded

that he is unable to contend that this evidence was legal evidence in the case. The learned District Judge also relies on a certain lease, alleged to have been executed by Amir plaintiff in favour of the defendant. But his discussion of this matter is very confused. For the foregoing reasons the judgment of the learned District Judge cannot be called a proper judgment and we are constrained to set it aside. The case will have to be sent back to the lower Court for re-decision in accordance with law. That Court must examine afresh such of the evidence as is on the record and come to a definite finding on the issues that arose in the case.

The appeal is accepted and the case remanded to the District Judge for decision in accordance with law. Court-fee on appeal will be refunded. Costs will be costs in the case.

Agha Haidar, J.—I agree.

R. L.

Appeal accepted;

A. N. A.

Case remanded.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 519
OF 1926.

August 8, 1927.

Present:—Mr. Justice Venkatasubba Rao.
NARAYANDOSS BALAKRISHNADOSS
—PLAINTIFF

versus

BACHRAJ CHORDIA SOWCAR AND
ANOTHER—DEFENDANTS.

Contract Act (IX of 1872), s. 16—Undue influence—Execution of mortgage by minor just come of age in favour of creditor of maternal uncle—Maternal uncle and nephew in position of fiduciary relationship—Mortgagee taking with knowledge of facts—Mortgage, whether liable to be set aside.

Where a person seeks to set aside a document executed by him to another on the ground of undue influence if there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an advantage—where this alone is established and nothing further—the Court gives relief to the party conferring the benefit, unless the other party shows that he did not avail himself of the confidence which subsisted between the parties. The burden is, therefore, upon him and, if he does not discharge the burden, the plaintiff succeeds. [p. 321, col. 1.]

When there is a third party involved, the position is not dissimilar. If it is shown that such third party was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence; that is to say, the Court gives relief to the plaintiff without demanding proof of fraud or imposition, or any specific act of undue influence. It is enough that the third party was aware of the existence of

the confidential relation and the Court does not insist on proof that he was further aware of the actual exercise of undue influence. [p. 321, cols. 1 & 2.]

In such cases the third party is affected not by reason of any active participation in, but by bare knowledge of, undue influence exercised in fact or by the mere knowledge of the situation of the parties which in law gave rise to a presumption of undue influence. [p. 322, col. 1.]

It is not special relations arising from certain situations only such as, parent and child, or guardian and ward, that are jealously watched by the Court; on the other hand, the principle on which equity gives relief is extended and applied to, all the variety of relations in which dominion may be exercised by one person over another. Similarly the Court does not fetter its discretion by a fictitious regard to the age of the person aggrieved. The law looks at the substance of the thing and it is essential that the relationship should have ceased not merely in name but in fact. [p. 323, col. 1.]

When a stranger takes a gift from a person tainted with the undue influence of another person to whom he stands in a fiduciary position, with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit. [p. 323, col. 2.]

Rhodes v. Bate (1), *Espéy v. Lake* (2), *Archer v. Hudson* (3), *Maitland v. Irving* (4), *Berdoe v. Dawson* (5), *Turnbull & Co. v. Duval* (6) and *Chaplin v. Brammall* (7), relied on and followed.

Bainbrigge v. Browne (8) and *Thornber v. Sheard* (9), distinguished.

Raj Coomar Roy v. Alfuzuddin Ahmed (10), dissented.

Where a person 20 years old executed a mortgage of almost the whole of his property in favour of a creditor of his maternal uncle for no personal benefit to himself and it was found that the uncle and nephew stood in the position of trustee and *cestui que trust*, that the nephew had no independent advice and was not directed to seek the disinterested opinion of his mother and paternal uncle who were alive and yielded to the importunities of the uncle who was in a position of financial bankruptcy and whom he wished to oblige, and the creditor was aware of these circumstances:

Held, that the transaction was vitiated by undue influence and liable to be set aside by the nephew. [p. 323, col. 2.]

Suit by the plaintiff to set aside a mortgage executed in favour of the 1st defendant on the ground of undue influence.

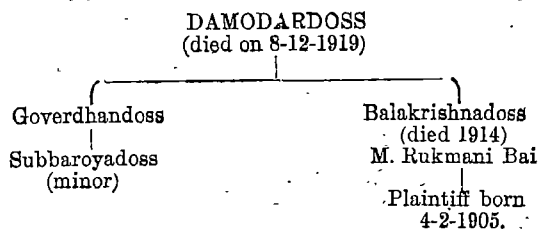
Mr. S. Doraiswami Aiyar, [for the Plaintiff.

Mr. Nugent Grant, for the Defendants.

JUDGMENT.—The plaintiff in this suit impeaches a mortgage executed by him. The 2nd defendant Purushothamdooss is his maternal uncle and he became indebted to the 1st defendant, a money-lender, in a large sum of money. When Purushothamdooss was pressed for re-payment the plaintiff executed a mortgage in favour of the 1st defendant securing his share in his family property and making himself liable for his uncle's debt. The transaction is challenged by the plaintiff on the ground

that it is vitiated by undue influence. The short point to be decided in the case is: is it so vitiated? I may, however, point out that a mass of evidence has been adduced to show, or to rebut, that other invalidating grounds existed, namely, (1) that in the deed finally executed, the term that the amount is re-payable on demand was fraudulently inserted, contrary to the original understanding that it was re-payable only after two years; (2) that the 1st defendant falsely denied the existence of certain jewels and repudiated after the execution of the deed, his promise to return them to the 2nd defendant. Not only was evidence directed to these points but much time was taken up on that account. But when the case reached the stage of final argument, the Counsel for the plaintiff and the 1st defendant adopted the view which I was disposed to take from the start and confined themselves to the bare question—the question decisive of the case—is the transaction vitiated by undue influence? I may state that I did not prevent evidence being adduced on the other points as I felt that in the event of the case going further; the parties should have no ground of complaint on the score of any evidence having been shut out.

The following pedigree may be found useful in understanding the facts of the case:—



The father of the plaintiff died in 1914 and the plaintiff thereafter lived at Madras with his maternal uncle, the 2nd defendant, whereas his mother resided (also at Madras) in the family house along with Goverdhandoss and his son. On the 30th of September, 1917, there was a partition of the family properties. The grandfather separated from the rest and certain properties were allotted in common to the other members of the family. At the partition the plaintiff, who was an infant, was represented by his mother and his maternal uncle, the 2nd defendant, who acted as his guardian. Immediately after the partition a trust deed was executed constituting the

plaintiff's grandfather and Purushothamdoss trustees for managing the properties belonging to the plaintiff, his uncle and his uncle's son. These properties, of course, included those that fell to their share at the partition. Damodardoss died in 1919 and on the 5th January, 1921, a deed came into existence which appointed one Chinna Veerappa trustee in the place of Damodardoss. Shortly afterwards Chinna Veerappa died and Purushothamdoss remained and continued to be the sole trustee.

There were dealings between the 1st defendant and Purushothamdoss and in the course of such dealings the latter became indebted to the 1st defendant in a large sum of money. It is unnecessary to go into the history of these dealings and it is sufficient to say that in August, 1925, it was found that Purushothamdoss owed the 1st defendant a sum of Rs. 24,000 and that the position of the former was extremely precarious. I must add that Purushothamdoss left Madras in 1923, and returned only about July 1925. During this period the evidence discloses that the dealings between the 1st defendant and Purushothamdoss continued and it became more and more manifest that Purushothamdoss was in difficulties. It is also important to note that during his absence from Madras the plaintiff went to live in the family house with his mother and his paternal uncle Goverdhandoss. After Purushothamdoss returned, the plaintiff seems to have continued to live at his family residence but was frequently visiting the former. This was the state of things that prevailed on the 14th August, 1925, when the suit mortgage deed was executed. On that date the plaintiff was 20 years of age and in the eye of the law an adult. It is common ground that the plaintiff was much attached to his maternal uncle. In fact, as I have shown, the boy practically lived as his ward, preferring his protection to that of his mother and his paternal uncle. The 1st defendant finding that Purushothamdoss was not in a position to pay the large amount due to him, began to feel uneasy and brought pressure to bear on him for the re-payment of his debt. A lawyer's notice was sent making a demand and it was evident that the 2nd defendant was in a state of bankruptcy. It is said that he had lands in the *mofussil* of some small value and that he imagined he was going to get at a future date a fabulous amount from some source. These points have not

been pursued and the case was argued on the footing that Purushothamdoss was on the date of the mortgage practically a bankrupt. He has in fact since been adjudicated an insolvent and the Official Assignee now represents his estate in the suit. The 1st defendant's demands having become persistent, a proposal came to be made which was to the effect that the plaintiff was to execute a mortgage in his favour charging the plaintiff's share in certain two houses with the debt and making that share security for its re-payment. A scribe by name Rahiman Ali, a man suggested by the 1st defendant was employed and a mortgage-deed was prepared and executed. Though the plaintiff was the only individual affected by the mortgage-deed, Purushothamdoss also nominally joined in its execution. Its recitals make it perfectly clear (and there is no dispute on this point) that the debt was that of the 2nd defendant and the plaintiff derived no personal advantage. I may notice that the deed says that a trifling amount in cash was paid to the plaintiff but the evidence has shown that this is utterly false and it is not now denied that the plaintiff derived no benefit whatever from the deed. In this case there has been a lot of hard swearing on every side and I am quite prepared to endorse a remark made by one of the Counsel at the Bar that a single case hardly ever presents a greater collection of liars than have figured at this trial. The curious result has been that none of the Counsel has chosen to rely upon the evidence even of his own witnesses and with great propriety each of the Counsel has taken his stand mainly on admitted or undisputed or indisputable facts. What, then, are those facts? Besides those that I have adverted to, the evidence also shows that the plaintiff was practically not possessed of any property other than his share in these two houses. They were valued by the 1st defendant himself at Rs. 20,000 and although Purushothamdoss to suit his purposes estimates them as being worth very much more, it was not seriously suggested that the mortgage really left any margin. These two houses (the subject of the mortgage) were part of the trust estate legally in charge of the 2nd defendant. The next important point to note is, that about two weeks after the date of the mortgage Purushothamdoss made an application to

this Court asking that he should be discharged from the office of trustee in respect of the estate of the plaintiff and his co-parceners (Ex. IX, dated 31st August, 1925). An order was made on that application by consent and it is alleged that the properties were thereafter formally handed to Goverdhandoss (plaintiff's paternal uncle) in whose favour Purushothamdoss also passed a promissory note dated the 8th September, 1925, for Rs. 4,000 being roughly the amount for which he was then accountable in respect of his management. That the condition of Purushothamdoss was perilous, also appears from the fact that at the instance of one Ponnandi Chetti, a criminal warrant had been issued for his arrest, first on the 17th of July, 1925, and that warrant having been returned unexecuted, a second one was issued on the 15th of August, 1925. Ponnandi Chetti had instituted criminal proceedings in respect of an alleged breach of trust by Purushothamdoss to whom certain diamonds were said to have been entrusted in his capacity as broker. The dates of those warrants are very significant, the second of them having been issued just one day subsequent to the execution of the mortgage-deed in question. It will be seen that so far I have been referring to facts which are either admitted or not denied. To the same category belong a few more facts. It is not disputed that neither the 1st defendant nor Purushothamdoss directed the plaintiff to seek independent or disinterested advice. There is then the fact that the 1st defendant was aware that the plaintiff had his mother alive and that he had also a paternal uncle. Indeed the 1st defendant admits having seen the plaintiff's mother and having spoken to the plaintiff's paternal uncle before the date of the mortgage. It is not disputed that the 1st defendant was aware that the plaintiff was then only 20 years old, that Purushothamdoss was his maternal uncle, that the properties mortgaged belonged to the plaintiff, that the debt was that of Purushothamdoss with which the plaintiff had no concern and that under the deed the latter obtained no benefit whatsoever.

Having stated facts regarding which there is practically no dispute, I shall now turn to that part of the evidence in respect of which there is some conflict,

The plaintiff who equally with Purushothamdoss and Ratanchand (the son and the main witness of the 1st defendant) has shown himself a thoroughly unreliable witness, has deposed that he was asked by them at and before the mortgage, to keep the transaction secret from every one including Goverdhandoss. Purushothamdoss who previous to and at the trial was consistently supporting the plaintiff, has, however, given a different version and said that there was no secrecy imposed and in this respect he was supported by the 1st defendant. It is difficult to say as between these three who has been guilty of the least lying, but in this instance, I am prepared to hold that the plaintiff was not expressly asked not to mention this matter to any third party. The 1st defendant admits that he had known both the plaintiff and the 2nd defendant for some years previously and that he had frequently seen the nephew in his maternal uncle's house. The 1st defendant pretends that he had, however, no knowledge of the fact that the plaintiff was living for several years under the same roof as Purushothamdoss. I have not been asked seriously to believe this and I find that the 1st defendant knew of the fact that the plaintiff was living with Purushothamdoss and as a member of his household. The 1st defendant also deposed that he was not aware of the existence of the criminal warrant. In this respect again I am not prepared to act on his evidence. Purushothamdoss swears—and in this he is corroborated by several—that he was in hiding at Mambalam, a suburb of Madras from the 6th August to the 18th August, 1925, and that during that time he was living with the 1st defendant at that place with a view to evade the criminal warrant which had been issued. I believe that this is substantially true and that the 1st defendant was aware at the time that a warrant was out for his debtor's arrest. There is another controversial point. Was the 1st defendant made aware of the existence of the trust deed? The plaintiff, Rahiman Ali the scribe, and Purushothamdoss give one version which is to the effect that the trust deed was shown to the creditor. Ratanchand the son of the 1st defendant swears he was not shown the trust deed. I have unhesitatingly come to the conclusion that the evidence of Ratanchand must be rejected on this point. I reject his evidence

mainly on the ground that it is so utterly improbable. In the first place, Ratanchand admitted in his evidence that several documents constituting the title-deeds were put into his hands. He was asked in the witness-box by his Counsel to select the documents of which he was given inspection. The documents were either in English or Telugu, neither of which he professed to understand, but he went through the form of looking at each document and ultimately was able to say that certain documents alone were handed to him and not the others. Among those which he was not shown were found to be the deed of trust and the deed of appointment of a new trustee. By what method he was able to make this selection it is impossible to say. In passing I may note that according to him the partition deed was one of the documents handed to him which shows that Purushothamdoss acted at the family division as the guardian of the plaintiff. Before Ratanchand was put into the box I asked the 1st defendant's Counsel what his case was in regard to this point and he made an express statement that the only documents which were handed to his client before the transaction was entered into, were some papers in a suit including a decree. The evidence of Ratanchand is at direct variance with this statement, for according to him several other important deeds were placed in his hands. I am inclined to believe that the 1st defendant in his anxiety to make out that he was not at the time aware of the trust had recourse to this falsehood. There was no motive on the part either of the plaintiff or Purushothamdoss to suppress mention of the trust deed. As a matter of fact, we find that soon after the transaction, disputes arose between the 1st defendant on the one hand and the plaintiff and Purushothamdoss on the other. Every possible contention was put forward on the latter's behalf to show that the mortgage-deed was invalid and inoperative. It did not occur to them to say that plaintiff and Purushothamdoss stood in fiduciary relations and the transaction was, therefore, invalid. It was long after the disputes began that this aspect of the case presented itself to the legal advisers of the plaintiff and there can be, therefore, no motive on the part of the plaintiff and Purushothamdoss for withdrawing the trust deed from the documents handed to

the 1st defendant. I am clearly of the opinion that the latter was on the date of the transaction aware of the peculiar relations between the uncle and the nephew by reason of the existence of, and arising out of, the trust deed.

There has been some little controversy as regards how far the plaintiff was competent to understand the nature of the transaction at the time he entered into it. He pretended that he did not know its nature when he executed the bond. After much fencing and prevaricating he greatly modified this answer and there is not the slightest doubt that he was aware, at any rate, generally, of the nature and the terms of the deed which he was called on to execute. The truth is, he had a bare knowledge of the facts, namely, that he was making himself liable for his uncle's debts and that he was giving his property as security. He was competent enough to understand this, but I do not think that he was in a position to resist the importunity of his uncle to whom he was attached. There is no evidence that he ever consulted Goverdhandoss and although there is much doubt as to when the transaction first came to his knowledge, I cannot find on the evidence that he knew it at the time the mortgage-deed was given. At any rate, on the material on record, there is nothing to show that the plaintiff sought the advice of any person, either of his paternal uncle or his mother or any stranger.

The last point that remains to be noticed is, did the 1st defendant take any part in persuading the plaintiff in entering into the suit transaction? It is not disputed that there was persuasion on the part of Purushothamdoss. The 1st defendant suggested that he left the transaction to Purushothamdoss to be put through and that he did not take an active part. It is difficult to say precisely what part the 1st defendant took, but I entertain no doubt that he was more than a mere silent participator. It is very probable that the 1st defendant in his anxiety to get his debts secured, joined with Purushothamdoss in inducing the plaintiff to execute the deed. I am prepared to believe that very little persuasion on his part was necessary, but I cannot say that he kept himself scrupulously free from the taint. His evidence is demonstrably false on so many points that I am not disposed to believe him when he says that he took no part in the transaction.

I have now stated my conclusions on points regarding which there has been some dispute and from the welter of false testimony which every one of the parties has asked me to reject, I have disentangled such facts as are reasonably free from doubt. The 1st defendant has not gone into the witness-box, his son Ratanchand has proved himself an untrustworthy witness, the plaintiff, the scribe Rahiman Ali and Purushothamdoss are unscrupulous liars and on every conceivable point, as many versions have been given as there are witnesses in the case. I have, therefore, taken care to separate out of this mass, only such facts as cannot admit of serious doubt. What then is the bearing of these facts on the question that I have to decide? To answer this question, the law on the point must be reviewed.

I shall now refer to certain cases which have clearly laid down the principles applicable to a case of this kind. The first of them is *Rhodes v. Bate* (1). The plaintiff was a lady about 50 years old who was living with her brother-in-law Codrington. He became indebted to Bate in a large sum of money and for this debt the plaintiff along with Codrington signed bonds in favour of Bate, and further charged almost the whole of her estate with the payment of the debt. The plaintiff complained that the documents and securities were obtained by the undue influence exercised on her by Codrington as well as Bate both of whom, she alleged, stood in confidential relations to her. I may note in passing that this case differs from the present one, in so far as the creditor, the 1st defendant, does not stand in any fiduciary relation to the plaintiff. But the case establishes certain propositions which have a close bearing on the case I have to decide.

Lord Justice Turner after examining the evidence found that at the date of some of the transactions complained against, Bate stood in confidential relations with the plaintiff and as the facts of the case brought it within the principles which the Lord Justice stated in his judgment, he set aside those transactions.

What then are the principles stated?

(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless

they can show that the persons who have conferred the benefits had competent and independent advice. In this case, neither does the age nor the capacity of the person conferring the benefit affect the principle.

This is stated by the learned Lord Justice to be "a settled general principle of the Court".

(2) Age and capacity are considerations which may be of importance in cases where no confidential relation exists.

Knight Bruce, L. J., concurs in this judgment. In this case, there is a distinct finding that the plaintiff was not of weak mind and was perfectly competent to understand what she did (page 256*). There is also a finding that the plaintiff signed the deeds in question freely and voluntarily and without pressure or solicitation on the part of the defendant, that the contents were fully explained to her and she clearly understood their nature and effect (page 257*). It is also noticeable that the judgment makes mention of the fact that Bate told the plaintiff that Codrington would not be in a position to re-pay the debt and that ultimately she would be obliged to re-pay it. (page 261*). Bate told the plaintiff this and cautioned her but the learned Lord Justice says that Bate did not press the subject upon her as an independent and disinterested adviser would have done, nor did he recommend the plaintiff to employ an independent Solicitor (page 261*).

The facts of this case serve to show with what strictness the principle of the law enunciated in the judgment is enforced.

Espey v. Lake (2) is an instructive case. The plaintiff was a young lady who had just come of age and joined in making with her step-father Speakman as his surety, a promissory note in favour of Lake to whom Speakman owed a sum of money. The plaintiff was living with her mother and step father from infancy. She received no consideration for the note which was given for the debt of her step-father. The transaction was challenged by the plaintiff and it was set aside by Turner, V.C. It will be seen that in this case the relationship was not in the nature of a trust; nor was it strictly that of guardian and ward. The transaction was set aside on the ground that Speakman stood to the

(1) (1866) 1 Ch. A. 232; 35 L. J. Ch. 237; 12 Jur (N.S.) 178; 13 L. T. 778; 14 W. R. 292.

(2) (1852) 10 Hare 260; 68 E. R. 923; 22 L. J. Ex. 336; 16 Jur. 1106; 1 W. R. 59; 20 L. T. (O. S.) 203; 90 R. R. 362.

*Pages of (1866) 1 Ch. A.—[Ed.]

plaintiff in a relation which gave rise to confidence between the parties. The step-father stood in *loco parentis* to the plaintiff and that was considered sufficient. It is also to be noted that this is a case of influence arising by inference from the situation of the parties. It is not necessary to prove by direct evidence that any deception of fraud was practised. Speakman being in confidential position, it was incumbent upon him to affirmatively prove that he did not take advantage of the position of influence which subsisted between the parties. He failed to do it and the plaintiff was entitled to succeed. So far as Lake was concerned, he had notice of the equities arising from the position of the parties and that was deemed sufficient as against him. There is a close resemblance between this and the present case. If it is shown that the parties stood in such a situation as to give rise to confidence between them and that the third party who derives the benefit was aware of the existence of this relation—if this is shown, the third party is not entitled to retain the security, unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in *loco parentis* towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. The doctrine is the result of the jealousy and solicitude with which Courts of Equity watch the interests of the weaker party where a special confidential or fiduciary relation is established. To sum up (1) if there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an advantage—where this alone is established and nothing further, the Court gives relief to the party conferring the benefit, unless the other party shows that he did not avail himself of the confidence which subsisted between the parties. The burden is, therefore, upon him, and, if he does not discharge the burden, the plaintiff succeeds. (2) When there is a third party involved, the position is not dissimilar. If it is shown that he was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence; that is to say, the Court gives relief to the plaintiff without demanding proof of fraud,

or imposition, or any specific act of undue influence. It is enough that the third party was aware of the existence of the confidential relation and the Courts do not insist on proof that he was further aware of the actual exercise of undue influence.

These two propositions are well-settled and both these principles are applicable to the facts of the present case. In *Espey v. Lake* (2), the case which I have been discussing, the Vice-Chancellor makes an observation which I find repeatedly occurs in the cases on the subject, *viz.*, that the creditor, the third party, was not guilty of any moral fraud, nor had he a knowledge of the principles which guide a Court of Equity in such cases. This does not any-the-less render the third party liable to surrender the benefit. This is a remark which one cannot disregard in dealing with a case of the kind before me.

Archer v. Hudson (3) is another case referred to by Mr. S. Doraiswami Aiyar for the plaintiff which is directly in point. The parties who stood in fiduciary relations were uncle and niece. The uncle over-drew his account at his bankers and the niece entered into a voluntary security for his debt. The Court found that the person who was representing the Bank in the transaction was well acquainted with the relative situation of these two parties. Lord Langdale, M. R., held (and it was subsequently affirmed by the Lord Chancellor) that, where there is a pecuniary transaction between a child and one in *loco parentis* towards her just after she comes of age and prior to what may be called a complete "emancipation" without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child. It must be shown, if the creditor is to succeed, that the child had such protection as would secure to her a free and unfettered judgment independent of any sort of control. In this case again, it will be observed that the undue influence was that which arose by inference from the situation of the parties. It will also be observed that the third party was merely aware of the existence of the confidential relation and that was held sufficient to disentitle him to retain the benefit.

(3) (1844) 7 Beav. 551; 49 E. R. 1180; 13 L. J. Ch. 330; 8 Jur. 701; 64 R. R. 152.

Maitland v. Irving (4) is another case which applies these well settled principles and I do not propose to state the facts of that case in great detail. That was also the case of a niece who had just come of age and the other party was her uncle who had previously been her guardian. There too the third party was a creditor to whom the uncle owed a debt for which the plaintiff, the niece, made herself liable. In that case also the creditor was aware of the peculiar confidential relations between the two parties and took the security without making any enquiry or taking any pains to ascertain whether the niece was a free agent who acted with the full knowledge of the consequences of her act. From these facts the Court firstly inferred undue influence and secondly held that the knowledge of the creditor was sufficient to bring the case within the principles I have stated.

Berdoe v. Dawson (5), *Turnbull & Co. v. Duval* (6) and *Chaplin v. Brammall* (7) are cases of the same kind and do not call for any special remarks.

I may here pause to re state, at the risk of repetition the principle established by these cases. With the exception of *Rhodes v. Bate* (1) and *Turnbull & Co. v. Duval* (6) (which are of a peculiar kind being open to the double objection of there being two persons in a position of special influence, one of whom was the creditor himself) these various cases illustrate and enforce the same point. In each of them, there was a third party present besides the individuals standing to each other in fiduciary relations—and the third party was held affected not by reason of any active participation in, but by bare knowledge of, undue influence exercised in fact, or as is more frequently the case, and this is important, by the mere knowledge of the situation of the parties which in law gave rise to a presumption of undue influence.

Having regard to the facts of the present case I may with advantage refer to another aspect emphasised in some of the authorities to which I have referred. In *Espey v. Lake* (2), *Turnbull & Co. v. Duval* (6) and *Chaplin v. Brammall* (7), the stranger

creditor claimed immunity on the ground that he took no part in the transaction but left it entirely to the person in fiduciary position. This argument was in each of these cases expressly negatived. The 1st defendant in the present case has taken up a somewhat similar position but that cannot avail him.

Mr. Grant for the 1st defendant has cited two cases. The first of them *Bainbrigge v. Browne* (8) does not support him as it states (and very clearly) the law in just the same terms as the other cases which have been already referred to. On the evidence it was found in that case that the defendants had no notice of the circumstances giving rise to the equity. Fry J., in his judgment says:—

"I think that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully emancipated from him, assisted by the advice of their friends, and by the advice of a Solicitor who was bound to do his duty to them."

This passage shows that the case, far from supporting Mr. Grant is really against his contention.

The second case relied on by Mr. Grant is *Thornber v. Sheard* (9) which is said to decide the other way (of which I am doubtful) but if it does, it is against the clear weight of authority and I cannot follow it. There is an Indian case *Raj Coomarr Roy v. Alfuzuddin Ahmed* (10) a decision of a single Judge which purporting to follow *Thornber v. Sheard* (9) states the law thus:

"But I do not find any authority for holding that a third party who stands in no confidential relation to the grantor, is bound in the first instance to show that no undue influence was used."

I must with the greatest respect dissent from this observation and hold that it does not correctly represent the law on the point.

This being the legal position, I shall now examine whether the facts I have stated bring the present case within the principles laid down in these various decisions. In discussing the facts I have carefully

(4) (1846) 15 Sim. 437; 60 E. R. 688; 16 L. J. Ch. 95; 10 Jur. 1025; 74 R. R. 115.

(5) (1865) 34 Beav. 603; 55 E. R. 768; 12 L. T. 103; 11 Jur. (N. S.) 254; 13 W. R. 420; 145 R. R. 693.

(6) (1902) A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521.

(7) (1908) 1 K. B. 233; 77 L. J. K. B. 366; 97 L. T. 860.

(8) (1881) 18 Ch. D. 188; 50 L. J. Ch. 522; 44 L. T. 705; 29 W. R. 782.

(9) (1850) 12 Beav. 589; 50 E. R. 1186; 85 R. R. 169.

(10) 8 C. L. R. 419.

separated those that are admitted or not denied from those that are disputed. It seems to me that I cannot support this transaction even if I confine myself only to indisputable and undisputed facts. Supposing this was a transaction between the plaintiff and the 2nd defendant and there was no third party in the case, could this be supported? That they stood in confidential or fiduciary relations is well established by authority. It is not special relations arising from certain situations only such as, parent and child, or guardian and ward, that are jealously watched by the Court; on the other hand, the principle on which equity gives relief is extended and applied to, all the variety of relations in which dominion may be exercised by one person over another (White and Tudor's Leading Cases, 8th Edition, Vol. I, page 282). Similarly, the Court does not fetter its discretion by a fictitious regard to the age of the person aggrieved; for the fact that the child has attained the bare age of majority signifies little and complete emancipation is insisted on. The law looks at the substance of the thing and it is essential that the relationship should have ceased not merely in name, but in fact. The plaintiff lived for several years with, and under the protection of, the 2nd defendant who besides was his maternal uncle and acted as his guardian at the family partition. The plaintiff again was not fully removed from the influence of the 2nd defendant and it cannot be said that there was complete emancipation. These facts alone would give rise to a position of great confidence between the parties. If the case had been merely one between the plaintiff and the 2nd defendant, it would have been the latter's clear duty to see that the relations were completely dissolved and that the donor had independent and disinterested advice.

Lindley, L. J., in *Allcard v. Skinner* (11) classifies cases in which equity invalidates gifts into two groups: the second group with which we are concerned, consists of cases where the Courts infer undue influence from the mere position of the parties and throws upon the donee the burden of proving that he has not abused his position and that the donor had independent advice and was removed from the donee's influence. In such cases, the

(11) (1887) 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 1; 36 W. R. 251.

transaction is disallowed not on account of any positive fraud but because it is contrary to the general policy of the law (White and Tudor's Leading Cases, pages 28 and 279).

To this group belongs the present case. No evidence has been given of the kind required and it, therefore, follows that if the transaction was between the plaintiff and the 2nd defendant, a Court of Equity would not uphold it.

How does the presence of the third party then affect this case? I have already said that when a stranger takes the gift tainted with the undue influence of the person in fiduciary position, with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit. Now applying this rule and again confining myself to admitted facts, I am of the opinion that the 1st defendant is bound to surrender the benefit. He was aware of the antecedent confidential relations, he was also aware that they were not completely dissolved and that the parties are not met on equal terms; he was further aware that the plaintiff was not in a position to exercise free, unfettered and deliberate judgment, and that he was not directed to seek disinterested or independent advice. On these facts alone, the plaintiff can, in my opinion, succeed.

But whatever my own view may be, it is unnecessary to rest my judgment on admitted facts alone. On the date of the transaction the plaintiff and the 2nd defendant occupied the position of trustee and *cestui que trust* and I have found that the 1st defendant was aware of the existence of this special relationship. I have further found that the plaintiff who was not a free agent equal to protecting himself, was persuaded by Purushothamdoss to enter into this transaction and that he was so drawn into this inequitable and unconscionable bargain also in some measure under the influence of the 1st defendant himself. In any case, being aware that there was importunity by Purushothamdoss which the plaintiff was unable to resist, he took full advantage of it. I have, therefore, come to the conclusion that the transaction cannot be upheld and I set it aside.

There remains only one small matter which I must notice. The mortgage-deed was attacked by the plaintiff *inter alia* upon the ground that when he executed it none of the attesting witnesses was present,

This case partially broke down when his chief witness Rahiman Ali was obliged to modify his previous answer and say that the plaintiff had admitted execution before the attesting witnesses signed their names. This ground was not seriously relied on and I do not think I need pursue the point.

As regards costs, I have an observation to make. The conduct of the 1st defendant in entering into the transaction was not dishonest or morally wrong and it is on account of the equitable principles which the Court applies that the plaintiff succeeds. If, therefore, the 1st defendant had been content to state the truth and leave the law to take its course, I should have been inclined to deprive the plaintiff of his costs, in view of the fact that he has given false evidence. But as the 1st defendant himself has adduced much untrue evidence, I do not think there is any reason for departing from the ordinary rule and I direct that he shall pay the plaintiff his costs of the suit.

I fix the remuneration of the short hand clerks at Rs. 300. I direct that the plaintiff and the 1st defendant shall each pay for the transcript of the evidence and the copies supplied, Rs. 150. If either of them pays more than his share in the first instance, he will be entitled to recover the excess from the other.

V. N. V.

Suit decreed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 363 OF 1927.

July 7, 1927.

Present:—Mr. Justice Page.

BONOMALI GOPE—PETITIONER

versus

FAKIR CHAND PAL AND OTHERS—

OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 14—Suit ordered to be tried in another Court—No want of jurisdiction—Plaintiff, whether entitled to exclusion of time—Time for obtaining copy of order, whether can be excluded.

A Union Court in which a suit for recovery of money was filed passed an order that the suit be conducted in a proper Court as it was of opinion that it was desirable that there should be a proper trial conducted by persons versed in law. The plaintiff subsequently filed the suit in the Small Cause Court;

Held, (1) that the plaintiff was not entitled to exclude the period of time during which the suit was pending in the Union Court, under s. 14 of the Limitation Act, as the Union Court did not decline to entertain the suit, or decide that it had no jurisdiction or that through want of jurisdiction or any other cause it was unable to entertain the suit; [p. 325, col. 1.]

(2) that the plaintiff was not entitled to exclude the period of time required for obtaining a copy of the order of the Union Court as the suit could have been filed without such copy. [*ibid.*]

Revision against a decision of the Munsif, Fourth Court, Munshigunj, dated the 22nd December, 1926.

Babū Panchanan Ghose, Radhika Ranjan Guha and Jatis Chandra Guha, for the Petitioner.

Babu Jatindra Mohan Chowdhury, for Babu Jitendra Nath Sen Gupta, for the Opposite-Party.

JUDGMENT.—This is an application under s. 25 of the Provincial Small Causes Courts Act to revise a decree passed by the learned Munsif of the Small Cause Court at Munshigunge. The suit was brought to recover money lent upon interest which was re-payable on demand. The money was lent on the 2nd, 3rd, 4th, 5th and 6th May, 1923. On the 14th June, 1926, the plaintiff filed the present suit. *Prima facie* his cause of action is time-barred. The learned Munsif, however, held that the claim was not time-barred, and decreed the suit in part.

Two points are taken by the learned Vakil for the opposite party. The first is that the period between the 2nd May, 1926, and 6th June, 1926, should be deducted from the period of limitation upon the ground that during that period the petitioner was prosecuting in good faith a suit to recover the subject-matter of the present suit in the Union Court in Bahar, which Court from defect of jurisdiction or through causes of a like nature was unable to entertain it. It was the common case of the petitioner and the opposite party that in law and in fact the Union Court of Bahar had jurisdiction to entertain the suit. But the learned Vakil for the opposite party contended having regard to all orders passed by the Union Court that the opposite party should be given the benefit of s. 14 of the Limitation Act upon the ground that his failure to prosecute the suit in the Small Cause Court was due not to lack of diligence on his part but to the act of the Union Court. When the suit came on for hearing before Union Court that Court passed the following order: "It being desirable that

there should be a proper trial conducted by persons versed in law of the question raised regarding the document filed by the plaintiff and regarding the question of the rate of interest, this Court orders that the suit be conducted in the proper Court." I am unable to accede to this contention. The opposite party was guilty of considerable and unreasonable delay in taking steps to recover the debt due to him. He waited until the 2nd May, 1926, (within two or three days of the expiration of the three years' period of limitation) before he filed his suit in the Union Court. If he had filed his suit with due diligence in the Union Court there would be ample time after the Union Court had considered the matter for him to have presented his suit in the Court of Small Causes within time. Further, I am not prepared to hold, having regard to what fell from the Union Court on the 6th June that that Court intended thereby to decline to entertain the suit or to decide that it had no jurisdiction or that through want of jurisdiction or any other cause of a like nature it was unable to entertain the suit.

The second contention upon which the learned Vakil for the opposite party sought to uphold the decision under review was that, assuming that he was entitled to the benefit of s. 14 for the period between the 2nd of May and 6th of June, he was also entitled upon the same ground to the benefit of s. 14 in respect of the period from the 6th June to 14th June because on the 6th June he had applied for a copy of the order of the Union Court that had been passed on that date, but the copy was not supplied to him until the 12th June, which was a Saturday, and he filed his suit in the Small Cause Court on the following Monday, the 14th. In support of this contention he relied upon the case of *Lakshiram Mandal v. Sonatun Basar* (1) decided by Mookerjee and Teunon, JJ., in which their Lordships gave a very wide and liberal interpretation to the provisions of s. 14. It is unnecessary to express any opinion as to the correctness of that decision because, in my opinion, it was unnecessary for the opposite party to wait from the 6th to the 14th of June before he filed his suit in the Small Cause Court. The suit could have been filed without a copy of the order of the Union Court, although no doubt it would have

been right and proper to draw the attention of the Small Cause Court to what had taken place in the Union Court in due course. In my opinion, neither of the two grounds upon which the learned Vakil on behalf of the opposite party has based his contention that the order under review should be supported is sound.

The result is that the suit in the Small Cause Court was barred by limitation, and the decree passed by the Munsif on the 22nd December, 1926, cannot stand. The decree is set aside, and the suit dismissed.

In the circumstances of this case I make no order as to costs in either Court, and I desire to express no opinion as to whether it is still open to the opposite party to prosecute the proceedings which he initiated on the 2nd May before the Union Court.

A. N. A.

Application allowed.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 993 OF 1923.

May 23, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Zafar Ali.

JODH SINGH—PLAINTIFF—APPELLANT
versus

MAHLA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Will—Construction—Will and gift, distinction between—Will giving life-estate to A with remainder to B—Nature of B's estate—Death of B before A—B's son, whether entitled to succeed on A's death.

H executed a deed by which he gave the whole of his property to A with the reservation that H would have full power to deal with the property so long as he was alive and that after his death his wife should have the same power during her lifetime. It was also recited in the deed that A was the duly adopted son of H. A pre-deceased the widow of H:

Held, (1) that the deed was neither a deed of gift or adoption nor a deed appointing an heir, but a Will; (2) that A acquired a heritable and vested interest in the property on the death of H and that A's son was, therefore, entitled to succeed on the death of the widow of H in preference to the collaterals of H.

Mela Singh v. Gurdas (1), distinguished.

Appeal from an order of the District Judge, Sargodha, dated the 8th March, 1923.

Mr. M. L. Furi, for the Appellant.

Dr. G. C. Naurang, for the Respondents.

JUDGMENT.—The plaintiff sues for a declaration of his title to the property of which the last male owner was Hardit Singh and which is now in the plaintiff's possession. His claim is based on a deed executed by Hardit Singh on the 20th August, 1893, by which he gifted the whole of his property to Attar Singh, father of the plaintiff, with this reservation that he (Hardit Singh) would have full power to deal with his property so long as he would live and that after his death his wife Har Devi whose nephew Attar Singh was, would have the same power during her lifetime. Thus the gift was not to take immediate effect. It was further recited that in the deed Attar Singh was the duly adopted son of Hardit Singh. Hardit Singh died in 1896 leaving him surviving his wife Har Devi and his adopted son Attar Singh, and in accordance with the provisions of the deed *Musammatt* Har Devi succeeded to his entire estate.

Attar Singh died in 1903. His son, the plaintiff, lived with *Musammatt* Har Devi till her death which occurred in 1920. *Musammatt* Har Devi during her lifetime put the plaintiff in possession of her property and applied for mutation of the landed estate in his name. This was sanctioned about a week before her death. Hardit Singh's collaterals (who figure as defendants in this litigation) appealed against this mutation order and the Collector accepting their appeal directed the plaintiff to establish his title in a Civil Court. This is the origin of the suit.

The defendants pleaded, *inter alia*, that the document was a forgery and that even if it was genuine it was inadmissible in evidence for want of registration because it was a deed of gift. The trial Court overruled both these pleas and decreed the plaintiff's suit, finding that the deed was duly executed by Hardit Singh and was to all intents and purpose a Will and that as Attar Singh had a vested interest in the property of Hardit Singh who had died before him the collaterals of Hardit Singh could not divest the son of Attar Singh of that interest.

On appeal the District Judge also came to the conclusion that the document was genuine and it was not a deed of gift; but relying on *Mela Singh v. Gurdas* (1), he dismissed the plaintiff's suit on the

(1) 68 Ind Cas. 858; 3 Lah. 362; A. I. R. 1922 Lah. 433 (F. B.)

ground that what Hardit Singh intended was to appoint Attar Singh his heir and that the son of the heir thus appointed had no right to succession. Against that decision the plaintiff has appeared in this Court in second appeal.

From the provisions of the deed taken as a whole it appears to us that it is not a deed of gift or alienation or adoption as contended by the respondents' Counsel; nor is it a deed appointing an heir as held by the lower Appellate Court. It is clear that Hardit Singh did not adopt Attar Singh as his son by this deed. The adoption had taken place sometime before the execution of the deed and the deed only contains a recital of that adoption. Further, the intention of the executant, as evidenced by the deed, undoubtedly was to bequeath his property to his adopted son or the heir appointed by him, because the incidents enumerated in the deed appertain to a disposition by Will and not to a gift. Consequently the term 'gift' applied to the disposition was undoubtedly a misnomer. Further it is clear that the legatees acquired a heritable vested interest in the property on the death of the testator as the property was certainly to come to him on the death of the testator's widow who had succeeded only to a life-interest therein. This being so, the plaintiff was the rightful successor on the death of the widow. The principle laid down in *Mela Singh v. Gurdas* (1) does not affect the plaintiff's right in his father having as the appointed heir survived the appointer.

We, therefore, accept the appeal and reversing the judgment and decree of the lower Appellate Court, restore that of the trial Court. The respondents will pay the plaintiff's costs throughout.

A. N. A.

Appeal accepted.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION CASE No. 48 OF 1925.

April 7, 1927.

Present:—Mr. Justice Page.

In re J. M. GREGORY.

Presidency Towns Insolvency Act (III of 1909), ss. 6 (2) (c), 8 (1)—Calcutta Insolvency Rules, r. 5—Registrar in insolvency, jurisdiction of, to rescind order of discharge—Successive insolvencies—Rescission of order of discharge in prior insolvency—Creditors in prior insolvency, whether entitled to prove in second insolvency.

A person was adjudicated an insolvent by the Registrar in Insolvency in 1920. No assets were recovered and he was unconditionally discharged. He was again adjudicated an insolvent in 1925 and property which he had acquired subsequent to his first discharge vested in the Receiver. Meanwhile the order of discharge in the previous insolvency was cancelled by the Registrar on the ground that the insolvent had misled the Court, and the adjudication was revived. Creditors in the previous insolvency applied for participation of the assets in the later insolvency:

Held, (1) that the Registrar had power to cancel the previous order of discharge passed by him; [p. 327, col. 2.]

(2) that the Official Assignee, as the representative of the creditors in the first insolvency, was entitled to prove in the second insolvency and to receive dividends *pari passu* with the creditors in the second insolvency. [p. 328, col. 1.]

A Registrar in Insolvency has jurisdiction to pass an order rescinding an order of discharge that he himself has made, whether the application for rescission is opposed or unopposed. [p. 327, col. 2; p. 328, col. 1.]

In re *Summers*, *Ex parte Official Receiver* (1), relied on.

Mr. A. A. Avetoom, for the Creditors in the first insolvency.

Mr. B. K. Ghosh, for the Creditors in the second insolvency.

JUDGMENT.—On the 4th February, 1915, John Marchmont Gregory was adjudicated insolvent, on his own petition. No assets were recovered by the Official Assignee in that insolvency, and on the 3rd August, 1920, the insolvent obtained an unconditional discharge.

On the 18th February, 1925, John Marchmont Gregory on his own petition was again adjudicated insolvent, and his property thereupon became vested in the Official Assignee for distribution among his creditors under ss. 17 and 52 of the Presidency Towns Insolvency Act (III of 1909).

On the 13th July, 1926, as a result of the transaction into which the insolvent had entered after he had obtained his discharge from the first insolvency, and before the second adjudication, a sum of Rs. 97,670-12 was acquired by the insolvent, and passed into the hands of the Official Assignee as assets distributable in the second insolvency. Meanwhile, on the 13th April, 1925 the order of discharge of the 3rd August, 1920, was rescinded, on the ground that when applying for his discharge the insolvent had misled the Court as to the state of his affairs. Accordingly, it was ordered that the adjudication of the 4th February, 1915, should be revived. On the 10th February, 1927, pursuant to s. 91 of the Insolvency Act an order was made that the

proceedings in the two insolvencies should be consolidated. All the above orders were passed by the Registrar in Insolvency.

The question that arises on this petition is whether the creditors in the first insolvency are entitled to participate in the said sum of Rs. 97,670-12 and any other assets distributable in the second insolvency. The creditors in the second insolvency contend (1) that the order of the 30th April, 1925 rescinding the order of discharge was *ultra vires* the Registrar in Insolvency, and is null and void; (2) that in any event, having regard to the order of discharge, the rights of the creditors in the first insolvency ought to be postponed to those of the creditors in the second insolvency.

In support of the first contention learned Counsel for the petitioner urged that, inasmuch as the application for an order rescinding the order of discharge was a substantive and opposed application, the Registrar in Insolvency had no jurisdiction in the matter. Now, the Registrar in Insolvency has no jurisdiction to entertain an opposed application for the discharge of an insolvent, and it was argued with plausibility that the Registrar in Insolvency ought not to be entitled to hear an opposed application for the rescission of an order of discharge, because the application, if granted, might re-act upon the rights of persons who in good faith had transacted business with the insolvent after the order of discharge and prior to its rescission in a manner gravely prejudicial to their interests. There is much force in this contention; but I am concerned to ascertain, not whether the Registrar in Insolvency ought to have jurisdiction, but whether he has it, and under the law as it obtains at present I am of opinion that the Registrar in Insolvency was entitled to make the order of the 13th April, 1925.

The order of discharge of the 3rd August, 1920, was passed by the Registrar in Insolvency upon the unopposed application of the insolvent. That order the Registrar had jurisdiction to make under s. 6(2) of the Insolvency Act, and the direction of Jenkins, C. J., dated 26th May, 1915.

It appears to me that under s. 8(1) of the Insolvency Act the Registrar in Insolvency had jurisdiction to pass the order of the 30th April, 1925, rescinding the order of discharge that he himself had made, whether the application for rescission was

opposed or unopposed. [See *In re Summers, Ex parte Official Receiver* (1).] Further, under s. 6 (2) (c) of the Insolvency Act, and General Rule 5 of the Calcutta Insolvency Rules of 1910, in my opinion, the Registrar in Insolvency had jurisdiction also to hear the application for rescission of the order of discharge as being an application "that may be heard and determined in Chambers."

No appeal has been preferred against the order of the 13th April, 1925, and upon both these grounds I am of opinion, that the order of the 30th April, 1923, rescinding the order of discharge of the 3rd August, 1920, is a valid and effective order.

In these circumstances, as I apprehend the matter, the respective rights of the creditors in the two insolvencies would be the same whether or not the order consolidating the insolvencies had been made. It appears to me that, subject to any *bona fide* and valid disposition of the property of the insolvent that had been effected between the date of his discharge and its rescission, the said sum of Rs. 97,670-12 and any other assets recovered by the Official Assignee in the second insolvency would become assets distributable in the second insolvency, and that the Official Assignee as the representative of the creditors in the first insolvency is entitled to prove in the second insolvency, and to receive dividends *pari passu* with the creditors in the second insolvency.

A solution of the problem in this sense, I think, is in consonance with the *ratio* underlying the provisions of s. 39 (1) of the English Bankruptcy Act, 1915, and the decision of the Court of Appeal in *Ex parte Pitt, In re Gosling* (2). I can understand that the creditors in the second insolvency may feel aggrieved that the creditors in the first insolvency should receive a share of the assets recovered in the second insolvency as a result of a transaction into which the insolvent entered when he was *sui juris* and discharged from liability under the first insolvency; but the hardship is more apparent than real, for if persons choose to have business relations with a debtor who has obtained his discharge, but who in certain events may again revert to a state of insolvency, such persons take the risks that are incidental to all transactions with persons under actual or potential disability,

(such as a minor or a woman possessing a Hindu widow's estate), and have only themselves to blame if they have miscalculated the chances of the transaction to which they have chosen to become parties.

An order will be passed giving effect to the view that I have expressed. The costs of both sets of creditors as of a hearing will be paid out of the assets available for distribution in the second insolvency.

A. N. A.

Order accordingly.

ODDH CHIEF COURT.

FIRST CIVIL APPEAL No. 20 OF 1927.

September 13, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

Musammât JAMUNA KUNWAR AND

OTHERS—DEFENDANTS—APPELLANTS

versus

MADARI SINGH AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Hindu Law—Widow—Gift by widow, validity of—Absence of challenge by reversioners—Donee's title, whether dates from date of gift—Death of donee—Donee's heir, rights of.

A gift by a Hindu widow is not void, but is a good alienation until and unless it is challenged by the reversioner, and in case the reversioner does not challenge the alienation a Court of Law will not permit a third party to challenge it. [p. 330, col. 2.]

Collector of Masulipatam v. Kavaly Vencata Narainapah (1), *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (2), *Bajrangî Singh v. Manokarnika Bakhsh Singh* (3), and *Kesho Prasad Singh v. Chandrika Prasad Singh* (4), relied on.

A Hindu widow made a gift in 1904. She died in 1907. The donee died in 1914 and was succeeded by his mother. The gift was not challenged by any of the reversioners:

Held, that the gift conferred a good title on the donee from the date of the gift and the donee's mother, therefore, held the properties not as a trespasser but as an heir with a limited estate. [p. 330, col. 2.]

Appeal against a decree of the Subordinate Judge, Unao, dated the 13th December, 1926.

Mr. A. P. Sen, for the Appellants.

Messrs. R. B. Lal and Mahabir Prasad, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are as follows. A certain Bhup Singh owned landed property in the village of Mela Ram Kunwar in the Unao District. Upon his death this property descended to his widow Musammât Ganesh Kunwar, who held in it the estate of a Hindu widow under the Mitakshara Law. Musammât Ganesh Kunwar

(1) (1907) 2 K. B. 166; 76 I. J. K. B. 707; 96 L. T. 791; 23 T. L. R. 465; 14 Manson 101.

(2) (1882) 20 Ch. D. 308.

transferred this property by gift to Kunwar Singh and Dharam Angad Singh on the 22nd of May, 1904. She died in 1907. Dharam Angad Singh died, and Kunwar Singh remained in possession of the whole property. He died in 1914, and was succeeded by his mother *Musammatt* Jamuna Kunwar, who has executed certain transfers in respect of the property. She is still alive. The present suit has been brought by the reversioners to the estate of Kunwar Singh for a declaration that the transfers by *Musammatt* Jamuna Kunwar are only effective during her life, and that they will have no effect against the plaintiffs-reversioners after her death. The learned trial Judge has decided the point in the plaintiffs' favour. *Musammatt* Jamuna Kunwar and her transferees have filed the present appeal. They base their case upon the following argument. This argument is, that Ganesh Kunwar having only the estate of a Hindu widow had no power to transfer that estate by gift for a period extending beyond her own lifetime, and that a transfer by her must be considered not as voidable but as void for the period after her death. The argument continues that in these circumstances Kunwar Singh must be considered to have been a trespasser in possession of the property from the year 1907 when *Musammatt* Ganesh Kunwar died to the year 1914 when he died himself, and that at the time of his death he had acquired no prescriptive title as he had been in possession for less than twelve years. The argument concludes that after the death of Kunwar Singh his mother *Musammatt* Jamuna Kunwar obtained possession without title and as a trespasser inasmuch as her son Kunwar Singh had acquired no title in this property, which she could inherit, and that her title has become effective through prescription as she had been in possession for more than twelve years before the present suit was instituted.

In order to decide this plea it is necessary to look at the exact powers of *Musammatt* Ganesh Kunwar. The first authoritative decision as to the powers of a Hindu widow will be found in the decision of their Lordships of the Judicial Committee of 1861 in *Collector of Masulipatam v. Cavalry Venkata Narrainapah* (1). Their Lordships say at page 550* :—

(1) 8 M. I. A. 529; 2 W. R. P. C. 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

*Page of 7 M. I. A.—[Ed.]

"It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

We interpret their Lordships to lay down here a rule which affects all alienations and not only alienations which purport to be for necessity or religious or charitable purposes. We cannot interpret the words "an alienation by her which would not otherwise be legitimate" as so narrow as not to include an alienation by gift. Therefore we interpret the latter portion of this passage to mean that a gift made by a Hindu widow, which is a form of alienation which she is not ordinarily competent to make, can become a valid alienation if made with the consent of her husband's kindred. The latter passage must, however, be qualified by the further direction that, if her husband has no kindred or the kindred have failed before they have had an effective opportunity of objecting, the abstention to object cannot be regarded as a consent. This is obvious. If there are no kindred there can be neither consent nor objection and if the kindred have failed before the opportunity has arisen the result is the same.

The next authority to which we refer is the decision in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (2). This was decided in 1906. Lord Davey in that judgment adds materially to the rule of law laid down

(2) 34 I. A. 87; 31 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329 (P. C.).

in *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). He says at page 91* :—

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."

Lord Davey here, according to our construction, has laid down the following important addition. An alienation by a Hindu widow is a good alienation unless and until the alienation is challenged by the reversioner. In a case in which the reversioner has not challenged the alienation a Court of Law would not permit a third party to challenge it. The alienation is good until it is challenged by the reversioner. This carries the previous doctrine further for it introduces the following principle. Consent can be implied from abstention to challenge when there are in existence persons who have a right to challenge.

We now come to the third authoritative decision in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (3). Their Lordships of the Judicial Committee decided this appeal in 1907. They have discussed the restrictions imposed by the Hindu Law upon a widow's power to alienate her deceased husband's estate at page 11† onwards and have discussed in particular the principles laid down in *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). They have considered the views of various High Courts in India upon the subject. They have approved the views of certain High Courts and have not approved the views of others, and they have added this important principle to the principles which we have enunciated. They say at page 16† :—

(3) 35 I. A. 1; 30 A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 5 A. L. J. 1; 3 M. L. T. 1; 41 O. C. 78 (P. C.).

*Page of 34 I. A.—[Ed.]

†Pages of 35 I. A.—[Ed.]

"Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

That is to say, an alienation which, if challenged, would be set aside, is a good alienation if the whole body of persons constituting the next reversion assent to it, and into this principle must be read the principle that their consent will be presumed from the failure to contest as was laid down in *Bijoy Gopal Mukerji v. Krishna Mahishi Debt* (2). This is the law. How is it to be applied to the facts of the present case? We have it as an admitted fact that on the death of Bhup Singh's widow Ganesh Kunwar there were persons entitled to succeed to his estate who could challenge her alienation by gift. She died in 1907. We have it as an admitted fact that no attempt was made to challenge this transfer by gift and that by the year 1919 no right of challenge legally remained. In these circumstances the gift by *Musammam Ganesh Kunwar* to *Kunwar Singh* must be considered as a valid alienation from the date of the deed of transfer and it must be considered that *Kunwar Singh* between the years 1907 and 1914 was holding the property not as a trespasser but as a transferee with good title. In these circumstances the property passed on the death of *Kunwar Singh* to his mother *Jamuna Kunwar* as a Hindu mother's estate. She has no right to transfer this property for a period beyond her lifetime in the face of objection by the reversioners. The reversioners having objected, the Court below has arrived at a correct decision that the suit should succeed. We have been referred by the learned Counsel for the respondents to the decision of a Bench of the Patna High Court in *Kesho Prasad Singh v. Chandrika Prasad Singh* (4). The learned Judges composing that Bench have arrived at a conclusion similar to the conclusion at which we have arrived on facts similar to the facts in this suit. At page 228* the learned Chief Justice says:—

"The question is whether a gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested inter-

(4) 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; A. I. R. 1923 Pat. 122.

*Page of 2 Pat.—[Ed.]

est after her death can be challenged by any one else. In my opinion there can be only one answer to this question. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled to remain in the possession of the donee that is their affair and no one else can object."

As a result this appeal is dismissed with costs.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 181
OF 1926.

April 11, 1927.

Present:—Mr. Justice Wallace and
Mr. Justice Jackson.

CHOUTIPALLI YERRA VENKATA
REDDI—DEFENDANT No. 1—APPELLANT
versus

CHOUTIPALLI KRISHNA REDDI
AND OTHERS—PLAINTIFFS NOS. 1 TO 4 AND
DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Arbitration—Reference to arbitration containing implied agreement dispensing with evidence—Omission by arbitrator to give notice, whether renders award void.

The conduct of the proceedings of arbitrators depends upon the order of reference to arbitration. [p. 331, col. 2.]

If in an order of reference there is an implied agreement that further evidence is not to be put forward by the parties and that the parties have sufficiently and completely stated their case, an award passed on the reference cannot be held to be invalid merely because the arbitrators did not give notice that they were prepared to receive evidence. [*ibid.*]

Krottapalli Gopalan v. Myneni Suryanarayana (1), distinguished.

Appeal against an order of the Court of the Subordinate Judge, Anantapur, dated the 25th March, 1926, and passed in O. S. No. 36 of 1925 (O. S. No. 6 of 1925 of the District Court).

Mr. B. Sitarama Rao, for the Appellant.

Mr. B. Somayya, for the Respondents.

JUDGMENT.—This is an appeal against the decision of the Subordinate Judge of Anantapur, who has given a decree in terms of an award passed on private arbitration between the plaintiffs on the one side and the defendants on the other. The decree follows the terms of the award. It is pleaded before us that the arbitration award is invalid for two reasons. The first

is that the arbitrators did not allow the defendants to adduce evidence or even to state their case. Now, in the terms of the reference itself which was signed by the parties, it is clearly stated that "both the parties have represented before you, what each of us has to say about his respective rights in the family property." It is, therefore, a most disingenuous statement in the petition by the defendants that the arbitrators did not even allow them to state their case. As regards the contention that the arbitrators did not even allow them to adduce evidence, we read the reference to mean that the arbitrators had already heard the case of each side and all that remained was to pass a decision after such further information as the arbitrators themselves desired. There is no hint in the order of reference that any evidence was sought for by either party or expected to be put forward. It is in evidence that the arbitrators heard the parties several times and it is not suggested that on any occasion the defendants requested them to hear the evidence on their behalf. It is argued that, as a matter of law, the arbitrators are bound to give notice to parties to adduce evidence, and that as this was not done in this case the award is invalid. A ruling of this Court to which one of us was a party reported as *Krottapalli Gopalan v. Myneni Suryanarayana* (1) is cited as an authority for that proposition. The conduct of the proceedings depends upon the order of reference, and if in that order of reference there is an implied agreement that further evidence is not to be put forward by the parties and that the parties have sufficiently and completely stated their case, the award cannot be invalid because the arbitrators did not give notice that they were prepared to receive evidence. *Krottapalli Gopalan v. Myneni Suryanarayana* (1) was decided on a different point. In that case the arbitrators had taken evidence, but in their award they ignored the evidence completely and purported to decide the case, not on the evidence, but on their own knowledge. One of them in fact purported to have decided not even on his own knowledge, but on information given him by two of the other arbitrators. Obviously that case is quite different from the present in which the parties when making the reference set out that they had already repre-

(1) 95 Ind. Cas. 740; 23 L. W. 681; 50 M. L. J. 514; (1926) M. W. N. 445; A. I. R. 1926 Mad. 752.

sented before the arbitrators what each of them had to say, and then directed the arbitrators to make the award, stating that they had given them full power to do so. We think there is no substance in the first point.

The second point is that the arbitrators did not all meet together on all occasions to discuss the award and that they did not all take part in the decision and the final judgment. We do not think that the evidence to which our attention has been called establishes this proposition. It is pointed out that some arbitrators say that they met two or three times, and some other arbitrators say that they met 5 or 6 times, but whether a real discussion of the question went on at these meetings, at which all the arbitrators were not present, is not made clear. It may be that the arbitrators who were present, finding that the others were absent, postponed the discussion until all the arbitrators were present. It is clear from the evidence that the final decision was come to a day shortly before the award was written in the presence of all the five arbitrators. Some stress was laid upon a statement by P. W. No. 4 that he did not "take part in the decision" he being one of the arbitrators. But the same witness also says that "we as a body of arbitrators commenced to decide the matter in the day time". He was not asked to reconcile these two statements, nor was his attention pointedly drawn to this apparent inconsistency. He further says that the award was read over to him after it was written, and he approved of it. We think that the evidence in the case justifies the learned Judge's conclusion that nothing in the evidence shows or suggests that any of the arbitrators surrendered his conscience or his judgment:

We, therefore, see no reason to interfere and we dismiss this appeal with costs.

V. N. V.

Appeal dismissed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 151 of 1927.

September 13, 1927.

Present:—Sir Louis Stuart Kt., Chief Judge, and Mr. Justice Raza.

KALU RAM AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

GAYA DIN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 4—Death of plaintiff or defendant after preliminary decree—Abatement—Rules 3 and 4, applicability of.

There can be no abatement of a suit under O. XXI, rr. 3 and 4, Civil Procedure Code, after a preliminary decree has been passed.

There can be no question of the surviving of a cause of action in a suit when a judgment has been pronounced in respect of that cause of action. By the effect of the judgment the decree takes the place of the cause of action either by affirming it or by rejecting it.

Appeal against a decree of the Subordinate Judge, Partabgarh, dated the 24th January, 1927 upholding that of the Munsif, Kunda, at Partabgarh, dated the 31st July, 1926.

Messrs. Niamat Ullah and Ali Zaheer, for the Appellants.

Mr. Radha Krishna, for the Respondents.

JUDGMENT.—Kalu Ram and Sri Nath instituted a suit on the 19th February, 1923, against Sitla Din and Musammatt Rajwanti on the basis of a deed of mortgage. They obtained a preliminary decree on the 5th September, 1923. On the 18 July, 1924, Sitla Din died. In October, 1925, Sri Nath died. On the 4th March, 1926, Kalu Ram and the representatives in interest of the deceased Sri Nath applied for a final decree and at the same time applied that the names of the representatives in interest of the deceased Sitla Din should be substituted for the name of Sitla Din. The Courts below have treated the matter as covered by the provisions of O. XXII, rr. 3 and 4 and have held that the right of the plaintiff has abated. The present appeal is filed.

There is very little to be said in this matter as almost a similar case was decided by a Bench of this Court on the 26th February, 1927, [*Lakhpai Kuer v. Daulat Singh* (1)]. The decision of the learned Subordinate Judge in appeal was passed on the 24th January, 1927, and it was thus not possible for him to know the view which was taken

subsequently by the Bench of this Court. In that decision it was laid down that O. XXII, r. 4 did not govern such proceedings. It follows that O. XXII, r. 3 would also not govern such proceedings. It was determined in that case that there can be no question of the surviving of a cause of action in a suit when a judgment has been pronounced in respect of that cause of action. By the effect of the judgment the decree takes the place of the cause of action either by affirming it or by rejecting it. According to the provisions of O. XXII, r. 6 no abatement takes place by reason of the death of either party between the conclusion of the hearing and the pronouncement of the judgment. This rule limits the meaning of the word "suit" to the conclusion of the hearing of the suit. In that appeal attention was drawn to the fact that if a suit was held to abate after the passing of a preliminary decree the effect would be that the preliminary decree would be set aside and in that connection it was pointed out that under a recent decision of their Lordships of the Judicial Committee in *Lachmi Narayan Marwary v. Balmakund Marwary* (2), their Lordships have stated that after a decree has once been made in a suit the only method of avoiding that decree is by its reversal on appeal. Of course the decree might become incapable of execution for failure to execute it within the period prescribed by law, but if the argument which found favour with the lower Courts were accepted, the preliminary decree of 5th September, 1923, would be set aside otherwise than by reversal on appeal while there was still a period within which it could be given effect to. We have heard the arguments of the learned Counsel for the respondents. He has not been able to satisfy us that there is any reason why we should take a view contrary to the view taken in *Lakhpatti Kuer v. Daulat Singh* (1). Had he been able to persuade us that the view taken in that appeal was not the correct view, we should have referred the point to a Full Bench. But as we accept the statement of the law taken in the previous case we allow the appeal. The result is that the

Court will dispose of the application for final decree in the manner required by law upon the merits. The respondents Gaya Din and Musammat Rajwanti will pay their own costs relating to this matter and those of the appellants in this Court and the Courts below.

G. H.

A. N. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 153 OF 1927.

September 16, 1927.

Present:—Mr. Findlay, J. C.

RONYA AND OTHERS—JUDGMENT-DEBTORS—
APPLICANTS

versus

BALIRAM—DECREE-HOLDER—NON-
APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 84, 89—Application for setting aside sale—No express prayer to set aside sale—Application, whether valid—Sale, when complete—Bid accepted and 25 per cent. deposit made on subsequent date—Limitation, whether runs from date of sale or date of acceptance of bid—Limitation Act (IX of 1908), Sch. I, Art. 166.

The absence of an express prayer to set aside the sale does not render an application under O. XXI, r. 89 of the Civil Procedure Code incompetent.

Tipangavda v. Ramangavda (1) and *Raoji Baburao v. Bansilal Narayan* (2), distinguished.

An execution sale is not complete until the bid is accepted and the deposit of 25 per cent. is made. The limitation of 30 days for setting aside the sale, therefore, begins to run from the date of the acceptance of bid and deposit of 25 per cent. and not from the date when the sale was actually held.

Application for revision of the decree of the District Judge, Ohhindwara, dated the 18th February, 1927, in Miscellaneous Appeal No. 17 of 1926.

Mr. P. C. Datta, for the Applicants.

Mr. D. W. Kathalay, for the Non-Ap-
plicant.

ORDER.—I am of opinion in this case that the orders of the lower Courts are improper ones. The learned District Judge, on the authority of *Tipangavda v. Ramangavda* (1) and *Raoji Baburao v. Bansilal Narayan* (2) has held that the application, dated 3rd September, 1926, apparently presented to the Court on 4th September, 1926, could not be held to amount to an application for setting aside the sale. In

(2) 81 Ind. Cas. 747; 51 I. A. 321; A. I. R. 1924 P. C. 198; 35 M. L. T. 143; 47 M. L. J. 441; 20 L. W. 491; (1924) M. W. N. 707; 10 O. & A. L. R. 1033; 5 P. L. T. 623; 22 A. L. J. 990; 26 Bom. L. R. 1129; 40 C. L. J. 439; L. R. 5 A. (P. C.) 171; 29 O. W. N. 391; 1 O. W. N. 629; 4 Pat. 61 (P. C.).

(1) 54 Ind. Cas. 670; 44 B. 50; 22 Bom. L. R. 35.

(2) 53 Ind. Cas. 135; 43 B. 735; 21 Bom. L. R. 835.

Raoji Baburao v. Bansilal Narayan (2) quoted, there was apparently a mere deposit without application, a receipt being obtained from the Nazir. In *Tipangavda v. Ramangavda* (1) quoted, no application to, or communication with, the Civil Court was made. Here, the application was presented in the Court and there can be no question whatever but that it was in effect intended to be an application under r. 89 of O. XXI, Civil Procedure Code, although, in the terms thereof, there was no express prayer for the setting aside of the sale. The Reader's report shows that it was, however, supposed and presumed to be such and the application in question was duly signed by the Subordinate Judge.

It is true that the report of the Reader on the back of the application is not necessarily authoritative but that report stated that the application was one for the setting aside of the sale. Although this was not so, having regard to the actual phraseology of the application, it was treated as such by the Subordinate Judge who signed the report and allowed the money to be deposited. In those circumstances, I am unable to concur with the lower Courts that the application was not, in effect, one for the setting aside of the sale. In view of its purport and terms, this was precisely what it was and it could indeed have been nothing else. On any reasonable construction of the document, therefore, it must be held that there was an application on 4th September, 1926, for the setting aside of the sale, and it is not disputed that the applicant had made the necessary deposit therewith, as required by r. 89 of O. XXI, Civil Procedure Code.

The next point, which arises for decision, is whether the application of 4th September, 1926, was made within 30 days of the sale. On that point, I am of opinion, that limitation ran not from 3rd August, 1926, but from 5th August, 1926. The bid was only accepted on 5th August, 1926, and, having regard to the terms of r. 84 of O. XXI, I do not think the sale can be said to have been completed until the bid had been accepted and the deposit of 25 per cent. had been made. So long as the bid was not accepted, it is impossible to say, in my opinion, that the sale was completed.

It follows, therefore, in my opinion that the Judge of the first Court was not entitled to confirm the sale; the order of 13th

November, 1926, passed by the Subordinate Judge is reversed and the Execution Case No. 187 of 1925 is remanded to his Court for disposal according to law in accordance with the above remarks. The present applicants' costs in this Court and in the lower Appellate Court will be borne by the non-applicant-decree-holder. I fix Rs. 15 as Pleader's fees.

G. R. D.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1470 OF 1925.

February 28, 1927.

Present:—Mr. Justice Waller and

Mr. Justice Madhavan Nair.

SRI VILAS FIRM BY ONE OF ITS PARTNERS
N. S. SADAGOPA IYENGAR—PLAINTIFFS

—APPELLANTS

versus

THE TINNEVELLY MUNICIPAL
COUNCIL BY ITS CHAIRMAN—

DEFENDANTS—RESPONDENTS.

Madras District Municipalities Act. (V of 1920), s. 92—Companies tax—Del credere commission agent of Company—Liability to pay tax—Del credere agent and independent contractor, distinction between.

A firm of merchants were appointed sole "banyans" of a Company for a period of 30 years to sell all goods manufactured or produced by the Company at such prices as shall be approved by, or on behalf of, the Company, and to be responsible to the Company for the due payment by the buyers of the prices of all such goods and merchandise sold by them for and on behalf of the Company, and for the due performance by the buyers of all contracts entered into by them through the said banyans with regard to such goods and merchandise. It was also provided that the price of goods was to be paid to the Company in a period of 1½ months from date of sale and in default the firm was to pay interest. They were also to assist the Company in procuring cotton. In lieu of all this they were to get certain commission from the Company.

Held, that the firm were agents of the Company for the sale of goods on terms of "del credere commission," that there was no relationship of vendor and purchaser between the firm and the Company, and that the firm was, therefore, bound to pay tax under s. 92 of the Madras District Municipalities Act.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevely, in A. S. No. 215 of 1924 (A. S. No. 349 of 1924 on the file of the District Court) preferred against that of the Court of the Principal District Munsif, Tinnevely, in O. S. No. 435 of 1922.

Mr. T. M. Ramasami Iyer, for the Appellants.

Mr. S. T. Srinivasa Gopalachari, for the Respondents.

JUDGMENT.—The appellants are a firm styled Sri Vilas. They have been assessed to pay the Companies tax under s. 92 of the District Municipality Act as agents of the Tinnevely Textiles Co. Ltd. The question for decision is whether they are employed by that Company as agents to represent it for the purpose of transacting business in the Tinnevely Municipality. The Courts below have found that they are so employed. Their contention is that they are, as stated in para. 8 of the plaint "independent contractors." in other words, that the relations between them and the Company are those of buyer and seller.

The answer to the question turns on the construction of the agreement between the parties Ex. IV. Under that agreement the appellants were appointed sole "banyans" of the Company for a period of 30 years. They were (cl. II) "to sell all goods manufactured or produced by the Company at such prices as shall be approved by or on behalf of the Company" and to be "responsible to the Company for the due payment by the buyers of the prices of all such goods and merchandise sold by them for and on behalf of the Company and for the due performance by the buyers of all contracts entered into by them through the said banyans with regard to such goods and merchandise." By cl. III the prices of goods sold were to be paid to the Company in 1½ months from the date of the sales and in default the appellants were to pay interest. By cl. IV the appellants were bound to assist the Company in procuring cotton at the market rates and be responsible to the Company for the due performance of all contracts entered into with the Company through them for the supply of cotton. By cl. V the rates of commission were fixed. By cls. VI and XI arrangements were made by the parties for mutual inspection of accounts. By cl. VII the Company had to bear the cost of carrying the goods from their mills to the appellant's depôts. By cl. IX the Company had to pay Rs. 150 a month to the appellants for their Tinnevely Depôt.

The only evidence as to the course of dealing between the Company and the appellants comes from a clerk employed by the latter. One admission by him is significant; it is that "yarn is sold to people here on the responsibility of Sri Vilas." In other words, the yarn sold is the property

of the Company and sold by it, the appellants merely guaranteeing the purchasers. In the face of this admission and of the terms of the agreement, it seems to us idle to contend that the appellants are, as they describe themselves 'independent dealers.' As pointed out by Jessel, M. R., in *Ex parte Bright, In re Smith* (1) the fact that the agents are to be liable for the purchasers of the goods paying the money is "wholly inconsistent with the notion that they were the real purchasers, for then they would be guaranteeing themselves, they would be personally liable to pay as purchasers and what would be the use of guaranteeing payment by themselves? The real position is that the appellants were the Company's agents, that the goods transmitted to and sold by them were the goods of the Company and that they had no independence of action. The prices were fixed by the Company and the contracts were made with them through the appellants. We think that the Courts below were perfectly right in finding that the appellants were employed by the Company to represent it for the purpose of transacting business at Tinnevely. They were not customers or commission agents of the Company. No doubt they earned a commission but it was what is known as a "del credere commission". They were in fact agents of the Company for the sale of their goods. The appeal must be dismissed with costs.

V. N. V.

Appeal dismissed.

(1) (1879) 10 Ch. D. 566; 48 L. J. Bk. 81; 39 L. T. 649; 27 W. R. 385.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2075 OF 1926.

December 16, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

BIDHU BHUSAN BAKHSI—

APPELLANT

versus

KALA CHAND ROY—RESPONDENT.

Court Fees Act (VII of 1870), ss. 10 (ii), 12 (ii), 28—Declaratory suit with consequential relief—Court-fees—Deficiency of Court-fees in plaint and memorandum of appeal—Power and duty of Appellate Court to levy deficiency of Court-fees in lower Court—Procedure.

Although the prayers in a plaint are worded in the form of mere declarations, yet, where some of them are really of a consequential nature, the plaintiff is bound to pay *ad valorem* fee on the plaint.

Taraprasanna Chongdar v. Nrisinha Murari Pal (1), followed.

Where a plaint as well as the memorandum of appeal filed by a plaintiff are found to be insufficiently stamped, the proper course to be followed by the Appellate Court is to direct that the appeal be registered on the appellant supplying the deficit Court-fees as regards his memorandum of appeal, and after the appeal has been registered and before it has been dealt with under O. XLI, r. 11, Civil Procedure Code, to place the case for orders under s. 12, sub-s. (ii) of the Court Fees Act as regards the deficit Court-fees on the plaint in the lower Court.

It is not necessary for the application of s. 12, sub-s. (ii) of the Court Fees Act that there should have been a formal decision on the question of sufficiency of Court-fees.

Shama Soondary v. Hurro Soondary (2), followed.

Provisions of s. 10 (ii) of the Court Fees Act are mandatory and the power conferred by this provision of law may be exercised at any time so long as the suit remains before the Court on appeal.

Appeal against the decree of the District Judge, Birbhum, dated the 10th March, 1926, confirming that of the Subordinate Judge, Suri, dated the 7th March, 1924.

Messrs. *Manmatha Nath Roy and Surjya Kumar Aich*, for the Appellant.

JUDGMENT.—We have examined the prayers in the plaint and we are of opinion that although they have been worded as embodying reliefs which on the face of them appear to be of a declaratory nature, two at least of these reliefs are really consequential ones. We are of opinion that the reason of the decision of this Court in the case of *Taraprasanna Chongdar v. Nrisinha Murari Pal* (1) fully applies to the present case, and the Registrar is right in the view he has taken, namely, that *ad valorem* Court-fees must be paid on the memorandum of appeal. He is also right in holding that the Court-fees paid on the plaint as well as on the memorandum of appeal which the plaintiff filed in the lower Appellate Court were insufficient.

Then, a question has been raised in view of s. 28 of the Court Fees Act as to the propriety of the Registrar's order calling upon the appellant to pay the deficit Court-fees on the plaint and on the plaintiff's memorandum of appeal to the lower Appellate Court. It has been argued that there has been no reception or use in this Court of the aforesaid documents yet and, therefore, an order for their stamping with the requisite Court-fees cannot be passed; in other words, it is said that if and when the appeal is heard and these documents

are sought to be used, and not till then, can an order of this description be made.

This contention seems reasonable enough, and were s. 28 of the Court Fees Act the only section that was applicable to the present case we would have been prepared to give effect to it. The present case, however, is one in which a plaintiff who has been unsuccessful in both the Courts below has preferred this appeal. There is another provision of the Act which is applicable, and more directly applicable, to this case and that is sub-s. (ii) of s. 12. It is not necessary for the application of this sub-section that there should have been a formal decision on the question of sufficiency of the Court-fees: [*Shama Soondary v. Hurro Soondary* (2)]. Under this sub-section the plaintiff-appellant may be called upon to pay the requisite additional Court-fees on the aforesaid documents, and on his failure to pay the same within such time as the Court shall fix, the Court is bound to dismiss the suit under s. 10, sub-s. (ii). For the adoption of this course by this Court it is necessary that the suit should have come before this Court, which evidently means that the appeal should have been registered, because not till the appeal has been registered in this Court can it properly be said that the suit has come before this Court. This course is mandatory and the power conferred by this provision of the law may be exercised at any time so long as the suit remains before this Court on appeal. The proper order to pass in the present case, therefore, is to direct that the appeal should be registered on the appellant supplying the deficit Court-fees as regards his memorandum of appeal to this Court. After the appeal has been registered and before it is dealt with under O. XLI, r. 11, Civil Procedure Code, it should be placed before the Court for proper orders being passed under s. 12, sub-s. (ii) of the Court Fees Act.

On the appellant's prayer we allow him further time till 3rd January, 1927, to put in the deficit Court-fees for his memorandum of appeal to this Court but it must be understood that he must put the same in by that date, and in default thereof the appeal will stand rejected.

A. N. A.

Time granted.

(1) 81 Ind. Cas. 763; 51 O. 216; 39 C. L. J. 212; 28 C. W. N. 683; A. I. R. 1924 Cal. 731.

(2) 7 C. 348; 4 Shonis L. R. 147; 81 C. L. R. 528; 3 Ind. Dec. (N. S.) 773.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 897 OF 1927.

October 28, 1927.

Present:—Mr. Justice Fforde.

PARMA NAND—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 409—Criminal breach of trust concerning public moneys—Sentence.

An offence of criminal breach of trust by a person in charge of public moneys is one of a specially serious nature and calls for a severe sentence.

Criminal appeal from the order of the Additional District Magistrate, Lahore, dated the 1st July, 1927.

Mr. Ram Lal Anand, for the Appellant.

Mr. Raj Krishna for the Government Advocate, for the Respondent.

JUDGMENT.—The appellant has been convicted under the provisions of s. 409 of the Indian Penal Code of criminal breach of trust in connection with the disappearance of a sum of Rs. 50,000 from the Pattoki Branch of the Allahabad Bank. He has been sentenced to seven years' rigorous imprisonment and to pay a fine of Rs. 5,000 and in default to undergo a further eighteen months' rigorous imprisonment.

The evidence in this case, which has been elaborately discussed by the learned Additional District Magistrate, leaves no shadow of doubt that the appellant is responsible for the disappearance of this sum of money from the Bank of Pattoki. It has been established by witnesses whose credibility has been in no way shaken and most of whom are quite disinterested, that the appellant gave as his version of the disappearance of this money that three men had come to the Bank while he alone was present and asked for change for notes, and, as he was taking the money from the strong room, one of them presented a revolver at him, while the other chloroformed him. They then robbed the strong room of Rs. 50,000 and left after having locked the strong room door on the outside. On the morning in question the clerk-in-charge states that he had left the Bank to attend certain religious ceremonies and to have his breakfast and, that on his return at about 11 A. M. he found that the appellant was missing. He thereupon instructed the *chaprasi* to go and find him. Both the *chaprasi* and two *chaukidars* who were subsequently called for the same purpose, went in search but were unable to find

him. Ultimately about 4 P. M. the attention of the clerk-in-charge was directed by the *chaprasi* to a sound coming from the strong room. On opening the strong room door the appellant was found who thereupon gave the version of what had happened to him as narrated above.

As the story told by the appellant was somewhat improbable he was arrested on the following day upon suspicion. Three days afterwards a key of the strong room was found amongst some flowers at a distance of 12 feet from the strong room window. It has been proved that a person inside the strong room could without any difficulty lock the door from the outside. The key which was found in the bed of flowers fitted the strong room lock. The appellant told Dr. Ganpat Rai (P. W. No. 13) that he had been drugged and was unconscious for six hours, that on his pointing out to him that no person could remain unconscious for six hours from any known anæsthetic he stated that he would alter his version in this matter later on. In his written statement he now says that he was attacked and rendered unconscious by three strangers at 2 P. M. and remained unconscious until 4 o'clock in the afternoon. He denies that he ever told anybody that he remained unconscious for a longer time.

I may say, having been taken through the evidence which has been subjected to keen criticism by Mr. Ram Lal who appears for the appellant, that I am in entire agreement with the conclusion arrived at by the learned trial Magistrate and with the reasons which he has given for coming to that conclusion. There can be no doubt at all that the appellant was responsible for the removal of the sum of Rs. 50,000 from the strong room of the Allahabad Bank at Pattoki.

Mr. Ram Lal has urged that the sentence is too severe. This, however, is a very serious kind of offence. The law always regards the offence of criminal breach of trust by persons-in-charge of public moneys as one of a specially serious nature. I find myself unable to take a more lenient view of this offence than has been taken by the learned trial Magistrate and accordingly I dismiss the appeal.

R. L.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 23 OF 1927.
(CRIMINAL REVISION PETITION No. 20 OF 1927.)

March 25, 1927.

Present.—Mr. Justice Jackson.
In re SRINIVASULU NAICKEN AND
OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 147, 149, 325, 352
—Conviction and sentence for offences under ss. 325
and 352—Acquittal under s. 325—Sentence, whether
must be reduced—Offence under s. 147, whether neces-
sarily embraces one under s. 352.

Where an accused person is convicted of an offence
under s. 325 and also under s. 352 read with s. 149,
Indian Penal Code, but on appeal the conviction
under s. 325 is set aside, the sentence must be re-
duced.

It cannot be said that an offence under s. 147 neces-
sarily embraces an offence under s. 352, inasmuch as
persons may riot without actually committing an
offence under s. 352.

Petition under ss. 435 and 439 of the
Code of Criminal Procedure, 1898, praying
the High Court to revise the judgment
of the Court of Session of the Coimbatore
Division, in Criminal Appeals Nos. 101 and
115 of 1926, preferred against the judg-
ment of the Court of the Assistant Sessions
Judge, Coimbatore Division, in S. C. Nos.
95 and 104 of 1926 respectively.

FACTS.—The accused were charged be-
fore the Assistant Sessions Judge, Coim-
batore, of the offences of rioting, grievous
hurt, dacoity, abduction with intent to
confine and wrongful confinement.

The Jury held that the accused were
not guilty of dacoity. The Assistant
Sessions Judge accepted this verdict and
found the accused guilty of rioting, grievous
hurt, abduction with intent not under
s. 365 but only under s. 352 read with
s. 149; wrongful confinement was negatived.

Accordingly the accused were convicted
of offences under s. 325, Indian Penal
Code, and under ss. 147 and 352 read with
s. 149 and sentenced to three years' rigorous
imprisonment for the former offence and
two years for the latter offences.

Accused Nos. 2, 3, 4, 7, 9, 10 and 12
were convicted under s. 147 read with
s. 345 and under s. 352 read with s. 149,
and sentenced to one year's rigorous im-
prisonment.

The 13th accused was convicted of offences
under ss. 147, 325 and 352 read with s. 149
and sentenced to two years' rigorous im-
prisonment.

On appeal the Sessions Judge held that
none of the accused could be convicted

under s. 325 but confirmed the sentence on
all.

Against this, a criminal revision petition
was filed.

Mr. K. S. Jayarama Ayyar for Mr. S.
Ramachandra Ayyar, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—Three points are raised:—

(1) That having eliminated s. 325, Indian
Penal Code, the learned Sessions Judge
should have reduced the sentences accord-
ingly. The Public Prosecutor concedes
that the three years under s. 325 should
give place to two years under s. 352 as set
forth in para. 11 of the Assistant Sessions
Judge's judgment as regards accused
No. 1.

As regards the other accused Nos. 3, 4,
7, 9, 10 and 12 now that they are acquitted
under s. 325 their culpability seems to be
less and their sentence is reduced to nine
months' rigorous imprisonment; and that
of the 13th accused to one year and nine
months and fine.

(2) The charge against accused No. 6
that he was member of this unlawful as-
sembly on October 30th is an illegality
vitiating the whole trial. It is a question
of fact, not of law. The trial Court found
that the charge was unsubstantiated; and
acquitted him. If the facts as charged had
been proved there would have been no
illegality.

(3) It is urged that s. 352 cannot be
coupled with s. 147, because the latter
necessarily embraces the former.

Persons may riot without actually com-
mitting an offence under s. 352 and this
theory that one section embraces the other
is fallacious.

The petition is dismissed except as indicat-
ed above.

V. N. V.

A. N. A.

Sentences reduced.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 1220
OF 1927.

November 1, 1927.

Present:—Mr. Justice Harrison.

WARYAM SINGH—CONVICT—PETITIONER

versus

EMPEROR THROUGH ISHAR SINGH—

COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 403—Autrefois acquit—Subsequent prosecution on facts different from those of previous prosecution—Acquittal on charge under s. 498, Penal Code—Prosecution for subsequent detention, whether barred.

Where the prosecution of an accused rests on facts wholly and completely different from those on which he was previously prosecuted, the principle of *autrefois acquit* cannot be invoked.

The previous acquittal of an accused on a charge under s. 498, Penal Code, is not a bar to subsequent proceedings under the same section on a charge of subsequent detention of the same woman.

Petition for revision of the order of the Additional Sessions Judge, Hoshiarpur, dated the 16th July, 1927, modifying that of the Magistrate, First Class, Hoshiarpur, dated the 14th June, 1927.

Mr. H. J. Rustonji, for the Petitioner.

Mr. Dhanpat Rai, for the Respondent.

JUDGMENT.—Waryam Singh has been found guilty under s. 498 of the Indian Penal Code and sentenced in the first instance to nine months' rigorous imprisonment. On appeal to the Additional Sessions Judge, this sentence has been reduced to six months. He has applied for revision, and the chief point urged by Counsel, is that for all practical purposes he has been twice tried for the same offence, and that on the principle of *autrefois acquit* the conviction should now be quashed.

As pointed out by the learned Sessions Judge, the section is the same in both trials, but the facts on which the prosecution rests, are wholly and completely different. In the first case it was the brother of the husband who instituted a complaint against the present accused on the ground of his having enticed away the woman and thereby committed an offence under s. 498 of the Indian Penal Code. The records of the previous case have been burnt but there can be no doubt that this is what happened; and even if the more favourable view were taken that he was charged under the second part of s. 498 not of enticing away the woman but of detaining her, the earlier acquittal on that charge would

not act, in my opinion, as a bar to subsequent proceedings sixteen years later on a charge of subsequent detention.

Both the complainant and the accused are soldiers and on the former's return from service he instituted proceedings for restitution of conjugal rights in a Civil Court in the year 1922. These proceedings went on till 1925, and in 1926 he having failed to get redress, although he had obtained a decree, he took action under the Indian Penal Code for the second time. I agree, throughout with the finding of the Sessions Judge that there is no question of a man being tried for the same offence and the conviction is perfectly good in law.

Counsel has drawn my attention to the fact that the woman on her own showing led a most immoral life before 1916. This has been taken into account by the Sessions Judge in awarding the sentence. He has also urged that whatever has been done has been done quite openly and that the accused and the woman have been living together as husband and wife. It appears to me that the offence is aggravated by the failure of the accused to submit himself to the decision of the Civil Court and to send back the woman after a decree had been passed. He is a young man of 28 years of age and a trumpeter in his regiment and in addition to the punishment awarded, he will be dismissed from service if a sentence of more than three months stand against him. I dismiss the application for revision but reduce the sentence of imprisonment to the amount of imprisonment already undergone, and a fine of Rs. 100 to be paid to the complainant, if realised, and in the event of failure to pay the fine a further term of one month's imprisonment.

B. L.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 820 OF 1927.

November 8, 1927.

Present:—Mr. Justice Coldstream.**MOHAMMED HUSSAIN alias FAJJA—****CONVICT—APPELLANT***versus***EMPEROR—RESPONDENT.**

Penal Code (Act XLV of 1860), ss. 75, 448, 511—S. 75, whether applies to attempts—House trespass, what constitutes—Entry, necessity of.

The accused with intent to commit house-breaking stepped on the platform in front of a door, but were disturbed and captured as soon as they had opened the door, before they had effected an entry.

Held, that the accused were not guilty of house-breaking but only of an attempt to commit house-breaking. [p. 341, col. 1.]

Section 75, Penal Code, does not apply to attempts punishable under s. 511 of the Code. [*ibid.*]

Criminal appeal from an order of the District Magistrate, Gujrat, dated the 25th June, 1927.

JUDGMENT.—I dispose of in this order the two appeals submitted through the Jail Authorities by Fajja *alias* Mohammed Hussain (Criminal Appeal No. 820 of 1927) and Ishar Das (Criminal Appeal No. 1003 of 1927). The two appellants were convicted at one trial by the District Magistrate of Gujrat, and sentenced under s. 457 read with s. 75 of the Indian Penal Code, Fajja to transportation for seven years and Ishar Das to three years' rigorous imprisonment. The story for the prosecution was as follows:—

Shortly after mid-night on the 21st of April, 1917, Chuni Lal (P.W. No. 1), a shop-keeper of Kacha Bazar in Pindi Baha-ud-Din, Notified Area, who had closed his shop at 8 or 8-30 in the evening leaving a lamp burning in his shop, was returning to his shop from his house after his evening meal in company with Kundan Lal (P.W. No. 2) a neighbouring shop-keeper. On approaching Chuni Lal's shop the two men heard a noise like that of the door being opened and Chuni Lal shouted "Who is there?" The two appellants were seen standing close to the door-way of the shop behind the curtain which covered the shop front. On raising a shout of thief Chuni Lal and Kundan Lal grappled with and secured Fajja in the verandah of the shop. They recognised him as Fajja, who had a shop opposite to Chuni Lal's. Meanwhile the other trespasser who turned out to be Ishar Das had been captured by Hans Raj (P.W. No. 3) and Daffadar Ishar Singh (P.W.

No. 4) both of whom had heard Chuni Lal's cries of thief and had seen Ishar Das coming out from behind the awning. Inside the verandah in front of the shop-door were found the lock of the door in a broken condition, an iron rod, and another instrument described as a darning needle. At the trial Fajja denied that he had been arrested as alleged by the witnesses and declared that he was innocently sleeping in his own shop when he was arrested about 8 o'clock in the evening by Daffadar Ishar Singh, Chaudhari Ladha Ram and about one hundred and fifty other persons. He had not broken the lock of Chuni Lal's shop. Ishar Das also declared his innocence stating that he was returning to the bazar from the Railway station at 8 o'clock in the evening and was watching a burning shop near Chuni Lal's shop when he was suddenly arrested for no particular reason. Fajja produced some Muhammadan witnesses to prove that there was a fire in a shop close to Chuni Lal's shop and that Daffadar Ishar Singh and others went to Fajja's shop and asked him to sold some tins but Fajja refused saying that he was ill and unable to move, thereupon he was forcibly removed to the *Chauk* where Chuni Lal accused Fajja of house-breaking. The District Magistrate accepting the prosecution evidence and holding the defence evidence to be false sentenced the appellants as stated in the beginning of this judgment.

I have read the record and have no hesitation in agreeing with the learned District Magistrate in finding that the defence evidence is entirely fabricated and that the story for the prosecution as set forth in the evidence of Chuni Lal, Kundan Lal, Ishar Singh and Hans Raj is true. The discrepancies in the evidence are immaterial and have been adequately discussed and disposed of by the learned District Magistrate. There is also the evidence of Ladha Ram, the Chaudhari (P.W. No. 6) before whom the appellants were produced by their captors; that the appellants asked to be pardoned Fajja pleading that he would get a heavy sentence as a previous convict and Ishar Das that he had acted at the instance of Fajja. The only question is what offence has been proved against them. There is no doubt that both the appellants went to Chuni Lal's shop with the common intention of breaking into it.

It is doubtful whether there was house

trespass, for apparently the appellants did no more than step on to the platform in front of the door.

House-breaking cannot be committed without entry. There is no proof of entry; indeed the evidence throughout indicates that there was none. The appellants were disturbed as soon as they had opened the door, nothing was stolen, the lock and the implements carried by the appellants were lying outside and the door opened outwards. The offence committed, was an attempt to commit house-breaking by night with the intention to commit theft punishable under ss. 511, 457, Indian Penal Code, with seven years' rigorous imprisonment. Section 75, Indian Penal Code, does not apply to attempts punishable under s. 511. It follows that in imposing the penalty in this case the previous convictions must be ignored. The maximum sentence which the appellants could have received from a First Class Magistrate, who would ordinarily have tried them had they not been previous convicts will, I think, be proper in the circumstances.

Accepting the appeal I alter the section under which Fajja and Ishar Das have been convicted to s. 511 read with s. 457, Indian Penal Code, and reduce the sentences to two years' rigorous imprisonment in each case.

R. L.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 187 OF 1927.

(CRIMINAL REVISION PETITION No. 168 OF 1927.)

May 4, 1927.

Present:—Mr. Justice Waller and

Mr. Justice Madhavan Nair.

In re ABBAS ALI SAHIB AND ANOTHER—
ACCUSED NOS. 3 AND 1—PETITIONERS.

Penal Code (Act XLV of 1860), s. 391—Trial by Jury—Three named men charged with dacoity along with two other unknown men—Acquittal of one accused on ground of insufficient identification—Con-

viction of other two for dacoity, legality of—Duty of Court to direct Jury to possible results of such acquittal.

Three known and named persons were charged with dacoity along with two other unknown men. The Jury acquitted one of the three accused and convicted the other two of the offence with which they had been charged:

Held, (1) that it was quite open to the Jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five; [p. 341, col. 2.]

(2) but that the Judge should have asked the Jury definitely whether they had considered the possible result of the acquittal and whether they still found that the number of robbers was five, since it was possible that if the questions had been put, the remaining two accused would have been found guilty only of robbery and received lighter sentences. [p. 342, col. 1.]

Petition under ss. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the Court of Session of the Madura Division, in Criminal Appeals Nos. 2 and 7 of 1927 preferred against the judgment of the Court of the Assistant Sessions Judge, Madura, in S. O. No. 88 of 1926.

Mr. F. S. Vaz, for the Petitioners.3

The Public Prosecutor, for the Crown.

ORDER.—The main question raised is this. Three known and named persons were charged with dacoity along with two other unknown men. The Jury acquitted one of the three accused and convicted the other two of the offence with which they had been charged. Mr. Vaz argues that the conviction is illegal as the Jury had no jurisdiction to substitute for a man known and named one who was unknown. We are not prepared to go that length. We think that it was quite open to the Jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five. At the same time we are of opinion that when they acquitted the 2nd accused, the Judge should have asked them definitely whether they had considered the possible result of the acquittal and whether they still found that the number of robbers was five. Nothing of the sort was however done and it is impossible to say what the finding of the Jury would have been had those questions been put to them. It is not at all unlikely that the petitioners before us would have been found guilty only of robbery and received much lighter sentences.

The convictions must be set aside. We,

however, see no necessity to direct a re-trial. The petitioners have been in Jail for several months a quite adequate punishment for what appears to have been no more than a drunken brawl. The petitioners will be released from custody.

A. N. A.

Conviction set aside.

LAHORE HIGH COURT.
CRIMINAL MISCELLANEOUS APPLICATION
No. 183 of 1926.

December 17, 1926.

Present :—Mr. Justice Harrison.

SAI—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 439, 476-A—Criminal trial—Accused's right, to trial by Judge with open mind—Hearing of case on appeal by Judge who made complaint under s. 476-A, whether legal—Prosecution for contradictory statements—Failure to draw up alternative charge—Order for re-trial on same charge, legality of.

The accused made a statement before a Sessions Judge which contradicted a previous statement made by him and the Sessions Judge made a complaint to the District Magistrate under s. 476-A, Criminal Procedure Code, in which he stated that the last statement made by the accused was false. The accused was tried by a Magistrate on this charge and convicted. On appeal, the same Sessions Judge, without ordering the framing of an alternative charge, ordered re-trial on the same charge as he found that there was no evidence to show that the last statement was false. The accused applied for transfer of the case:

Held, (1) that the proceedings against the accused must be quashed inasmuch as the complainant and the Appellate Court were one and the same. [p. 343, col. 2.]

(2) that the accused should not be submitted to a fresh trial inasmuch as the principle of *nemo debet bis vexari* applied to the case in the spirit if not in the letter. [*ibid.*]

An accused is entitled to a decision both in the trial Court and on appeal from a Judge who approaches his case with an absolutely open mind. [p. 343, col. 1.]

Application for transfer of the case from the Court of the Additional District Magistrate, Shahpur, at Sargodha, to some other competent Court.

Sheikh Niaz Muhammad, for the Petitioner.

Mr. Ram Lal, Assistant Legal Remembrancer, for the Respondent.

ORDER.—This is an application for transfer. It does not disclose the real flaw in the proceedings. The facts are briefly that in a s. 304 case, in which Maulu absconder was tried and eventually convicted, his appeal being dismissed by the High Court, one Sai gave evidence to the effect that a man named Maulu was one of the assailants but that it was not the Maulu before the Court but a man of different parentage. In the first and second trials, therefore, this man Sai had named one Maulu as one of the assailants, but gave his father's name as Amir on one occasion and Muhammad on the other. This contradicted his previous statement and the Sessions Judge took action and sent a complaint to the District Magistrate under s. 476-A of the Criminal Procedure Code. In this it was stated that the last statement of Sai accused "was decidedly false and was deliberately made with a view to help Maulu, son of Amir, in the case under s. 304, Indian Penal Code." The eighth paragraph of the complaint runs as follows:—"That as Sai has given false evidence in the Court of Mr. Vishnu Bhagwan in his statement, dated 2nd December, 1924, (i. e., his statement in the last trial) he is guilty of an offence under s. 193, Indian Penal Code." A list of witnesses was sent with the complaint. The case was entrusted to Mr. Daulat Ram, Budhwar, by the District Magistrate. He proceeded to examine the witnesses, framed a charge to the effect that the last statement was false, and eventually convicted the accused and sentenced him to four years' rigorous imprisonment. On appeal the learned Sessions Judge wrote an order to the effect that the Magistrate had relied on the finding of the Sessions Court and the High Court in the previous trial, and that there was no data on the present record for a finding as to which of the two statements made by the accused was false. The judgment goes on: "Possibly if the Magistrate had framed an alternative charge that one or the other of the two statements of the accused was false, there would have been some reason for the conviction, but as the charge and the record stand at present, there is not an *iota* of evidence to substantiate the charge." The Sessions Judge, therefore, accepted the appeal, set aside the

conviction and directed that Sai should be re-tried. Sai applied for transfer to the District Magistrate on the ground that Mr. Daulat Ram, Budhwar, had already made up his mind, and I think it would have been well had the District Magistrate granted his prayer. Sai did not then nor even when applying to this Court take the ground that the same officer was the complainant and the Appellate Court. He now applies for revision of the District Magistrate's order. I propose to deal with the matter on the ground, which has not been raised, namely, that it is impossible to allow the same Judge or the same Magistrate to be the complainant and the Court.

It is urged and truly that the Sessions Judge's order is in favour of the accused in the sense that it gives him another chance though a very poor one. It is not on the ground that the Sessions Judge is in any way biased that I take exception to the procedure, but merely on the ground of his identity with, or rather his being, the complainant. He must have believed that the accused had committed an offence or it would have been wholly impossible for him to lodge a complaint. The accused is entitled to a decision both in the trial Court and on appeal from a Judge who approaches his case with an absolutely open mind.

There is a further objection that the real trouble in this case is that the charge was not in the alternative, and the reason why the charge was not in the alternative was that the complaint was not in the alternative for it definitely stated that the last statement of the accused was false and asked for a decision on this point and on this point alone. Naturally enough the Magistrate, even, if he noticed the defect in the complaint presented by his superior officer, did not draw any attention to it, and proceeded to try that complaint as lodged and to hear the witnesses, whom he had been directed to hear. The Sessions Judge now realises apparently that the form in which he drew up the complaint was wrong. He does not order a fresh charge in the alternative, which would require no further evidence at all, but perseveres in the matter, asking for a conviction on a finding that the last statement is untrue, and directs the Magistrate to re-hear the whole of the material evidence in the s. 304 case and to come to a decision on the point, which has been decided both by the Sessions Judge and by the High Court, and not to allow himself to

be influenced in any way by those previous decisions.

To say the least of it, this would necessitate an enormous amount of unnecessary labour, and a terrible waste of time. The District Magistrate has complained of the expense already incurred in this case and that expense would be very much increased if the order of the Sessions Judge were carried out. This, however, is no sufficient ground for interference. The reasons why I think the proceedings must be quashed and not re-opened are: (1) that the complainant and the Appellate Court are one and the same; and (2) that I do not think it right that the accused should have to submit to a fresh trial because the initial mistake was made of not framing the charge in the alternative. It would not be illegal but I think most inadvisable to allow such a fresh trial and the principle of *nemo debet bis vexari* applies in the spirit if not in the letter. The accused has undergone one month's imprisonment and a great deal of trouble and anxiety and also considerable expense, and I think he has been punished enough for any offence he may have committed.

I accept the application and quash the proceedings.

A. N. A.

Application accepted.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 208 OF 1927.

August 19, 1927.

Present:—Mr. Justice Jackson and
Mr. Justice Thiruvengkatachariar.

On difference of opinion

Before Mr. Justice Wallace.

In re GUTURI NAGADU—PRISONER—
APPELLANT.

Penal Code (Act XLV of 1860), s. 300, Exception 1—Murder and culpable homicide—'Sudden and grave provocation'—Aggressive provocation by deceased—Challenge by accused—Subsequent provocation by deceased—Fatal blow by accused—Offence, whether

murder or culpable homicide not amounting to murder.

In the course of a quarrel between the party of the accused and that of the deceased, the deceased came out of his house shouting for the accused. The accused who was then standing near a tree in front of his house near by abused in return and defied the deceased and told him to come on. The deceased then caught hold of the accused by the tuft and gave him two blows with the fist. There was a struggle and the deceased held the accused firm by the tuft. The accused then gave a fatal blow to the deceased on the left side with a dagger which he had in his hand:

Held, (Per Wallace and Thiruvengkatachariar, JJ.), that though the first provocation of the deceased in calling out for the accused was not grave and sudden, it was aggressive and the second provocation, i.e., seizing the accused by the tuft was grave, and sudden and the stabbing being directly attributable to it, Exception 1 to s. 300 applied to the case and the accused was not guilty of murder but of the lesser offence of culpable homicide not amounting to murder. [p. 346, col. 2; p. 347, col. 1.]

Per Jackson, J., (dissenting).—When a man defies another and tells him to come on, in brief, challenges him to fight, and a fight ensues, he cannot claim that he has been gravely and suddenly provoked merely because he is getting the worst of it. [p. 344, col. 2.]

Appeal against the order of the Court of Session of the Chittoor Division, in C. C. No. 5 of 1927.

This appeal came on for hearing on 13th July, 1927, after service of notice on the accused, and Counsel not appearing on his behalf upon perusing the petition of appeal and the record of the evidence and proceedings before the Court of Session and upon hearing the arguments of the Public Prosecutor on behalf of the Crown and the case having stood over for consideration till the 28th of July, 1927, the Court (Jackson and Thiruvengkatachariar, JJ.) delivered the following dissenting judgments.

JUDGMENT.

Jackson, J.—I have had the advantage of reading the judgment of my learned brother. I entirely agree with the finding of fact, and take up the story from the fatal fight. "The accused who was then standing near the tree abused in return, and defied the deceased and told him to come on. The deceased caught hold of the accused by the tuft and gave him two blows with his fist. There was a struggle and the deceased held accused firm by the tuft. The accused then gave the deceased a blow on the left side with a 'baku' which he had in his hand.

I think that the only exception in s. 300 of the Indian Penal Code possibly applicable to such circumstances is Exception 4...

sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage.

When a man defies another and tells him to come on, in brief, challenges him to fight and a fight ensues, he cannot claim that he has been gravely and suddenly provoked merely because he is getting the worst of it. Suppose it is the other way round, and accused after challenging deceased to fight is getting the better of it, is he prepared to concede that at that point deceased may stab him and plead grave provocation? Which ever in such a case stabs is doing exactly what Exception 4 provides against his taking undue advantage, and acting in a cruel manner. Nor can I find that accused *bona fide* exceeded the right of private defence. He had asked for a fight, and was in no serious danger. I agree with the learned Sessions Judge that the offence is clearly murder and see no reason to interfere.

Thiruvengkatachariar, J.—The appellant in this case has been convicted of the offence of murder and sentenced to transportation for life, the charge against him being that he intentionally caused the death of Kodipatnam Bayya Reddy by stabbing him with a dagger. The appellant denied the charge and said that the case against him was wholly concocted. The learned Sessions Judge agreeing with three of the assessors found the accused guilty. The fourth assessor was of opinion that the accused was not guilty. The appellant in his petition of appeal contests that finding. Upon the evidence there can be hardly any doubt as to the correctness of the learned Judge's finding that the accused stabbed Bayya Reddy with a dagger with intent to cause his death, or I may add at least such bodily injury as was sufficient in the ordinary course of nature to cause death.

The only question, therefore, which remains to be considered is whether in the circumstances of this case the appellant should be held guilty of the graver offence of murder under s. 302, or of the offence of culpable homicide not amounting to murder under s. 394, and in the latter case whether he should be convicted under the first part or the second part of that section. The learned Sessions Judge has considered this question with reference to Exception 2 to s. 300, Indian Penal Code, and his opinion is that the said

exception does not apply to this case and that the offence committed by the appellant is murder. The material facts bearing on this question are as follows:—

About ten days prior to the occurrence the deceased discovered that there was criminal intimacy between the accused and the wife of his brother, P. W. No. 4, and that they intended to elope. The deceased and his brother thereupon chastised the latter's wife. Her husband threatened to shoot her and her lover (the accused) if he saw them together. The accused apprehending danger to himself made himself scarce for some days.

The events that immediately preceded the occurrence are set out by the learned Sessions Judge in para. 6 of his judgment. P. W. No. 6 the brother of the wife of P. W. No. 4 had been sent for by the deceased and he came to their house on the morning of the day of the occurrence. After breakfast he went to the house of the accused, referred to as Guturi house and there he was informed by Achamma and Papulu the women of the house that P. W. No. 4 and the deceased were ill-treating his sister P. W. No. 7. P. W. No. 6 came back to his brother-in-law's house and asked the deceased why his sister was beaten to which the latter replied "if she misbehaves in the house is she not to be checked?" P. W. No. 6 said that the husband was the proper person to chastise her and not he. Then the deceased asked P. W. No. 6 who told him that he had beaten and abused his sister. P. W. No. 6 mentioned the names of Achamma and Papulu. The deceased went out of the house and asked those women who were standing in their premises why they carried tales which brought about misunderstanding. There was then an exchange of abuse between the deceased and the said women and the deceased pulled out a stick from the fence and was going to jump out to attack them when his brother P. W. No. 4 came and restrained him. This quarrel took place in the afternoon and then neither the accused nor his father and uncle were in the house. The accused and his father after they came home in the evening heard evidently from their women that the deceased had come to their house and abused them. That put them (accused and his father) in any angry mood and with sticks in their hands they proceeded

to the entrance of the deceased's house and challenged him to fight with them for having abused the women. The deceased went out to meet them and presently came back and picked up a bamboo stick. His brother, P. W. No. 4, held him back and asked him to stay in and himself went out saying that he would speak to the accused and his father. In the meantime Chalamiah, the paternal uncle of the accused who was then in the house of P. W. No. 4 also went out and pushed the accused and his father towards their house. When P. W. No. 4 came out into the street the accused's father Narayana attacked him at once with his stick giving him a blow on the shoulder and another on the knee. P. W. No. 4 snatched the stick from him and dealt blows in return. It would appear that in that fight the accused's father Narayana was hurt more than P. W. No. 4. The deceased also came out of the house shouting, where is Nagulugadu? The accused who was then standing near the tree in front of his house abused in return and defied the deceased and told him to come on. What happened afterwards is spoken to by P. Ws. Nos. 4 and 6. The deceased caught hold of the accused by the tuft and gave him two blows with the fist. There was a struggle and the deceased held accused firm by the tuft. The accused then gave a blow to the deceased on the left side with a 'baku' which he had in his hand. The deceased cried out that the accused had stabbed him with a 'baku' and left the accused and went home holding his side with his hand. It would appear that in the struggle the accused also received some injuries which are set out in the wound certificate Ex. C: which, however, were not of a serious nature. The learned Judge observes as follows:—

"The deceased was, therefore, clearly the aggressor, but the evidence shows that he was not armed with any weapon whereas the accused must have already armed himself with a dagger for the fray before his assailant came to attack him."

On that ground the learned Judge holds that Exception 2 to s. 300, Indian Penal Code does not apply. He has not considered whether the case would fall within any of the other exceptions to s. 300. I need scarcely observe that the facts of a case may be such that it may fall

within more than one exception to s. 300 and the question, therefore, for consideration in this case is whether the case falls within any and which of the exceptions to s. 300. The deceased in this case having been the aggressor, as found by the learned Judge, the first question is whether Exception 1 to s. 300 does not apply to the case. I have thought it necessary to state the facts at some length as it seems to be clear that the quarrel was provoked by the deceased himself. The accused was standing at a distance in front of his house. He took no part in the quarrel between his father and brother of the deceased. But the deceased went towards the accused challenging him to fight and caught hold of him by his tuft and gave him blows with his fist. There was a struggle between them during which, according to the 6th witness, the deceased held the accused firmly by his tuft, and while he was so being held and had received some injuries the accused stabbed the deceased with the dagger which he had with him. It will be seen that though the accused was armed with a dagger he did not use it immediately the deceased came upon him, but he used it only when the deceased went on beating him without leaving his hold of the tuft. The act of the deceased was highly provocative and it was both grave and sudden and was well calculated to enrage the accused and deprive him of the power of self-control. He found himself suddenly under the grip of his enemy from whom he might have apprehended serious danger to himself. If under these circumstances the accused retaliated and stabbed the deceased with the dagger which he already had, I think he is entitled to the benefit of Exception 1 to s. 300, I may here refer to ill. (F) to this exception which runs as follows:—Z strikes B, B is by this provocation excited to violent rage. A, a by-stander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose, B kills Z with the knife. Here B may have committed only culpable homicide but A is guilty of murder.

I do not think that so far as Exception 1 is concerned if the act which resulted in the death was the result of grave and sudden provocation, it makes any difference that the man who was so provoked had a knife already or he was given a

knife by a by-stander with which he stabbed his assailant. No doubt, the circumstance that the accused had already provided himself with a knife or dagger is a fact to be taken into consideration in order to determine whether the stabbing was merely the outcome of the grave and sudden provocation which the accused had or whether it was a premeditated act which the accused had already determined to carry out apart from any provocation to him from the deceased. Upon the facts of this case, I am of opinion that the stabbing of the deceased by the accused is directly attributable to the grave and sudden provocation which the deceased gave to the accused, and that Exception 1 to s. 300 applies to the case. I think that Exception 2 also applies to the case. It can hardly be questioned that the deceased who was evidently much enraged attacked the accused violently and in such a manner as to make him apprehend that the deceased wanted to wreck vengeance on him for his misconduct with his brother's wife which was the original cause of all this trouble between the two families. The accused had certainly the right to defend himself against such an attack. No doubt, the accused would be justified in causing death only if he could reasonably apprehend that death or grievous hurt would otherwise be the consequence of such assault. Otherwise he can only inflict so much harm as is necessary to inflict for the purpose of defence. It need scarcely be observed that a man who is suddenly attacked by his enemy violently cannot be expected to judge too nicely what the consequences of the attack may be, or how much force he should use in retaliation. Considering that the deceased though the aggressor, was unarmed, it might have been unreasonable on the part of the accused to apprehend that either death or grievous hurt would result from the assault. But there was sufficient cause for him to apprehend that he would be seriously injured as the deceased held his tuft firmly and went on beating him. It is only then that he stabbed the deceased fatally in two places. I think the case is very similar to the one given in the illustration to Exception 2 in which the accused used a pistol he already had with him, but in excess of the right of private defence, and that the offence committed by the accused in this case amounts only to culpa-

ble homicide not amounting to murder. Under the circumstances the mere possession of the dagger by the accused cannot make the crime one of murder any more than the possession of the pistol by A in the illustration to Exception 2.

Lastly, I may observe that when the evidence in a case leaves room for doubt as to whether the accused has committed murder or the lesser offence of culpable homicide not amounting to murder, the benefit of that doubt should be given to the accused.

For the reasons stated I am of opinion that the accused should have been convicted only of culpable homicide not amounting to murder under the first part of s. 304 and I would alter the finding of the learned Sessions Judge accordingly. Taking the circumstances of the case into consideration I would reduce the sentence to one of rigorous imprisonment for a period of five years.

By the Court.—As we disagree, this case must go to a third Judge under s. 426 of the Criminal Procedure Code.

The appeal was heard in pursuance of the above said order of reference by his Lordship Wallace, J.

The Public Prosecutor, for the Crown.

JUDGMENT.

Wallace, J.—In my view the provocation began at an earlier stage than that noted by Mr. Justice Jackson, *viz.*, when deceased ran out of his house calling out where is this Nagulugadu. Obviously he was then provoking a fight; if he was not he would have remained where he was in his house. This challenge accused answered verbally and then deceased started the use of violence by seizing accused by the tuft. Though the original provocation by deceased was not grave and sudden it was aggressive and the 2nd provocation, *viz.*, seizing accused by the tuft was certainly grave and sudden.

I agree with Mr. Justice Thiruvenkatachariar that the first exception to s. 300, Indian Penal Code, is in point and that the offence is culpable homicide not amounting to murder.

I alter the conviction accordingly and reduce the sentence to rigorous imprisonment for three years.

V. N. V.

A. N. A.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 797 OF 1927.

October 31, 1927.

Present:—Mr. Justice Dalip Singh.
MANGTA AND ANOTHER—CONVICTS—
APPELLANTS

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 342—
Evidence, recording of, after examination of accused
—Further explanation from accused, necessity of.*

Where a Magistrate records some evidence after the examination of the accused has been concluded he should call for further explanation from the accused. [p. 348, col. 1.]

Criminal appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Kaithal, District Karnal, dated the 22nd June, 1927.

Mr. Ganpat Rai, for the Appellants.

Mr. R. C. Soni, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellants Mangta and Bichha have been convicted by the learned Magistrate according to the judgment under s. 258, Criminal Procedure Code. As they were charged respectively under ss. 397 and 394, Indian Penal Code. I presume that the learned Magistrate meant to convict them under the sections under which they charged, that is, he meant to convict Mangta accused under s. 397 and Bichha accused under s. 394, Indian Penal Code. He has sentenced Mangta to seven years' rigorous imprisonment including three months' solitary confinement and Rs. 200 fine or in default to six months' further rigorous imprisonment and Bichha appellant to three years' rigorous imprisonment and Rs. 200 fine or in default to six months' further rigorous imprisonment. Rs. 200 of the fine, if realised, is to be paid to Naraina complainant and Rs. 100 to Budh Ram complainant.

The facts of the case as shown by the prosecution evidence are that Naraina's donkeys were missing for sometime. Finally he discovered that they were with Mangta appellant. He and Kalu proceeded to address Mangta on the subject and a *bhunga* of Rs. 50 was settled. One Budh Ram was also included in the matter to stand surety for Naraina not filing a complaint after recovery of the donkeys. The appellants accompanied Naraina and Kalu and Budh Ram along a road and the two donkeys were discovered, there

and duly handed over to Naraina. Rs. 50 were also paid to the appellants and the parties separated. As they were going away Naraina, however said that he would complain to the Police about the whole subject as Rs. 50 have been extorted from him. Upon this Mangta attacked Naraina with a cutting weapon and inflicted grievous and dangerous injuries on him and Bichha appellant attacked Kalu and also inflicted hurts on him with a *lathi*. Budh Ram who came to the rescue of these people also had his arm severed at the wrist evidently by a blow from Mangta appellant's cutting weapon. Thereafter the appellants took away the two donkeys, which were recovered later from one Maru who said he had got them from Matu, who in his turn said that he had got them from the appellant Mangta.

These facts are established by the evidence of Naraina, Kalu and Budh Ram. There is no reason to doubt their evidence. Counsel for the appellants has argued that in any case there was no robbery as the hurt was not caused in the committing of theft or in order to commit theft. It seems to me that the appellants wished to remove the donkeys, which would be the main evidence in the case, threatened by Naraina, and they proceeded to inflict the injuries that they did inflict with this object in view. I, therefore, consider that Mangta has been rightly convicted under s. 397, Indian Penal Code, and I do not consider the sentence in any way severe. I also consider that Bichha has been rightly convicted under s. 394, Indian Penal Code, and the sentence is not severe in his case either.

Counsel from the Crown has very properly pointed out to me that the learned Magistrate recorded some evidence against the appellants after they had been examined and no further explanations were called for from the accused as regards this evidence. The evidence, however, or rather the material portion thereof consist in the recovery of a *chhavi* blade from Mangta. Quite apart, however, from this recovery of a *chhavi* blade I consider that the case is sufficiently made out against him. I have accordingly not taken into account the evidence after the accused had been examined. Counsel for the appellants did not raise this point at all.

I, therefore, dismiss the appeal.

E. L.

Appeal dismissed.

PATNA HIGH COURT.

JURY REFERENCE No. 17 OF 1927.

November 2, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Ross.

EMPEROR—PROSECUTOR

versus

ASADALI *alias* TUNU—ACCUSED.

Penal Code (Act XLV of 1860), s. 376—Girl under 10 years—Consent, effect of—Assailant suffering from gonorrhœa—Gonococci not found on girl—Inference.

In the case of a conviction for rape where the girl is 10 years of age no question of consent arises. [p. 348, col. 2.]

The fact that a person accused of having committed rape is found to be suffering from gonorrhœa but the injured girl is not infected with the disease, is by no means conclusive of the innocence of the accused. [p. 349, col. 2.]

Reference made by the Sessions Judge, Cuttack, in his Letter No. 1539, Cr., dated the 16th/20th September, 1927.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Ross, J.—This is a reference under s. 307 of the Criminal Procedure Code by the learned Sessions Judge of Cuttack. Asadali *alias* Tunu was charged with having on the night of the 2nd of June, 1927, committed rape on a girl Kanika aged 10 years near the compound of the Cuttack Railway Station. The trial was by Jury and the Jury by a majority 4 to 1 were in favour of giving the accused the benefit of the doubt.

The first question is whether Kanika was ravished. On that point there is her own evidence and the medical evidence as to the state of her body when she was examined and the further medical evidence that spermatozoa were found on a smear taken from the vagina. As the girl is 10 years of age no question of consent arises. The rape is proved conclusively.

The next question is as to the identity of her assailant. On this point there is the evidence of the girl herself, and she says that she had seen the accused at the Station before the occurrence also. The accused is a tout of a Motor Car Company and he frequents the Station to procure passengers for his Company's cars. The ravished girl is a beggar child who also frequents the Railway Station and there is, therefore, no improbability in her knowing the accused. She was found by the water-carrier of the Station (P. W. No. 5) about 11 o'clock the following morning lying at the Station with blood on her cloth. The water-carrier inform-

ed the Ticket Collector who with the Assistant Station Master asked the girl what had happened and questioned her as to who her assailant was. She said he was one of the Motor Car touts and she was taken to the Motor Park outside the Station to identify him and pointed out the accused. The evidence on this point is that of the Ticket Collector and the Assistant Station Master. As the latter witness was ill at the time of the trial, his statement before the Committing Magistrate on which he was not cross-examined was taken in evidence. Corroborative evidence was also given by Jalil, a bearer in the Waiting Room of the Railway Station (P. W. No. 3) and Duesan Das a Telegraph Peon of the Railway Station (P. W. No. 4) as well as by a sweetmeat seller Dwarka Nath Das (P. W. No. 9) whose shop is situated near the Station, where a crowd had gathered over this matter. Evidence was also given by two motor car touts, but the learned Assistant Government Advocate did not lay much stress on their evidence because of the defence of the accused which is that he has been charged falsely out of enmity, because there have been constant quarrels between the servants of two rival Motor Car Companies for one of which he is tout, while these two witnesses and another man called Shaikh Rakha are touts of the competing Company. There is some evidence that Shaikh Rakha was seen with the girl that morning, but there is nothing to show that he had tutored her to identify the accused and it seems to me most unlikely that a false charge of this nature would have been got up because of this rivalry. Nothing is said by the defence against the Railway Official witnesses and there is nothing in their evidence to suggest that the identification by the girl was anything but genuine.

The case, however, does not rest there. The accused was medically examined, and he was found to have two scratches on his wrist which were probably caused by a finger nail and scratches on the front of the left knee and on the front of the right knee caused by friction against a hard and rough surface. He had also an abrasion at the orifice of the urethra most probably caused by knocking at and making friction against an intact hymen and tight vaginal canal and a healing abrasion on the frenum most probably caused in the same way. Moreover, he was found to be suffering from gonorrhoea. A point was made by the de-

fence that if he had been the assailant, then girl ought to have been infected with this disease. She was under treatment in the hospital for about a month and did not develop the disease. The Assistant Surgeon in his evidence says that as a rule gonococci would have been found in the vagina of the girl as there was sexual intercourse by the accused with the girl. But as the girl was bleeding profusely, the gonococci were probably washed out. He refers with approval to the opinion of Lyon that in the case of young children there is greater likelihood of inoculation with gonorrhoea on the freshly torn surface. But he points out that while there must be spermatozoa there only may be gonococci. The other medical witness, the Sub-Assistant Surgeon attached to the Medical College at Cuttack, says that in chronic cases of gonorrhoea (such as this) generally gonococci will not come out with the seminal fluid. The text-writers say that there is no certain test in this matter. Taylor in his Principles and Practice of Medical Jurisprudence, 7th Edition, Vol. II, page 128, says that the probabilities of communication of a venereal disease by one person to another are certainly very high, but the facts would seem conclusively to prove that they are not 100 per cent., and if they are not 100 which is to prove that the case in dispute may not be an exception? Lyon in his Medical Jurisprudence, 6th edition, page 302, says that infected individuals do not necessarily by intercourse communicate gonorrhoea. The fact that the injured girl was not infected with the disease is, therefore by no means conclusive of the innocence of the accused. It is consistent either with his innocence or with his guilt. On the other hand, the marks found on his person clearly indicate the probability of his guilt and this combined with the direct evidence of the girl and with the evidence of identification which was promptly given leaves no room for doubt on the matter.

Evidence was gone into by the defence. Two witnesses were examined to prove that no identification took place at the Railway Station. The first of these witnesses was a Police Sub-Inspector on leave, but as he admits that he remained at the Cuttack Railway Station for 4 or 5 minutes only his evidence is of little value. The second witness was a Canal Sectional Officer who professes to have been at the Railway Station from 1-30 or 2 P. M. till 3 o'clock, that

is, during the period when the identification took place. The learned Judge has discussed the evidence of this witness and, in my opinion, the witness is not telling the truth. He has not given a credible explanation of his presence at the Railway Station and his evidence cannot stand against that of the disinterested witnesses on the Railway Staff. Further evidence was given to establish an *alibi* by proof of a fracas having occurred between the touts of the two rival Companies that evening at which the accused was present. This occurrence seems to be admitted by the prosecution witnesses, but it does not establish any *alibi* because it refers to an occurrence at 6 or 7 in the evening, while the girl says that the assault upon her was made late at night. And in fact one of the defence witnesses Khairat Hussain (D. W. No. 4) admits that on the night of the 2nd June the accused was at the Station.

In consideration of all the evidence and particularly in view of the facts disclosed by the medical witnesses there can be no reasonable doubt of the guilt of the accused. I would, therefore, accept this reference and convict Asadali *alias* Tunu and sentence him to two years' rigorous imprisonment under s. 376 of the Indian Penal Code.

Jwala Prasad, J.—I agree.

B. K. P.

Reference accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 600 OF 1927.

November 3, 1927.

Present:—Mr. Justice Broadway
and Mr. Justice Zafar Ali.

EMPEROR—APPELLANT

versus

AHMAD AND OTHERS—ACCUSED—
RESPONDENTS.

*Penal Code (Act XLV of 1860), ss. 399, 402—
Preparation to commit dacoity, what constitutes—
Criminal Procedure Code (Act V of 1898), s. 162—
Reference to statements before Police to contradict
prosecution witness, legality of.*

The accused assembled on a night under a *shisham* tree outside a village to commit dacoity. Two of them were armed with revolvers and one with a spear. Three of them were residents of another District:

Held, that the accused were guilty of the offence of preparing to commit dacoity under s. 402, Indian Penal Code. [p. 352, col. 2.]

Karmun v. Emperor (1), followed.

It is not competent to a Magistrate to refer to the statements made by a witness before the Police with a view to contradict a subsequent statement made by him until copies of those statements have been given to the accused on trial and an attempt has been made to prove those statements. [p. 352, col. 1.]

Criminal appeal from an order of the Sessions Judge, Attock at Campbellpur, dated the 23rd February, 1927.

Mr. Mackay, for the Government Advocate, for the Appellant.

Mr. Ali Hussain Khan, for the Respondents.

JUDGMENT.—It appears that the Police of the Attock District received information that certain dacoits were collecting to commit a dacoity at Dhok Baju Dakhli Kariman. The names of the dacoits were also known. Accordingly arrangements were made to prevent the commission of the dacoity and a Police guard was sent out to render assistance to the villagers. This was on the 23rd October, 1926. The house which was to be dacoited belonged to one Dosa, a man of doubtful character himself who was shown on register No. 10. He lived in Dhok Baju and he, together with Fakir Muhammad, was deputed by the *lambardars* to meet the Police guard which was coming under the command of Raja Khan Head Constable, from Campbellpur. Raja Khan was accompanied by Khan Bahadur *lambardar* and as they neared Dhok Baju certain men were seen at a distance. Raja Khan sent Khan Bahadur on to reconnoitre and to ascertain who those persons were. Khan Bahadur went on and found five persons seated in a depression under a *shisham* tree just outside Dhok Baju. He questioned them and was beaten by one of them as well as threatened by another. While he was with them Dosa and Fakir Muhammad arrived on the scene. These two, seeing the *lambardar*, at first did not realize that the other persons present were dacoits but as soon as they realized this fact all three of them went off and joined Raja Khan and his Policemen who were told that the men in question were dacoits. Raja Khan then moved his force nearer to these persons in order to intercept them. The dacoits fired at the Police Force but, as they were armed with revolvers only, the Police and villagers sustained no casualties. The Police returned the fire with the result that one at least of the dacoits received a bullet wound. The

dacoits, however, succeeded in effecting their escape and the matter was reported to the Police Station in due course. An investigation followed, and as the names of the five persons were known steps were taken to arrest them. The persons so arrested were Wali, Ahmad, Mehmud, Bakhsha and Mirza. Ahmad and Mehmud are brothers and these two with Bakhsha were arrested together, on the 27th October, 1926, at Maira Badia. They reside in another village Chhokar in the Rawalpindi District. Their arrest was effected in the courtyard of the house of the sister of Ahmed and Mehmud. Mirza was also arrested and found to have received a bullet wound in his wrist. Wali was granted a pardon and these four persons together with three other were sent up for trial charged under ss. 399 and 402 of the Indian Penal Code.

At the completion of the trial the assessors were unanimously of opinion that the case for the prosecution was correct and that all the persons sent up for trial were guilty. They accept the statement of Wali as true. The learned Sessions Judge, however, took a different view. He came to the conclusion that the testimony of Wali was unreliable and that the witnesses, who claimed to have identified the four persons named above, were not reliable. He accordingly acquitted all the seven persons who were arraigned before him.

Against this acquittal the Local Government has preferred an appeal under s. 417, Criminal Procedure Code, in the cases of Ahmed, Mehmud, Bakhsha and Mirza, and after hearing Mr. Mackay for the Crown and Mr. Ali Hussain Khan for the respondents, in my judgment the verdict of the assessors *qua* these four persons was the correct one.

The learned Sessions Judge has recorded a lengthy and detailed judgment in which his reasons for disbelieving the approver are set out in detail. I do not think it necessary to discuss those reasons as, in my opinion, the weight to be attached to them is very considerably reduced by the fact that the learned Sessions Judge appears to have overlooked the fact that Mirza, who undoubtedly was injured by a gunshot wound and according to Lieutenant Colonel Corry, I. M. S., Civil Surgeon by a 303 bullet, distinctly mentions the presence of Wali on the scene. It is true that Mirza denied having

been at Dhok Baju for the purpose of committing a dacoity and told a story to account for his presence there, but after a careful examination of that story it seems to me that it is one that is wholly incredible. To a large extent it is based on enmity not with the Police but with a certain *lambardar*. Nevertheless that enmity has not been established and, as has been held by the learned Sessions Judge, the Police cannot be said in this case to have lent themselves to any fabrication. To my mind the case rests almost entirely on the testimony of Dosa, Fakir Muhammad and Khan Bahadur. These are the three witnesses who actually saw and spoke to the dacoits on that occasion. Subsequently to the arrest of these respondents an identification parade was held under the auspices of a Magistrate of the First Class. This Magistrate has been produced as a witness and has described the steps taken by him to ensure the correctness and fairness of the identification. After consideration of his testimony I have no reason whatever to think that the witnesses had any opportunity given them to see the persons to be identified prior to the parade. Indeed none of the respondents alleged that they were shown to these persons. At this parade Dosa and Fakir Muhammad identified all four of the respondents while Khan Bahadur *lambardar* identified Bakhsha and Mirza alone. Now, Khan Bahadur's statement that he was sent on to reconnoitre by Raja Khan is supported by Raja Khan himself, and there is no reason to doubt the veracity of these two witnesses. Khan Bahadur says that when he arrived at the spot he found these five persons there among whom he recognised Wali as a man he already knew. None of the other four were known to him. One of the dacoits slapped him and another searched his person. He identified Bakhsha and Mirza because it was these two who slapped him and searched his person. The evidence of these witnesses, which I consider credible, leaves no room for doubt as to the presence of these four, together with Wali under the *shisham* tree on the night in question. They corroborate very materially the statement of Wali whose evidence as far as it refers to these men appears to be perfectly clear and above suspicion. It is true that the learned Sessions Judge refers to certain discrepancies between the statement made by Wali in Court and certain statements

made by him in the course of the Police investigation. It was contended, and I think rightly contended by the learned Counsel for the Crown, that the learned Sessions Judge's action in referring to statements made before the Police with a view to contradict prosecution witnesses was entirely erroneous. The procedure is a simple one and it is clear that in this case that procedure was not carried out. Copies of the statements do not appear to have been given to the accused persons on trial and certainly no attempt has been made to prove any statement made to the Police by Wali and any of the other witnesses. It is clear, therefore, that references to those statements were irregular and ought not to have been made. Wali was seen by Khan Bahadur *lambardar* with the respondents on the night in question and Wali was known to that witness. Wali later on produced a revolver and it is curious feature in the case that Mirza, in setting up a story to explain his presence there, not only admits Wali's presence but definitely admits that Wali was armed with a revolver. So far as Mirza is concerned that is a very strong corroboration of his (Wali's) statement. In my judgment the statements of Dosa, Fakir Muhammad and Khan Bahadur offer sufficient corroboration of Wali's statement as against these four respondents.

There is, however, further corroboration as regards Ahmed, and Bakhsha. Ahmed was instrumental in producing a revolver in the course of the investigation. This revolver he had placed in the custody of *Musammât Mukhi*. Ahmed took the Police to this woman's house and had the revolver produced. According to Wali, Ahmed was on the night in question, armed with a revolver. Again Bakhsha was said by Wali to have had a spear and in the course of the investigation Bakhsha produced a spear-head. There is thus ample corroboration of the approver's story *qua* these two respondents and I am unable to agree with the learned Sessions Judge's comments as to the evidence relating to the recovery of these articles.

In the case of Mehmahd it appears that he was said to have received an injury on his thigh. He was examined by Lieutenant Colonel Corry and that witness found a small injury on the thigh, which, he says, could not possibly have been caused by a 303 bullet but might have been caused by

such a bullet having first hit a stone and being splintered and one of the splinters entering the body of Mehmahd. He advised a Skiagram to be taken but the prosecution failed to comply with the suggestion. No steps appear to have been taken to recover the trousers that Mehmahd was wearing on the occasion which must have been pierced through to cause the injury, had that injury been due to a gunshot wound as alleged. Mehmahd himself says that he received this very slight injury some fifteen days before when he was playing *kabaddi*. Whether his account is correct or not I consider that the learned Sessions Judge is right in thinking that the prosecution have failed to prove that Mehmahd received any injury on the night in question. Against him, however, there is the testimony of Dosa and Fakir Muhammad already referred to, which, to my mind sufficiently corroborates the approver's story.

I would hold, therefore, that it has been proved beyond any reasonable doubt that these four persons along with Wali assembled on the night of the 23rd of October, 1926, under a *shisham* tree at Dhok Bajju, that two of them at any rate were armed with revolvers and one at least was armed with a spear. Ahmed, Mehmahd and Bakhsha are residents of Rawalpindi District and their presence on the occasion requires considerable explanation. The reason for their presence at that place on the night in question has been given by the approver, and his evidence, having been so materially corroborated in other particulars, I have no hesitation in accepting his statement as to the object with which he and these other persons assembled at the spot on the night in question.

In these circumstances I consider that all the four respondents committed an offence falling within the purview of s. 402 of the Indian Penal Code. In this I am supported by the decision of Mr. Justice Shadi Lal in *Karmun v. Emperor* (1).

I would, therefore, accept this appeal and convict Ahmed, Mehmahd, Bakhsha and Mirza under s. 402, Indian Penal Code and sentence each of them to undergo rigorous imprisonment for a period of seven years.

R. L.

Appeal accepted.

(1) 34 Ind. Cas. 1000; 6 P. R. 1916 Cr. 17 Cr. L. J. 280; 37 P. W. R. 1916 Cr.

CALCUTTA HIGH COURT.

CIVIL REFERENCE NO. 1 OF 1926.

May 11, 1927.

Present:—Sir George Olāus Rankin,
Kt., Chief Justice, and Mr. Justice
Majumdar.
EMPEROR

*versus***PROBHAT CHANDRA BARUA—ASSESSEE.**

Income Tax Act (XI of 1922), s. 2—'Agricultural income,' meaning of—Fees for storing purchases, punyaha nazar and nazar on petitions, whether agricultural income.

Income which is derived from the use of land for storing purchases of food crops, etc., and *punyaha nazar* paid by tenants of agricultural holdings at the beginning of the agricultural year are not 'agricultural income' as defined in s. 2 of the Income Tax Act. [p. 353, col. 2.]

Meher Banu Khanum v. Secretary of State for India (1), distinguished.

Nazar paid to the *zemindar* for petitions presented to him for dealing with questions of succession, settlement and partition is not agricultural income although *nazar* paid for landlord's recognition of such transactions is such income. [p. 354, col. 1.]

Reference from the Commissioner of Income-Tax, Assam, dated the 12th of March, 1926, unders. 66 (2) of the Income Tax Act.

FACTS.—On the 12th March, 1926, the Commissioner of Income Tax, Assam, referred to the Court for decision, under s. 66 (2) of the Indian Income Tax Act of 1922, the following questions:—

I. Whether the following sources of income are agricultural and, therefore, exempted from assessment to income-tax under s. 4 (3) (viii) of the Act:—

- (i) *Jalkar* or rents received from fisheries.
- (ii) Ground rent from land used for potteries.
- (iii) Ground rent from land used as brick-fields.
- (iv) Fees received from the tying up of boats against the assessee's land.
- (v) Fees received from land used for storing purchase of crops (*paiati*).
- (vi) Fees received from cart stands.
- (vii) *Punyaha nazar*, or *nazar* paid by tenants of agricultural holdings at the beginning of the *zemindari* year.
- (viii) *Nazar* for petitions presented to the *zemindar* dealing with questions of succession, settlement and partition.
- (ix) Ground rent for permanent shops at *hats* and *bazars*.
- (x) Stall fees paid by temporary (daily) sellers at *hats* and *bazars*.

II. Whether income derived from such of the above sources as were not taken

into consideration at the time of fixing the *jama* at the Permanent Settlement is assessable for income-tax purposes.

III. Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates is liable to assessment to income-tax.

This reference came on for hearing before the late Chief Justice (Sir Lancelot Sanderson) and Mr. Justice Rankin on the 21st May, 1926. The attention of the learned Judges having been drawn to the conflict of opinion between *Probhat Chandra Barua v. Emperor* (1) and *Emperor v. Indu Bhusan Sarkar* (2), questions II and III were referred by the learned Judges to a Full Bench for decision. (*Vide* 102 Ind. Cas. 815)

The remaining questions came up for decision before Rankin, C. J., and Majumdar, J.

Sir B. C. Mitter and Babu Surendra Nath Guha, for the Crown.

Mr. N. Sircar and Babu Jatindra Mohan Chaudhury, for the Assessee.

JUDGMENT.

Majumdar, J.—In the present Reference, the learned Vakil who appears for the assessee confines himself to three items included in the first question, namely, item (v), item (vii) and item (viii).

With reference to item (v), namely, fees received from land used for storing purchases of crops (*paiati*), what is actually meant by this is given in the petition of the assessee which he presented to the Assistant Commissioner of Income Tax at Goalpara. He means the income which is derived for the use of land for storing purchases of food crops, etc., by merchants. Evidently this does not come within the definition of "agricultural income" as given in s. 2 of the Indian Income Tax Act. The income as derived is not derived from land used for agricultural purposes and, as such, such income cannot be claimed to be exempt from assessment.

With reference to item (vii), i.e., *punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the *zemindari* year, I am of opinion that this also does not come within the defini-

(1) 84 Ind. Cas. 31; 51 C. 504; A. I. R. 1924 Cal. 868.

(2) 95 Ind. Cas. 539; 44 O. L. J. 427; 53 C. 524; 30 C. W. N. 524; A. I. R. 1926 Cal. 819.

tion of "agricultural income" as given in the Act. This *nazar* is generally paid by tenants who are actually present on the occasion of the *punyaha* to the landlord. There is no uniformity in the payment of such *nazar*, nor is there any compulsory method for realising such *nazar*. The tenants, if they choose, might not pay any *nazar* whatsoever on that occasion and the landlord cannot under any law at present in force enforce his supposed right, nor can the landlord demand *nazar* at a certain uniform rate. It is purely a voluntary payment by tenants, who take part in the ceremony and who usually are present on the occasion. It is not, therefore, an income which is derived from land used for agricultural purposes.

The learned Vakil draws our attention to the Full Bench case of *Meher Bano Khanum v. Secretary of State for India* (3) and particularly to a passage in the judgment delivered by Mr. Justice Greaves where the learned Judge says, referring to the *salami* paid to a landlord for recognition of the transfer of a non-transferable holding that "it is a money which comes to the landlord by virtue of the fact that he is the owner of the land" and that that being so it would be an agricultural income and so exempt from the operation of the income-tax.

Now, in the Full Bench case the reference was in connection with *nazar* paid by a tenant for recognition of transfer of a non-transferable occupancy holding. With reference to such a holding the position stands thus in law, that when such a transfer takes place the landlord is not bound to recognise such a transfer and that in case the landlord does not recognise such a transfer the landlord is free to take *khas* possession of the holding. When he does recognise such a transfer, that practically amounts to a sort of new settlement with the transferee and the *nazar* which is actually paid on the transfer by the transferee really amounts to the capitalized value of a part of the rent. Under such circumstances such *nazar* would be an income derived from land, and, as such, would come within the definition of "agricultural income." Though this fact was not referred to permanently in the judgment, still the effect of such a transfer and of such a recognition amounts in law to a sort of

new settlement by the landlord with the transferee. That being so, the case covered by the Full Bench decision altogether stands on a different basis from the present case and can hardly be used in support of the argument advanced by the learned Vakil in connection with *punyaha nazar*.

Then with reference to item (viii), i. e., *nazar* paid for petitions presented to the *zemindar* dealing with questions of succession, settlement and partition, this stands on a worse ground. This has absolutely nothing to do whatsoever with lands used for agricultural purposes unless in a most indirect and remote way. The landlord is not entitled to exact from a tenant *nazar* for such petitions, nor is a tenant liable to pay it under any provision of law. When the question of succession opens up with regard to a holding no such petition is necessary under the law. If the holding be an occupancy holding the landlord is bound to recognise the succession, petition or no petition. It is only in certain cases that certain steps have got to be taken in connection with succession of tenures and those have been provided for in the Bengal Tenancy Act. But that has got nothing whatsoever to do with the *nazar* which is referred to in item (viii).

Then, the item (viii) refers to *nazar* for petitions dealing with questions of succession, settlement and partition. It is not "*nazar* paid for recognition of succession or partition or for settlement." Certainly the landlord may be entitled to something for recognising succession or partition or for settlement. That would be an income derived from land. In cases of partition the landlord may rightfully demand certain fees. In cases of holdings and tenures, if the tenants choose to partition the same, they can do it with the consent of the landlord, and the consent of the landlord may have to be purchased and in those cases the fee which the landlord would get may come under the definition of "agricultural income" as given in the Act. But in this Reference we are concerned with the *nazar* for petitions dealing with the questions of succession, etc., and not with *nazar* paid to the landlord referred to above, for obtaining the recognition of the landlord in matters of succession or partition or for settlement. Such being the case, such *nazar* for petitions would not come within the definition of "agricultural income" as

(3) 89 Ind. Cas. 997; 53 C. 34; 29 C. W. N. 969; 42 G. L. J. 151; A. I. R. 1925 Cal. 920 (F. B.).

given in the Act, so this item could also be assessable to income-tax and would not be exempt from the operation of the Income Tax Act.

Rankin, C. J.—I agree entirely in the judgment which has been delivered.

With reference to the first question put by the Commissioner of Income Tax the answers to all the items are in the negative. The answer is in the negative with reference to items (v), (vii) and (viii) for the reasons which have been given by my learned brother and with which I entirely agree.

We make no order as to costs.

The judgments now given (together with the judgments given by the Full Bench on the second and third questions, if those have not already been sent to the Commissioner) will be forwarded to him under the seal of the Court and the signature of the Registrar as provided by s. 66 of this Act (XI of 1922).

A. N. A.

Order accordingly.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No 251 of 1926.

April 25, 1927.

Present :—Sir Guy Rutledge, Kt.,
Chief Justice, and Mr. Justice

Mya Bu.

BACKER KHORASANEE—DEFENDANT—
APPELLANT

versus

AHMED ESMAIL JAMAL—PLAINTIFF—
RESPONDENT.

Contract Act (IX of 1872), s. 108—Mortgage of goods—Sale by mortgagor in possession—Bona fide purchaser, rights of.

A bona fide purchaser of mortgaged goods from the owner of such goods who is in possession thereof, without notice of the mortgage, takes the goods free from the mortgage. [p. 356, col. 1.]

Sreeram Narasiah v. Bommireddi Venkataramiah (1), *Oo Tha Way v. Ko Aung Doon* (2), *Dearle v. Hall* (3), and *Manackjee Pallanjee v. Meyappa Chetty* (7), followed.

Orient Bank of India, Ltd. Lahore v. Ghulam Fatima (4), *Ko Kywee v. Ko Koung Bane* (5) and *Tatham v. Andree* (6), distinguished.

First appeal from the judgment of the Original Side, in Civil Regular No. 351 of 1926.

Mr. M. M. Jawad, for the Appellant.

Mr. Young, for the Respondent.

JUDGMENT.—This is an appeal from the Original Side of this Court giving the

respondent a decree, declaring that he has a lien on the stock-in-trade in shop No. 283, Dalhousie Street, Rangoon, for Rs. 2,200 being the balance due on a mortgage, Ex. A, dated the 22nd of March, 1926.

The sole question in the case is whether the appellant, when he purchased, on the 9th of July, 1926, the stock-in-trade of the first defendant Parekh, purchased it subject to the respondent's mortgage. It is admitted that the respondent was never in possession of the stock-in-trade and it is also admitted that the appellant was not aware of the respondent's mortgage when he purchased the stock-in-trade.

Section 108 of the Indian Contract Act states :—

"No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :—

Exception.—When any person is by the consent of the owner, in possession of any goods..... he may transfer the ownership of the goods of which he is so in possession..... to any other person, and give such person a good title thereto, notwithstanding any instruction of the owner to the contrary: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods."

Admittedly, the buyer in this case acted in good faith, and, though the respondent's mortgage was registered, as mortgages of moveables are not required to be registered, there was no duty cast on the buyer to make a search in the Registration Office to see if there was any encumbrance. The respondent, however, urges that the exception only applies where a person is in possession of goods by the consent of the owner and that in this case the mortgagor was owner in his rights; and that the exception would not cover him.

On this point we are in agreement with the Madras High Court in *Sreeram Narasiah v. Bommireddi Venkataramiah* (1) where it was held that :—

"Under s. 108 of the Indian Contract Act a person in possession of moveables, although not the owner, can pass the property in the goods to an innocent purchaser. Much

(1) 47 Ind. Cas. 976; 42 M. 59; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 151.

more than would it appear that the real owner could pass the property, which was only subject to an undisclosed hypothecation.....When goods are left in the possession of the mortgagor, a wide door is opened for fraud; when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud. In this view we think that a *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it."

There is a decision to the same effect by the Recorder of Rangoon, Sir William Agnew, in *Oo Tha Way v. Ko Aung Doon* (2). In that case the learned Recorder followed the principle of the English case of *Dearle v. Hall* (3).

The learned trial Judge has relied upon a decision of the Lahore High Court in *Orient Bank of India, Ltd., Lahore v. Ghulam Fatima* (4). That case, however, is clearly distinguishable from the present case, in that the purchaser had knowledge of the prior encumbrance. With regard to two of the cases cited by the Lahore High Court, viz., in *Ko Kywetnee v. Ko Koung Bane* (5), the purchaser had notice of the prior lien and in the Privy Council case from Ceylon, *Tatham v. Andree* (6), the case was decided under Roman Dutch Law, which has no application in British India.

We may note that a Bench of the late Chief Court held in *Manackjee Pallanjee v. Meyappa Chetty* (7) that: "It is settled law that a *bona fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date, and in this case it is not disputed that the appellant obtained possession of the launch through the Court and is now through the Court in possession of the sale proceeds. If Manackjee had notice of the S. A.

(2) 1 Bur. L. R. 18.

(3) (1828) 38 E. R. 476; 3 Russ. 1; 2 L. J. Ch. (o. s) 62; 27 R. R. 1.

(4) 57 Ind. Cas. 117; 1 Lah 422; 2 U. P. L. R. (Lah) 143; 2 Lah. L. J. 590.

(5) 5 W. R. 189.

(6) (1863) 1 Moo. P. O. (N. S.) 386; 9 Jur. (N. S.) 1019; 9 L. T. (N. S.) 2; 2 N. R. 554; 15 E. R. 747; 138 R. R. 552.

(7) 28 Ind. Cas. 462; 7 L. B. R. 336.

Firm's earlier incumbrance, the latter is entitled to priority and not otherwise."

The principle stated in s. 108, Exception I, of the Indian Contract Act, in our opinion, applies *a fortiori* to the present transaction.

The appeal must accordingly be allowed and the plaintiff-respondent's suit dismissed with costs in both Courts.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 73

OF 1925.

November 2, 1927.

Present:— Mr. Justice Ross and Mr. Justice Wort.

Babu DEOKINANDAN SINGH—PLAINTIFF
—APPELLANT

versus

Saiyed JAWAD HUSSAIN AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 10—Attachment before judgment, effect of, on rights prior to attachment—Transfer of Property Act (IV of 1882), s. 53—Transfer in good faith and for consideration, validity of—Presumption of intention to defeat creditors, when arises—Purchaser, whether bound to see to application of purchase-money.

Where an agreement for sale has been entered into before an attachment before judgment is effected, the attachment cannot affect the purchaser's right to a conveyance under that agreement. [p. 357, col. 2.]

Nothing in s. 53 of the Transfer of Property Act bars the right of any transferee in good faith and for consideration. A transfer cannot be presumed to have been made with the intent to defeat or delay creditors and, therefore, to be voidable at the option of the creditors, if it was not made gratuitously or for a grossly inadequate consideration, even though its effect has been to delay creditors. [*ibid.*]

It is no part of the duty of a purchaser to see what is done with the purchase-money. [*ibid.*]

Appeal from the decision of the District Judge, Gaya, dated the 30th of May, 1924, confirming that of the Subordinate Judge, Gaya, dated the 23rd of May, 1923.

Mr. Kailashpati, for the Appellant.

Mr. Anand Prasad, for the Respondents.

JUDGMENT.

Ross, J.—This is an appeal by the plaintiff in a suit for a declaration that he was the purchaser in good faith and for consideration of 2 dams share in *Mauza Ohobra Bargaon* by a conveyance dated the 17th of March, 1921, and for an injunction

restraining the 1st defendant from executing a decree, which he had obtained against the second defendant, by sale of that property.

The plaint alleges that on the 10th of February, 1921, the defendant No. 2 entered into an agreement for sale of this property to the plaintiff and that the conveyance was executed on the 17th of March. The property had been attached before judgment in a suit for money brought by the first defendant against the second defendant. The claim by the plaintiff had been decided against him in the Court executing that decree; and, therefore, this suit was brought. The second defendant in her written statement supported the plaint, admitting receipt of Rs. 200 at the time of the agreement for sale and of the balance at the execution of the deed. The defence of the first defendant was that the conveyance was fraudulent and collusive; that the plaintiff was the *benamidar* of defendant No. 2; and that no consideration passed.

Both the Courts below have dismissed the suit. The learned District Judge deals first with the passing of consideration and while he holds that out of the total sum of Rs. 1,200 Rs. 552 had been paid to one of the creditors of defendant No. 2, the evidence of the payment of the balance was only that of the *Patiwari* of the defendant No. 2 and, in his opinion, there was no proof of the passing of full consideration. The learned Judge then went on to deal with the question of fraud and collusion and, with reference to the relevant dates in the suit, namely, the dates of summons on defendant No. 2, of the order of attachment, of the appearance of defendant No. 2 and of the agreement for sale and of the attachment and of the conveyance, he concluded that the defendant No. 2 knew of the suit when she entered into the agreement for sale; that the plaintiff was also aware of the suit and of the attachment; and that the transaction itself was fraudulent and collusive within the meaning of s. 53 of the Transfer of Property Act, apparently on the ground that only a portion of the consideration was used for the payment of debts and the debtor received a substantial sum in cash. With regard to possession the learned District Judge agreed on the evidence with the finding of the Subordinate Judge that the plaintiff had not proved his actual possession over the property. But there seems to be no

definite finding on this point by the Subordinate Judge though he apparently did not consider the evidence of possession satisfactory.

There are two separate matters: the first is the effect of the attachment before judgment; and the second is the question of fraudulent transfer. Order XXXVIII, r. 10 provides that attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit. Now the agreement for sale was entered into before the attachment took place; and, consequently, that attachment could not affect the plaintiff's right to a conveyance under that agreement. The attachment before judgment was, therefore, immaterial in this case.

Nor does it seem to me that the defence of fraudulent transfer has been made out. This is not a pure question of fact. Nothing in s. 53 bars the right of any transferee in good faith and for consideration. There can be no doubt that in this case the transfer was for consideration and it was made at a time when a transfer could be made. Now its effect, no doubt, has been to delay or to defeat a creditor and, in such circumstances, the transfer may be presumed to have been made with that intent and, therefore, to be voidable at the option of the creditor, if it was made gratuitously or for a grossly inadequate consideration. This was not a voluntary transfer and it was not suggested that a consideration of Rs. 1,200 was insufficient. It is found that almost half of the sum was actually paid to one of the creditors and the vendor in her written statement admits receipt of the balance. While the learned District Judge holds that the plaintiff had failed to prove passing of full consideration, he also finds that only a portion of the consideration was used for payment of debts and the debtor received a substantial sum in cash. It does not seem that these two findings are strictly consistent with each other. It is no part of the duty of the purchaser to see what is done with the purchase money; and, even if the full consideration was not paid, this would not, in my opinion, be a ground for holding that the transaction was fraudulent. The applicability of s. 53 has not, in my opinion, been shown; and, as neither that section nor attachment before judgment was available as a defence to this suit, it seems to me that there ought to have been a decree.

I would, therefore, allow this appeal and decree the plaintiff's suit with costs throughout.

Wort, J.—I agree.

B. K. P.

Appeal allowed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 80 OF 1926.

May 12, 1927.

Present:—Mr. Justice Pratt and Mr. Justice Otter.

MAUNG MON—DEFENDANT—APPELLANT
versus

MA KIN OH AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Vendor and purchaser—Oral evidence to show that a sum of money in addition to sale price was agreed to be paid, admissibility of—Suit for possession by purchaser—Purchaser, whether entitled to possession without paying consideration—Property, when passes.

A purchaser sued his vendor for possession of the properties sold. The latter pleaded that the plaintiff had agreed to pay him a sum of money in addition to that fixed as the sale price as a preliminary to the execution of the conveyance, and that the amount paid by the plaintiff at the time of the execution of the deed was this additional amount and not part of the price. The plaintiff admitted non-payment of part of the consideration. There was no recital of receipt of consideration in the sale deed:

Held, (1) that it was open to the defendant to adduce oral evidence to substantiate his plea; [p. 359, col. 1.]

(2) that the plaintiff could be given a decree for possession only on condition of payment of the whole of the consideration remaining due to the defendant. [p. 359, col. 2.]

There is no invariable rule that mere registration of an instrument without reference to other circumstances operates to transfer the property; where a transfer is intended to be effected only in the event of a certain condition being fulfilled and, that condition not being fulfilled, effect is not given to the intention to transfer, no property passes. [*ibid.*]

Mr. Aung Thin, for the Appellant.

Mr. R. K. Banerjee, for the Respondents.

JUDGMENT.—Ma Kin O on her own behalf and as guardian *ad litem* of her minor son Maung Kyaw Zan sued to evict Maung Mon from a piece of paddy land purchased from him by a registered deed (Ex. A in Civil Regular Suit No. 8 of 1926 of the Township Court, Myittha) and for mesne profits.

The suit was originally instituted in the Township Court, but the Judge, after

framing issues, hearing evidence in full, and the arguments of the Pleaders, decided that he had no jurisdiction and returned the plaint for presentation to the proper Court.

The plaint was accordingly presented to the District Court.

By consent the Judge of that Court, decided the case on the issues framed and evidence recorded by the Township Court, after hearing the arguments of the Advocates. The evidence was not transferred to the record of the District Court as it ought to have been.

Plaintiffs' case as disclosed in evidence was somewhat different to that set forth in the plaint. In the plaint it was stated that the land had been purchased for Rs. 480 as set out in the deed of sale.

In the written statement defendant admitted execution of the deed of sale, but alleged that he refused to register it, because the consideration was not paid.

In evidence plaintiff Ma Kin O admitted that she had only paid Rs. 300 out of the Rs. 480 specified in the deed of sale and expressed her willingness to pay the balance of Rs. 180.

She also admitted that she actually only bought from defendant two-thirds of the land as alleged by him in his written statement. The one-third was already in possession of plaintiff and is not in dispute.

The two-thirds in question had been bought by defendant at an auction for Rs. 480.

Defendant's whole case was consequently not disclosed till U Mon himself gave evidence as first witness cited by plaintiff.

His case briefly was that he agreed to sell the land to plaintiffs for Rs. 480 on condition that they paid the interest on the purchase money paid by him at the auction for 16 months at 4 per cent. per mensem, which approximately amounted to Rs. 300.

Plaintiff agreed to do so and paid Rs. 300 on account of interest on the price originally paid by defendant, and defendant gave her the conveyance for Rs. 480 the same day.

Plaintiff agreed to pay the purchase money Rs. 480 at the time of registration; but as she failed to do so, defendant refused to register the sale deed.

The document was ultimately registered by order of the Registrar under s. 75 of the Registration Act.

The District Court found that, as defend.

ant had not mentioned in the sale-deed that Rs. 300 had been paid as interest on the previous purchase money, evidence of the agreement to that effect was inadmissible under s. 92 of the Evidence Act.

It held that by virtue of the sale-deed plaintiff became legal owner of the land and was entitled to eject defendant and to a decree for mesne profits.

It is difficult to follow the reasoning of the learned Judge of the District Court.

The document was silent as to any payment of Rs. 300 as purchase money or otherwise.

There was no recital of receipt of consideration.

There was, therefore, no reason why defendant should not prove that there was an agreement that plaintiff should pay him Rs. 300, on account of interest on the money originally paid by him, as a preliminary to be given a conveyance for Rs. 480.

Defendant was also equally entitled to prove an agreement that the sale should not be completed by registration until the purchase money had been paid and that non-payment was his reason for refusal to register.

The lower Court seems to have forgotten the 2nd and 3rd provisos to s. 92. Defendant was entitled to prove failure of consideration. This point is not disputed. Plaintiff admitted failure to the extent of Rs. 180 and defendant alleged total failure. The main question for decision is, therefore, whether the Rs. 300 paid on the day the conveyance was executed was part of the Rs. 480 specified as consideration in the deed of sale or was a preliminary payment on account of interest as alleged by defendant, made as a condition of granting the conveyance for a further sum of Rs. 480.

We have no hesitation in holding on the evidence that defendant has established his allegation that Rs. 300 was a preliminary payment and that no part of the consideration specified in the sale-deed has been paid.

It is, however, argued that, even if it be conceded that the purchase money has not been paid, nevertheless the transfer has been completed by registration, the title to the property is with plaintiff and she is still entitled to a decree as prayed.

The authorities cited on behalf of plaintiff do not, however, support the contention that she is under the circumstances entitled

to evict defendant unconditionally and to recover mesne profits.

In *Ponnayya Goundan v. Muttu Goundan* (1), it was undoubtedly held that registration constitutes a sufficient delivery to pass the interest in the land sold.

That was a case where earnest money had been paid. But the important point is that plaintiff was merely given a decree for specific performance on payment of the balance of the purchase money.

In *Bajinath Singh v. Paltu* (2), it was held that in a sale of immoveable property non-payment of the purchase money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser can, notwithstanding such non-payment, maintain a suit for possession.

In that case similarly a decree was given for delivery of the property on payment of the purchase money.

Assuming, therefore, for the purposes of the argument that the effect of registration of the sale-deed was to pass the title in the property to plaintiff, she would only be entitled to obtain possession of the suit property on payment of the purchase money agreed upon, Rs. 480.

It should, however, be observed that there is authority for the proposition that where a transfer is intended to be effected only in the event of a certain condition being fulfilled and, that condition not being fulfilled, effect is not given to the intention to transfer, no property passes.

It cannot be laid down as an invariable rule that mere registration of an instrument without reference to other circumstances operates to transfer the property; *vide* the Madras case of *Ramalinga Mudali v. Ayyadurai Nainar* (3).

The Advocate for plaintiff expresses his willingness to pay Rs. 480, if we find against him on the facts, and the Advocate for defendant admits that plaintiff is entitled to possession on payment of Rs. 480.

The decree of the District Court will, therefore, be set aside and plaintiff will be given a decree for possession on payment of Rs. 480 within one month of the date of the decree.

Plaintiff to pay the costs in both Courts.

If plaintiff fails to pay the purchase money within the specified period the suit

(1) 17 M. 146; 6 Ind. Dec. (N. S.) 100.

(2) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.

(3) 28 M. 124; 14 M. L. J. 493.

will stand dismissed with costs in both Courts.

A. N. A.

Suit dismissed.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 1 OF 1927.

September 20, 1927.

Present:—Mr. Justice Hasan and
Mr. Justice Misra.

MATHURA—DEFENDANT—APPELLANT
versus

HIS HIGHNESS Maharana SIR UDEY
BHAN SINGH—PLAINTIFF AND ANOTHER—
DEFENDANT—RESPONDENTS.

Landlord and tenant—Abadi—Sale of house by tenant—Absence of sale-deed—Landlord, whether entitled to invoke doctrine of part-performance—Transfer amounting to abandonment—Landlord's right to re-enter—Duty to pay sale price to tenant.

A tenant occupying a house in a village abadi sold his house without the consent of the proprietor. He received part of the consideration, and put his transferee in possession but no sale-deed was executed. In a suit by the proprietor for possession of the house together with the site thereof:

Held, (1) that the plaintiff was not entitled to invoke the doctrine of part performance as he was not privy to the transaction on which the estoppel rested; [p. 361, col 2]

(2) that the transfer amounted to an abandonment on the part of the tenant, which entitled the plaintiff to enter into possession; [*ibid.*]

(3) that the plaintiff must take the abandonment with all its incidents, one of the incidents being the payment of the sale price to the transferor. [p. 362, col. 1.]

Azmat-un-nissa v. Ganesh Parshad (1) and *Mahabir Parshad v. Uman Shankar* (2), followed.

Second appeal from a decree of the Subordinate Judge, Rae Bareilly, dated the 22nd September, 1926, reversing that of the Munsif, Rae Bareilly, dated the 3rd June, 1926.

The appeal came on for hearing before Misra, J., who made the following Order of Reference to a Bench.

ORDER.—This is an appeal arising out of a suit brought by the Maharana of Dholpore for ejectment of the defendants from house No. 180 situate in village Bainti, District Rae Bareilly, of which he is the landlord. The suit was brought on the allegations that defendant No. 1 Mathura, was his *riyaya* (tenant) occupying house No. 180, in the *abadi* of the said village; that he sold the house to defendant No. 2, Parai Din, without the consent of the plaintiff; and that the sale

was not good because of a custom prevalent in the village by virtue of which a tenant could not sell his house without the permission of the landlord.

Defendant No. 1 contended that he had not sold the house but had only temporarily given it to defendant No. 2 for occupation on rent.

Defendant No. 2, however, asserted that the house had actually been sold to him for Rs. 112-8, out of which he had paid Rs. 62-8 once previously and the remaining amount of Rs. 50 subsequently on the day when he had gone to occupy the house. He, however, alleged that no sale-deed had been executed. He denied the custom alleged by the plaintiff.

The three main contentions, therefore, for trial were whether the house had actually been sold by defendant No. 1 to defendant No. 2; whether the sale price, Rs. 112-8 had been paid in full; and whether the custom prohibiting tenants to sell their houses had been in existence in the village.

The learned Munsif of Rae Bareilly, who tried the suit, held that defendant No. 1's story that he had let out his house on rent to defendant No. 2 was untrue; that the house had actually been sold to defendant No. 2 for Rs. 112-8 and that the custom alleged by the plaintiff had been established. He also found that although there was a contract for sale yet because there was no sale-deed executed no title passed to defendant No. 2 and there was no completed sale, and thus no cause of action accrued to the plaintiff. On this view of the case he dismissed the plaintiff's suit. On appeal the learned Subordinate Judge of Rae Bareilly agreed with the findings of the learned Munsif on the question of custom and also on the question of the contract for sale. He, however, did not agree with the view taken by the learned Munsif with regard to the cause of action. He was of opinion that because defendant No. 2 had been put in possession by defendant No. 1 under a contract for sale and also because a portion of the price had been paid to defendant No. 1, that was enough to constitute a sale which could give the plaintiff a cause of action. Being of this opinion he allowed the appeal and decreed the plaintiff's claim.

In second appeal on behalf of the defendant No. 1 it is contended before me that the view of law taken by the learned

Subordinate Judge is erroneous and that under s. 54 of the Transfer of Property Act no sale could be completed without the execution of a registered deed. It was further contended that the receipt (Ex. B-1) was inadmissible in evidence to prove the contract for sale relating to the house.

The point of law involved in this appeal is an important one which is likely to affect a number of cases arising in Oudh out of similar circumstances. I am, therefore, of opinion that this is a fit case for decision by a Bench of two Judges of this Court. I, therefore, refer it to a Bench under s. 14 of Act IV of 1925.

Mr. D. K. Seth, for the Appellant.

Mr. Radha Krishna, for Mr. Bisheshar Nath, for the Respondent.

JUDGMENT.—This is the appeal by Mathura, defendant No. 1, from the decree of the Subordinate Judge of Rae Bareilly, dated the 22nd of September, 1926, reversing the decree of the Munsif of the same place, dated the 3rd of June, 1926.

The plaintiff is the proprietor of the village Bainti, Pargana Kumhrawan, District Rae Bareilly. He claims possession of a house together with the site thereof, which formerly belonged to Mathura, defendant No. 1. The plaintiff's case is that Mathura sold the house to Paridin, defendant No. 2; that under the village custom the sale was invalid, Mathura having no right to transfer the house and that in the right of the proprietor of the site he is entitled to the possession of the house together with the land on which it stands. Mathura's defence was that he had made no sale but that he had transferred possession of the house in question to Paridin on an agreement of rent being paid by Paridin for the occupation of the house. Paridin admitted the sale.

The consideration for the sale is found by the Court below to be the sum of Rs. 112-8 and according to the lower Appellate Court Paridin has paid only Rs. 25 as part consideration of the sale. No sale-deed was executed and on that ground the trial Court dismissed the suit. On appeal the lower Appellate Court has come to the conclusion that the sale must be held valid in spite of the absence of a registered deed for that purpose on the ground that there has been part-performance in relation to that transaction, the vendee having paid a part of the

consideration and the vendor having delivered possession in pursuance thereof.

In appeal it is argued on behalf of the vendor that the view taken by the Court below as to the application of the doctrine of part-performance was erroneous. On the side of the respondent the argument in support of the decree of the Court below is that the findings of the Court below that Mathura has parted with the house altogether and that he has put Paridin in possession thereof and has received Rs. 25 towards the consideration of the transfer establish a case of abandonment by the tenant who had no other right in the house except that of occupation. This being so, it is argued that the plaintiff being the owner of the land on which the house stands is entitled to enter into possession.

We are of opinion that the appeal fails on the ground now urged on behalf of the respondent. The doctrine of part-performance is clearly one of equitable estoppel and the plaintiff-respondent not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale even in the absence of a registered deed to evidence it may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee but there the estoppel ends. The argument on the side of the respondent based on abandonment, it seems to us, must be accepted. The facts found by the Court below clearly establish that Mathura has transferred the possession of the house to Paridin for consideration and has thereby relinquished all his rights in the said house. That being so, the abandonment on the part of Mathura is complete and as the transfer which he has made is invalid both for the reason of there being no registered document to prove it and also for the reason that such a transfer is forbidden by the village custom the transferee acquires no rights under that transfer. His possession, therefore, is that of a trespasser and the owner of the land is entitled to eject him. This principle was considered by one of us in the case of *Azmat un-nissa v. Ganesh Parshad* (1) and was followed by a Bench of two Judges in the late Court of the Judicial Commissioner of Oudh in the case of *Mahabir*

(1) 83 Ind. Cas. 51; 28 O. C. 119; 10 O. & A. L. R. 1305; 11 O. L. J. 750; L. R. 6 A. (O.) 6; A. I. R. 1925 Oudh 262; 1 Q. W. N. 515.

Parshad v. Uman Shankar (2). We think that those cases were rightly decided.

There remains one matter to be considered in this case and that is the question of consideration for the transfer. The lower Appellate Court has found that the consideration was a sum of Rs. 112-8. It has further found that only Rs. 25 have been paid by the vendee to the vendor in part-payment of that consideration. We have held that this act of transfer amounts to the abandonment and that the abandonment gives to the plaintiff the right to enter into the possession of the subject-matter of the transfer. The plaintiff obviously, therefore, must take the abandonment with all its incidents, one of the incidents being the payment of Rs. 112-8 to Mathura, the transferor. The abandonment rests on its consideration for it. Without the consideration there was no abandonment. Out of this sum of money the vendor has already received Rs. 25 from the vendee. The vendor, therefore, is still entitled to the balance of Rs. 87-8 and the vendee is entitled to the refund of the Rs. 25 on the failure of the consideration which has now happened by the effect of our decree which compells him to deliver possession to the plaintiff.

We accordingly confirm the decree of the Court below but delete from it the condition allowing the vendee Paridin to remove the materials within two months and in lieu thereof we direct that the plaintiff shall deposit in Court a sum of Rs. 112-8 before he is allowed to enter into possession of the house. In the event of such deposit Mathura, the vendor, will be entitled to Rs. 87-8 and Paridin, the vendee, to Rs. 25 out of the same. This deposit should be made within one month from to-day. In the event of default the plaintiff's suit shall stand dismissed with costs in all the three Courts. But in the event of compliance with the direction as to the deposit the plaintiff will get his costs from Mathura, defendant No. 1, to the extent of one half and from Paridin, defendant No. 2, to the extent of the other half in both the Courts below. The parties will bear their own costs in this Court.

G. H. Decree accordingly.

A. N. A.

(2) 85 Ind. Cas. 527; 2 O. W. N. 22; 10 O. & A. L. R. 1310; L. R. 6 A. (O.) 39; 12 O. L. J. 258; A. I. R. 1925 Oudh 319; 28 O. C. 133.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 23 OF 1927.

November 2, 1927.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice Adami.

Musammat HIRA BIBI—APPELLANT

versus

LACHMI NARAYAN AND OTHERS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 109, 110—
Duty of High Court to determine whether point of law is substantial.*

In dealing with an application for leave to appeal to the Privy Council although it is no part of the duty of the High Court to prejudge the case on the merits, yet at the same time it is the duty of the High Court under the provisions of s. 110 of the Civil Procedure Code to determine where a point of law arises for discussion on appeal to His Majesty in Council whether there is any substance in that point. In order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty in Council. [p. 363, col. 1.]

Application for leave to appeal against the decision of Mr. Justice Das and Mr. Justice Kulwant Sahay passed in M. A. No. 245 of 1926.

Messrs. H. Imam and A. Prasad, for the Appellant.

Messrs. S. M. Mullick and S. N. Roy, for the Respondents.

JUDGMENT.

Miller, C. J.—The question for determination in this case is whether there is any substantial question of law for decision by their Lordships of the Privy Council if this application for leave to appeal should be granted.

The facts shortly stated are these:—The respondents obtained in the High Court a mortgage decree against six defendants including Hira Bibi. Hira Bibi and the other defendants appealed from the decision of the High Court to His Majesty in Council. Pending that appeal the appellants applied for a stay of execution of the decree of the High Court and a stay was granted on certain terms. The appellants provided a security bond jointly which contained the following provision:—"We, therefore, do declare and give out in writing that if the Privy Council Appeal No. 57 of 1921 be decided against us (the executants Nos. 1 to 6) and the decree holders take out the execution of the decree and the entire decretal amount be not recovered by them from the value of the mortgaged property, in that case the decree holders shall be entitled to recover the balance of the

decretal amount to the extent of Rs. 35,000 from the properties specified in this security bond." A second bond for an amount of Rs. 10,000 was subsequently executed containing similar terms.

The result of the appeal to the Privy Council was that the appeal on behalf of five out of the six executants of the bond failed but the appeal on behalf of Hira Bibi succeeded on the ground that her signature had not been properly attested. The suit was accordingly dismissed as against her but the decision was affirmed as against the other five executants. In these circumstances execution proceeded against the mortgaged property which proved insufficient. Thereupon the decree-holders sought to take out execution against the security provided by the two bonds already referred to. The defendants, the judgment-debtors, contended that as the suit had failed against one of the executants, therefore, the security bond was no longer available. Alternatively, as I understand, it was urged that at all events that proportion of the security bond which represented the proportionate interest of Hira Bibi should be freed from execution.

Both the trial Court and this Court on appeal decided against the contention of the judgment-debtors and held that the security bond was available for the unrecovered balance of the mortgage.

From that decision Hira Bibi seeks to appeal to His Majesty in Council and the only question which arises is one of the interpretation of the security bond in suit. In dealing with an application of this sort I fully appreciate that it is no part of the duty of the Court to prejudge the case on the merits but at the same time it is our duty under the provisions of s. 110 of the Civil Procedure Code to determine where a point of law arises for discussion on appeal to His Majesty in Council whether there is any substance in that point. In order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty in Council. We must, therefore, make up our minds on that point. Speaking for myself I have not the slightest doubt that the decisions of the trial Court and of the High Court on appeal were right and that no other interpretation could be given to the words of this security bond. I must, therefore, hold that there is no substantial

question of law for determination by His Majesty in Council and dismiss the present application.

Another matter which induces me to take this course is that if we should grant leave, although of opinion that the appeal does not really involve a substantial question of law, then all the expense of preparing the case for appeal to His Majesty in Council will be incurred and if our opinion should be well founded the expense would be entirely wasted. I think in the circumstances, taking the view which we do, that it is much more desirable that we should dismiss this application and the appellant, if she is so advised, can apply without any considerable expense to His Majesty in Council for special leave to appeal. If it should turn out that the view which I have now expressed is not the correct view she would undoubtedly obtain special leave to appeal and no great harm would be done. In these circumstances it seems to me that this application must be dismissed with costs. Hearing-fee five gold mohurs.

Adami, J.—I agree.

B. K. P.

A. N. A.

Application dismissed.

ODDH CHIEF COURT.

FIRST CIVIL APPEAL No. 63 OF 1926.

March 22, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Reza.

SARDAR SINGH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

GANGA BAKHSH SINGH AND OTHERS.

—PLAINTIFFS—RESPONDENTS.

Oudh Civil Courts Act (XIII of 1879), s. 37—Suit for redemption—Limitation—Mortgage of 1795—Award recognising mortgage, whether gives fresh cause of action.

The plaintiff's predecessors-in-interest had executed a mortgage to the defendant's predecessors in 1795. There was nothing to show what the terms of the mortgage were. In 1858 there was some dispute between the parties, the matter was referred to arbitration and an award was made by which the defendant's predecessors were held entitled to remain in possession until the amount due to them under the mortgage-bond was paid. In a suit for redemption by the plaintiff:

Held, (1) that the claim to redeem the mortgage of 1795 was barred under s. 37 of Act XIII of 1879 as there was nothing to show that there was any term in the instrument of mortgage and that such term had not expired before the 13th February, 1856; [p. 365, col. 2].

(2) that the award did not amount to a fresh mortgage and did not give a fresh cause of action. [*ibid.*]

First appeal against a decree of the Additional Subordinate Judge, Sultanpur, dated the 25th of January, 1926

Messrs. A. P. Sen and H. K. Ghosh, for the Appellants.

Messrs. Bisheshwar Nath Srivastava and Bishambhar Nath Srivastava, for the Respondent.

JUDGMENT.—This is a defendants' appeal against a decree allowing redemption of a 3 annas 6 pies share in the village of Sarmai in the Sultanpur District.

The history of the case is a long one. It appears that at some time about 1795 A. D. some person, whose name is unknown, mortgaged with possession to another person, whose name is unknown, a 3 annas 6 pies share in the village of Sarmai. There is nothing to show to whom the rights of the mortgagor and the mortgagee descended until the year 1856, when it is admitted that a certain Gajadhar Singh as representative-in-interest of the mortgagee was in possession of the 3 annas 6 pies share in question, the mortgagor's rights being then held by a certain Ajrael Singh, who was the representative-in-interest of the mortgagor. In 1856 during the period of anarchy, when there was no Government of any kind in the Sultanpur District, Ajrael Singh dispossessed Gajadhar Singh and obtained possession of the property; and we have it that in 1858 Gajadhar Singh and Ajrael Singh referred their claims to possession to the decision of certain arbitrators who made an award (Ex. 5) on the 5th of January, 1858. It was alleged by Ajrael Singh in subsequent proceedings that on the 22nd of February, 1858, Gajadhar Singh executed an acquittance under which he renounced all his rights to the mortgaged property which remained with Ajrael Singh. During the First Regular Settlement, Gajadhar Singh instituted a claim in respect of this 3 annas 6 pies share against Ajrael Singh. The claim was brought in the Settlement Courts, the plaintiff being Ex. 8. His claim was dismissed by the Assistant Settlement Officer in Ex. 10 on the 29th of June, 1865. Gajadhar Singh appealed to the Commissioner, who on the 25th of August, 1865, by Ex. 11 allowed his claim and placed him in possession of the 3 annas 6 pies share in question as mortgagee. In that Regular Settlement, however, his name

was recorded not as mortgagee but as proprietor, and the name of himself and the names of his successors in interest have been recorded as proprietors ever since. The present suit has been instituted by a young man called Ganga Bakhsh Singh, who has established that he is the representative-in-interest of Ajrael Singh. He has sold 6/7ths of his claim to the second plaintiff Bhabhut Singh, who does not appear to have any connection with the family. The claim has been brought against the successors-in-interest of Gajadhar Singh and is a claim for redemption of the property. It has been decreed by the trial Court.

In order to understand the questions for decision in this appeal it is necessary to consider carefully the exact nature of some of the former proceedings. The task of the Courts has been rendered difficult in this respect owing to the fact that the evidence of these proceedings is contained almost entirely in certified copies of documents, many of which were procured a number of years ago. These certified copies, on the face of them, are inaccurate in many places, the copyist having clearly inserted wrong words to an extent which frequently turns a passage into a meaningless collection of words. But we have sufficient materials before us to arrive at a reasonable construction on every thing of importance. The first document that we shall consider is the plaint (Ex. 8) which was presented by Gajadhar Singh to the Assistant Settlement Officer. In this plaint he states distinctly that in the year 1265 *Fasli* (1857-58) Ajrael Singh with the assistance of a certain *taluqdar* had dispossessed him (Gajadhar Singh) from the possession of the 3 annas 6 pies share, which he held as mortgagee, without redeeming the mortgage; and he asks that possession should be awarded to him as it was held in times gone by. We can only construe this plaint as showing that Gajadhar Singh was suing on the basis of the mortgage which was executed about 1795 A. D. In his plaint he makes reference to the award (Ex. 5) of 8th of January, 1858, but only as evidence of the truth of his claim. He in no way bases his claim upon the award. The facts, as subsequently found were that although the deed of mortgage of 1795 was in existence on the 8th of January, 1858, and was shown to the arbitrators, the deed had afterwards passed out of the possession of Gajadhar Singh, and he, therefore, relied

upon the award (Ex. 5) in order to prove that such a deed had existed. We now come to the award (Ex. 5). We have checked the translation in the paper book and have noted the criticism of the learned Counsel for the respondents. We find that the following is the correct translation of the passages of importance:—

"Ajrael Singh and Gajadhar Singh of Sarmai have both come for arbitration in respect to their dispute as to the debt and the share of the village. Having heard what the parties have to say, having read their documents and heard their witnesses it is decided that the bond in favour of Gajadhar Singh is a completely genuine deed. Ajrael Singh must pay Rs. 1,840 6 6 and give 3,146 maunds 35 seers of grain to Gajadhar Singh. So long as the money and grain are not given he is not to have possession of the share....."

We now come to the decision of Mr. Gibson, the Assistant Settlement Officer (Ex. 10). Mr. Gibson found that the award (Ex. 5) and the acquittance (which is not before us) were both genuine documents. He found that in some manner or other Ajrael Singh had recovered possession of the share in 1857 and that then the arbitrators had made the award (Ex. 5), but that after that award was made Ajrael Singh had paid up the full amount which the arbitrators had ordered him to pay, that Gajadhar Singh had then given him a full acquittance, and that thus all liability on the mortgage having been wiped off, Ajrael Singh was entitled to retain possession as full proprietor. Upon these findings he dismissed the claim. Mr. Reid, the Commissioner, accepted the facts that a mortgage of 1795 had been executed and that Gajadhar Singh was holding possession of the 3 annas 6 pies share under the terms of that mortgage in the year 1857. He found that Ajrael Singh had then dispossessed Gajadhar Singh and that Gajadhar Singh had then called in the aid of the arbitrators who framed the award (Ex. 5). Mr. Reid found, however, that Ajrael Singh had not paid anything to Gajadhar Singh; and on our construction of his judgment he did not find that the deed of acquittance was a genuine document. Holding thus that Gajadhar Singh was entitled as a mortgagee and holding that the mortgage had not been satisfied he restored Gajadhar Singh to possession.

Now it would be observed that ordinarily

the claim of the present plaintiffs to redeem would have been a claim to redeem the mortgage of 1795; but such a claim was, on the face of it, a bad claim. Apart from anything else a claim to redeem that mortgage could only succeed under the provisions of s. 37, Act XIII of 1879, if it were shown that the instrument of mortgage had fixed a term within which the property comprised therein might be redeemed and such term had not expired before the 13th of February, 1856. It is impossible to say that the mortgage of 1795, which had disappeared before 1855, contained any such term, and thus the provisions of s. 37 effectively prevented a claim to redeem the mortgage of 1795. The plaintiffs-respondents clearly foresaw this difficulty for they have based their claim upon the award (Ex. 5), asserting that that award was in effect a novation which created a new mortgage. The learned Counsel for the respondents in support of this view has suggested to us that the arbitrators, who made that award, were not concerned only with a single transaction of mortgage, but that they were concerned with a variety of disputes between Gajadhar Singh and Ajrael Singh, only one of which was in respect of the mortgage of 1795, and that they arrived at an arrangement by which the 3 annas 6 pies share was to be placed in possession of Gajadhar Singh in satisfaction of the total amount due to him under these several heads with a fixed amount to be paid by Ajrael Singh for redemption of the property. Even if this were a correct construction of Ex. 5, it would be difficult, in our opinion, to consider that such a transaction created a mortgage, but it is unnecessary to discuss that question as, on our construction of Ex. 5, we do not consider that there was any general dispute before the arbitrators. As we read Ex. 5 we find that all that it says is that Gajadhar Singh, who had been in possession under the mortgage of 1795 had been put out of possession by Ajrael Singh, that Ajrael Singh had justified his action by denying the validity of the deed of 1795, and that the arbitrators, finding the deed of 1795 to be a genuine deed, had ordered Ajrael Singh to restore possession to Gajadhar Singh and had laid down that the amount due under the terms of the deed of 1795 for redemption of the property was Rs. 1,840 6-6 in cash and 3,146 maunds 35 seers of grain. We read the award as

creating nothing new. It was no more than a decision that Gajadhar Singh was entitled to hold possession of the property and that the amount due under the deed for its redemption by Ajrael Singh was the amount which we have already stated. In these circumstances the plaintiffs-respondents have no right to redeem.

The defendants hold the property as the successors in-interest of the original mortgagee under the deed of 1795, and as under the provisions of s. 37, Act XIII of 1879, no suit can be brought for the redemption of that mortgage, the plaintiffs' suit should have been dismissed. We accordingly allow this appeal and direct that the plaintiffs' suit shall stand dismissed. The plaintiffs will pay their own costs and those of the contesting defendants in both Courts.

A. N. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 37 OF 1927.

September 12, 1927.

Present:—Mr. Findlay, J. C.,
and Mr. Macnair, A. J. C.

RAMLAL LODHI—DEFENDANT—

APPLICANT

versus

INDRAJ SINGH, R. B.—PLAINTIFF—NON-
APPLICANT.

Civil Procedure Code (Act V of 1908), s. 110—"Substantial question of law," meaning of—Findings based on inferences, whether involve substantial question of law.

The term "substantial question of law" in s. 110 of the Civil Procedure Code merely means a question of substantial importance as between the parties to the case. It does not imply a substantial question of law of general importance. [p. 366, col. 2]

Raghunath Prasad Singh v. Deputy Commissioner of Partabgarh (2), followed.

A finding of fact does not necessarily involve a question of law merely because it is based to some extent on inferences drawn from other facts. [p. 368, col. 1.]

Application for leave to appeal to the Privy Council against the judgment of the Judicial Commissioner's Court, (Mr. Findlay, J. C., and Mr. Macnair, Offg. A. J. C.) in First Appeal No. 71 of 1925 dated the 1st April 1927, and reported as 102 Ind. Cas. 785.

Messrs. V. Bose and P. N. Rudra, for the Applicant.

Messrs. M. V. Abhyankar and G. R. Bapat, for the Non-Applicant.

ORDER.—The defendant-applicant Ramlal, has applied for leave to appeal to the Judicial Committee of the Privy Council against the judgment and decree of this Court, dated 1st April, 1927, in First Appeal No. 71 of 1925.*

The only question involved in the said judgment was as to whether the gift of *Mouza Ekodi* granted to Harpriabai was one for maintenance only, or was an absolute one. The judgment of this Court affirmed the judgment of the Court below and held that the said grant was merely a maintenance one to Harpriabai and her children. She admittedly had no heirs and, therefore, the village was held to have rightly reverted to the plaintiff-non-applicant. It is not disputed that the value of the subject-matter in dispute, both in the Court of first instance and of appeal to His Majesty in Council, is above Rs. 10,000. What the defendant-applicant, therefore, has to establish, before leave to appeal can be granted, is that a substantial question of law is involved in the case. There has been considerable difference of judicial opinion as to the meaning of the term "substantial question of law" in s. 110 of the Civil Procedure Code. One school of opinion has been to the effect that the said phrase implies a substantial question of law of general importance and not merely one of substantial importance as between the parties to the suit: cf. *Bishambhar Nath v. Muhammad Abaidullah* (1). This matter has now been set at rest by the decision of their Lordships of the Privy Council in *Raghunath Prasad Singh v. Deputy Commissioner of Partabgarh* (2). Their Lordships have therein definitely laid down that the term "substantial question of law" merely means such a question as between the parties in the case involved.

It remains, therefore, to decide whether, in the circumstances of the present case, such a substantial question of law can be said to be outstanding. The learned Counsel for the defendant-applicant has pointed out that the evidence, on which the Bench of this Court came to the conclusion it did, fell into five sections: (1)

(1) 79 Ind. Cas. 213; 46 A. 227; A. I. R. 1924 All. 559; L. R. 5 A. 158 Oiv.

(2) 102 Ind. Cas. 889; 2 Luck. 93; 31 O. W. N. 495; A. I. R. 1927 P. C. 110; 4 O. W. N. 515; (1927) M. W. N. 519; 26 L. W. 70 (P. C.).

*See 102 Ind. Cas. 785 [Ed.]

certain oral evidence; (2) a Will (Ex. D-9); (3) certain evidence of a practice in this *zemindari* of making provision for unmarried daughters and female relatives by giving them a grant of the profits of a village for maintenance; (4) a statement made by Harpriabai herself; and (5) certain settlement entries referred to in para. 10 of the judgment of this Court.

The oral evidence produced by the defendant and by the plaintiff alike was held by the Bench to be unconvincing. Mr. Bose has urged that the remaining evidence is almost wholly documentary, so that our decision depended upon the right construction of documents. He cites a remark of their Lordships of the Privy Council in *Fateh Chand v. Kishan Kunwar* (3):

"The right construction of documents is a question of law which Judges in second appeals are not, by ss. 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower Appellate Court, based upon such documents."

But the construction of the passage relied on in the Will is of a very minor importance in the present case and forms only one of the number of bases on which our findings stand; and it cannot, in our opinion, be maintained that there is any valid doubt regarding the meaning of *Musammât* Harpriabai's statements or of the correct interpretation of the settlement entries. We do not consider, then, that there is any question regarding the right construction of a document which is of substantial importance as between the parties to the suit.

It is next urged that as we have arrived at a decision on a question of fact—namely, whether the grant was one for *Musammât* Harpriabai's life only or in perpetuity—by drawing inferences from certain facts which we held to be proved, our findings involve a question of law. In support of this contention, the learned Counsel refers us to a number of rulings. In *Nafar Chandra Pal v. Shukur Sheikh* (4), where their Lordships of the Privy Council stated:—

"Questions of law and of fact are sometimes difficult to disentangle. The proper

legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact."

In *Surendra Nath Roy v. Dwarka Nath Chakrabutty* (5), Sanderson, C. J., remarked as follows:—

".....when one remembers that the question which it is desired to argue is this, whether upon certain given facts or data the tenancy is to be regarded as one at will or one of a permanent nature, it seems to me that this is a matter in which a substantial question of law is involved."

And in the same case, Mookerjee, J. made the following observations at page 129*—

"The only other question is, whether the decree appealed against, which is in affirmance of the decree of the Court immediately below, involves a substantial question of law. As already explained by the Chief Justice, the question in controversy relates to the nature of the tenancy held by the defendants under the plaintiffs; was that a permanent tenancy or a tenancy terminable by notice to quit? The District Judge has in effect accepted the findings of the Court of first instance, but he has drawn from those findings a conclusion precisely contrary to that drawn by the trial Court. The question thus is, what inference may legitimately be drawn from the facts found, and this clearly is a mixed question of fact and law, as appears from a long line of case reviewed in *Mahoram Sheikh Chaprasi v. Telamuddin Khan* (6) and *Rajah Makund Deb v. Gopi Nath Sahu* (7)."

In another case, the facts of which are somewhat apposite to those of the present case, viz., *Satgur Prasad v. Raj Kishore Lal* (8), the point involved was the nature and effect of the possession of property by a Hindu widow. There were two alternatives, viz., that her possession was only in lieu

(5) 35 Ind. Cas. 605; 44 C. 119 at p. 125; 24 C. L. J. 350, 21 C. W. N. 530.

(6) 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.

(7) 25 Ind. Cas. 286; 21 C. L. J. 45.

(8) 55 Ind. Cas. 486; 42 A. 152; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 2 U. P. L. R. (P. C.) 55; 22 Bom. L. R. 451; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

*Page of 44 C.—[Ed.]

(3) 16 Ind. Cas. 67; 34 A. 579 at p. 585; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 17 C. L. J. 1; 39 I. A. 247 (P. C.).

(4) 51 Ind. Cas. 760; 46 C. 189 at p. 195; 23 C. W. N. 345; 9 L. W. 552; 45 I. A. 183 (P. C.).

of maintenance, and the other that it was adverse possession. Such a question had to be decided by legal inferences drawn from documents. The opinions of the Courts, although concurrent, were held not to be findings of fact; and where wrong conclusions had been drawn from such inferences, their Lordships held it was their duty to interfere.

We are, however, unable to agree that whenever the decision of a certain fact is based to some extent on inferences from other facts it can be said that a substantial question of law is involved. The present defendant-applicant attempted to support the theory of absolute gift by oral evidence and his witnesses have been disbelieved. It was the applicant who urged that it could be inferred from the terms of a Will (Ex. D-9) that the grant was in perpetuity, and the conclusion to which we came was that no such inference could be drawn. We held that the admissions of *Musammāt Harpriabai* could not be reconciled with the position which the defendant is now taking up. We laid some stress on the entries made at the settlement and relied on evidence that there was a practice in this *zemindari* of giving to daughters and other female relatives grants of villages for maintenance: the existence of this practice, although it did not amount to anything like a custom within the technical meaning of the term, was a fact which supported the position of the plaintiff. Our finding is based, to a very large extent, on the clear admissions of *Musammāt Harpriabai*, applicant's predecessor in title. We do not consider that the correctness of our decision depends on the answer given to any substantial question of law.

For these reasons we are of opinion that the present appeal cannot be said to involve a substantial question of law as between the parties and we are unable, therefore, to certify the present case as one in which leave to appeal should be granted. The application is accordingly dismissed; the applicant must bear the non-applicant's costs. We fix Rs. 50 as Counsel's fees.

G. R. D.

A. N. A.

Application rejected.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 99
OF 1927.

August 18, 1927.

Present:—Justice Sir Benjamin Herbert
Heald, Kt.

U PO THEIN AND OTHERS—APPLICANTS
versus

O. A. O. K. R. M. FIRM—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, O. XLVII, r. 1—Specific Relief Act (I of 1877), s. 42—Suit for mere declaration by person who has not preferred claim or objection, whether maintainable—Review—Omission to argue point of law fully—No ground for review.

A person who has failed to make a claim or objection under O. XXI, r. 58 of the Civil Procedure Code is not entitled to sue for a mere declaration under O. XXI, r. 63 of the Code, where he is able to seek further relief. [p. 370, col. 1.]

Wamanrao Damodar v. Rustomji Edalji (1), Raghnath Mukund v. Sorosh K. R. Kama (2), Kristnam Sooraya v. Pathma Bee (3), Societa Coloniale Italiana v. Shwe Le (4), Chan Tat Thai v. Ma Lat (5) and Meyappa Chettiar v. Maung Po Thein (6), distinguished.

An application for review on a point of law cannot be maintained on the ground that that point of law was not fully argued. [p. 370, col. 2.]

Mr. U. Pu, for the Applicants.

JUDGMENT.—The facts of this case are set out in my judgment in Civil Second Appeal No. 495 of 1926 of this Court. In that judgment I said in effect that because the present applicants had not applied for removal of the attachment, when the property which they claimed was attached, they were not entitled to institute a suit under the provisions of O. XXI, r. 63 in respect of that property and that because they were not in possession of the property and would be entitled to possession of it or of part of it in case they established the claim which they desired to make, they were barred by the proviso to s. 42 of the Specific Relief Act from suing for a bare declaration of their title or interest in the property.

Applicants ask me to review my finding on that point. Their learned Advocate contends now, as he contended at the hearing of the appeal, that a suit lies under O. XXI, r. 63, even if there is no application for removal of the attachment and that the applicants' suit was brought under the provisions of that rule.

In support of his contentions he has now cited a number of cases, some of which were not cited at the hearing of the appeal.

The earliest of the cases cited is that of

Wamanrao Damodar v. Rustomji Edalji (1). In that case the mortgagee of certain properties obtained a decree for the sale of the properties. After the decree was made, but before the sale or proclamation of sale, the mortgagor's brothers claimed that the mortgaged properties were owned by them and the mortgagor jointly. The Court ordered that their claim should be notified in the proclamation for sale. The mortgagee then filed a suit against them for a declaration that his mortgagor was sole owner of the properties. The question arose whether such a suit lay under s. 42 of the Specific Relief Act and the Court held that it did lie. That case is clearly no authority for the contention that a suit such as the present lies either under O. XXI, r. 63 or under s. 42 of the Specific Relief Act, since there was in it no question of the application of O. XXI, r. 63, or the corresponding provisions of the earlier Code of Civil Procedure and it does not appear that the mortgagee was able to seek further relief than a mere declaration of title against the defendants, so that the proviso to s. 42 would be no bar to his suit under the Specific Relief Act.

In the case of *Raghunath Mukund v. Sarosh K. R. Kama* (2) a number of creditors obtained decrees against different persons, each of whom was alleged to be owner of a certain mill, and in execution of their decrees each of them attached the mill as belonging to his judgment-debtor. Raghunath applied for removal of one of the attachments but his application was dismissed. He then filed a suit under s. 283 (now O. XXI, r. 63) of the Code, not merely against the creditor whose attachment he had opposed, but against all the creditors who had attached the property. It was contended that under s. 283 he could sue only the creditor whose attachment he had opposed but it was held that the summary remedy given by s. 278 (now O. XXI, r. 58) of the Civil Procedure Code to a person whose property has been wrongfully attached is alternative with the more elaborate one by way of suit, which he if so minded may adopt, and that the object of the section is not to deprive a claimant of his remedy by suit but to give him, if he is diligent, a more speedy and summary remedy. This may be true, but if

the claimant prefers the remedy by suit his suit will be subject to the limitations imposed by law on such suits, and if it is a suit for a bare declaration it may be barred by the proviso to s. 42 of the Specific Relief Act.

The next case is that of *Kristnam Sooraya v. Pathma Bee* (3) where it was held that the proviso to s. 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under ss. 280, 281 or 282 (now O. XXI, rr. 60, 61, 62) of the Code the special right conferred by s. 283 (now O. XXI, r. 63) to sue for a declaration of his title so far as it is affected by the order which he seeks to impeach. It is clear that that case cannot be regarded as an authority on the questions which arise in the present case since in this case it is admitted that there was no order made under O. XXI, r. 60.

Applicants' learned Advocate has mentioned also the case of *Societa Coloniale Italiana v. Shwe Le* (4). In that case the decree-holders attached certain property and the defendants in the suit applied for removal of the attachment. While that application was pending, the decree-holders filed a suit for a declaration that the property belonged to their judgment-debtor.

The decision was in these words "It is admitted now that Chap. VI of the Specific Relief Act does not apply to the case . . . but I think there is no doubt that plaintiffs have a right of suit quite independent of s. 283, Civil Procedure Code. That a person who claims to be the owner of attached property has such a right was laid down in *Raghunath Mukund v. Sarosh K. R. Kama* (2) and there is no reason why the decree-holder should not have a like right of suit provided he has attached the property and his right to attach it has been disputed." The facts of that case differ from those of the present case in that in the present case there has been no application for removal of the attachment, and it may be mentioned that a Bench of this Court has already expressed dissent from the view taken in that case that independently of s. 42 of the Specific Relief Act and of the provisions of O. XXI, r. 63, a decree-holder who has attached property and whose right to attach has been disputed has a right to sue for a bare declaration of his judgment-debtor's title.

(1) 21 B. 701; 11 Ind. Dec. (N. S.) 471.

(2) 23 B. 266; 12 Ind. Dec. (N. S.) 176.

(3) 29 M. 151.

(4) 4 L. B. R. 252; 14 Bur. L. T. 135.

The decision in the case cited above was mentioned by a Single Judge of the Chief Court in the case of *Chan Tat Thai v. Ma Lat* (5) which was not officially reported but to which the applicants' learned Advocate has referred. In that case a decree-holder had attached certain property in execution of his decree but had subsequently withdrawn the attachment, and the learned Judge said that although he was not entitled to sue under O. XXI, r. 63, for a declaration of his judgment-debtor's title to the property, he was nevertheless entitled to sue for such a declaration under the Specific Relief Act. This may or may not be correct, but even if it is correct it is clear that if the plaintiff sues under the Specific Relief Act his suit will be subject to the limitations imposed by that Act and one of those limitations is contained in the proviso to s. 42.

The last case to which the learned Advocate has referred is the case of *Meyappa Chettiar v. Maung Po Thein* (6). In that case there was no attachment but the decree-holders sued for a declaration of their right to attach certain properties in execution of their decree and was held that such a suit did not come within the purview of s. 42 of the Specific Relief Act. It may be noted that that is the case referred to above, in which doubts were cast on the correctness of the decisions in the cases of *Societa Coloniale Italiana v. Shwe Le* (4) and of *Chan Tat Thai v. Ma Lat* (5). It is clearly no authority for the proposition that such a suit as the present falls within the provisions of O. XXI, r. 63, or that if it is a suit under s. 42 of the Specific Relief Act it would not be barred by the proviso to that section.

I am still of opinion that applicants were bound to make a claim or objection under O. XXI, r. 58 if they desired to sue for a bare declaration under O. XXI, r. 63, and that although the provisions of O. XXI, r. 63, would not debar them, in case they failed to make a claim or objection under O. XXI, r. 58, from suing for any relief to which they might be entitled, their suit, if it was a suit for a bare declaration, would be barred by the proviso to s. 42 of the Specific Relief Act if they were able to seek further relief than a mere declaration and omitted to do so. In the judgment which is under

review I held that they were entitled to claim further relief and as they omitted to do so, their suit was, in my opinion, rightly dismissed as being barred by that proviso.

The present application is in effect an application for the re-hearing of the appeal on a point of law on the ground that that point was not fully argued. I do not think that that is a good ground for review and as I am not satisfied that there was any ground for review within the meaning of O. XLVII, r. 1, I reject the application.

A. N. A.

Application rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1118 OF 1924.

May 5, 1927.

Present:—Mr. Justice Devadoss and
Mr. Justice Jackson.

GANAPATHI AYYAR AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

RANGASWAMI IYENGAR (DEAD) AND
OTHERS—DEFENDANTS NOS. 1 TO 3 AND LEGAL
REPRESENTATIVE OF DEFENDANT No. 1—
RESPONDENTS.

Hindu Law—Alienation—Suit to set aside alienation by guardian—Consideration binding to extent of half—Decree, form of.

In a suit by a minor to set aside an alienation made by his guardian where the amount of consideration which is found not binding upon the plaintiff is large, Courts will not be justified in allowing the vendees to retain a portion of the property purchased by them. In such cases the proper decree would be to give a decree to the plaintiff for possession of the property sold, and give a charge to the defendants for the amount found binding on the plaintiff.

Where out of the consideration of Rs. 1,500 and Rs. 800 for two sales, the binding portions were Rs. 912 and Rs. 407 respectively:

Held, that the sales should be set aside on payment by the plaintiff of the binding amounts.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Trichinopoly, in A. S. No. 36 of 1924 (A. S. No. 7 of 1923, District Court, Trichinopoly), preferred against that of the Court of the District Munsif, Turiayur, at Trichinopoly, in O. S. No. 768 of 1920 (O. S. No. 241 of 1918, District Munsif's Court, Srirangam).

FACTS.—The plaintiffs sued to set aside two alienations by their mother as their guardian executed the same day, by two documents, Exhibit I for Rs. 800 in favour

(5) 33 Ind. Cas. 124; 9 Bur. L. T. 89.

(6) 95 Ind. Cas. 98; 4 Rang. 22; A. I. R. 1926 Rang. 124.

of the 2nd defendant in the case, and Ex. II for Rs. 1,500 in favour of the 1st defendant.

The learned District Munsif held that out of the consideration only Rs. 397 and Rs. 745 respectively were for discharge of binding debts and, therefore, for necessary purposes and accordingly set aside the sales and gave the plaintiffs a decree for possession on payment of the said amounts.

On appeal, however, the learned Subordinate Judge held that having regard to the circumstance that both the sales were on the same date and there were necessary debts of the family to the extent of Rs. 1,319 made up of Rs. 407 partly utilised in respect of the alienations in favour of the 1st defendant, but with the consent of the defendants held that the sale Ex. II was entirely binding on the plaintiffs with a direction to defendants to pay Rs. 181, the balance, and also held that the sale in favour of the 1st defendant was not binding to any extent.

Accordingly in modification of the decree of the 1st defendant, plaintiffs were held entitled to the property dealt with by Ex. I and also to Rs. 181 from the alienee under Ex. II.

The plaintiffs preferred a second appeal.

Mr. T. V. Muthukrishna Iyer, for the Appellants.

Mr. A. Srirangachariar, for the Respondents.

JUDGMENT.—The only point in this second appeal is whether the 1st and 2nd defendants should be allowed to retain a portion of the property purchased by them or whether they should be allowed to have only a charge for the amounts found binding upon the plaintiffs. The District Munsif decreed possession of the plaintiff property and gave a charge to the defendants Nos. 1 and 2 for the amounts binding on the plaintiffs. The Subordinate Judge has modified the decree by allowing defendants Nos. 1 and 2 to retain a portion of the property purchased by them. It is found by the Subordinate Judge that out of the consideration of Rs. 1,500 for Ex. II only Rs. 912 was binding upon the plaintiffs, and out of the consideration of Rs. 800 for Ex. I only Rs. 407 was found binding upon the plaintiffs. In these circumstances, the question is whether the Court would be justified in giving defendants Nos. 1 and 2 any portion of the property purchased by them. When the consideration which is found binding upon the plaintiffs, is a little

more than half, it would not be right to allow the transaction to stand to any extent. We cannot lay down any hard and fast rule as to the form of the decree in cases of this kind. But where the amount of consideration which is found not binding upon the plaintiff is large, the Courts will not be justified in allowing the vendees to retain a portion of the property purchased by them. In such cases the proper decree would be to give a decree to the plaintiffs for possession of the property sold and give a charge to the defendants for the amount found binding on the plaintiffs. We, therefore, set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs here (one set) and the lower Appellate Court. The amounts found due by the Subordinate Judge will stand. The memorandum of objection is dismissed with costs.

V. N. V.

*Appeal allowed;
Cross-objections dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2460 OF 1923.

January 5, 1926.

Present :—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.

DEVEN MANDAL AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

DHURBA KUMAR MANDAL AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 11-A—
Execution of decree—Resistance to delivery of possession—Suit to recover possession—Limitation.*

A obtained a decree against B for possession and obtained symbolical possession against B in execution of his decree. When A wanted to take khas possession by removing certain huts he was resisted by C who claimed to be a tenant in his own right. The Executing Court rejected A's application for possession on the 28th February, 1918. A sued C for possession on the 10th December, 1919:

Held, that the suit was barred under Art. 11-A of Sch. I of the Limitation Act as it was not instituted within one year from the date of the order rejecting A's application for possession. [p. 372, col. 1.]

Appeal against the decree of the Subordinate Judge, Third Court of 24-Parganas, dated the 8th August, 1923, reversing that of the Munsif, Second Court, Baruipore, dated the 20th June, 1921.

Babu Ramgati Sarkar, for the Appellants.

Babus Biraj Mohan Mojumdar and Jotindra Nath Sanyal, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—The only point involved in this appeal is whether the suit is barred by limitation. The trial Court made a decree in favour of the plaintiffs. On appeal by the defendants that decree was reversed by the Subordinate Judge who held that the suit was barred by one year's rule of limitation under Art. 11-A of the Indian Limitation Act. What happened was this—the plaintiffs obtained a decree against third persons in a previous suit. In execution of that decree they obtained symbolical possession against the judgment debtors. They, however, wanted to remove certain huts which were on the land and to take *khas* possession. These huts were claimed by the defendants who resisted the plaintiffs in taking possession on the ground that they were on the land as tenants in their own right. The Executing Court rejected the plaintiffs' application for *khas* possession on the finding that the defendants were on the land in their own right. That order is dated the 28th of February, 1918. The present suit was brought on the 10th December, 1919, that is, more than one year after the order was passed. The suit is evidently barred by Art. 11-A of the Limitation Act.

The appeal must, therefore, be dismissed with costs.

Cuming, J.—I agree.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 538 OF 1924.

July 28, 1927.

Present :—Mr. Justice Sulaiman and Mr. Justice Banerji.

UMRAO SINGH—DEFENDANT—APPELLANT
versus

Musammam MOHAN KUNWAR AND

ANOTHER—PLAINTIFF AND DEFENDANT—

RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 4, cls. (1), (2), (3)—Applicability of Act to sale-deeds executed before Act came into force—Wajib-ul-arz—Contract of pre-emption for fixed period, effect of—Partition of mahal subsequent to wajib-ul-arz—Proprietor's right

to pre-emption, whether confined to each new mahal—Death of pre-emptor—Right of heir to continue suit.

Clauses (1), (2) and (3) of s. 4 of the Agra Pre-emption Act, 1922, are not applicable to a sale-deed executed before the coming into force of the Act. [p. 372, col. 2.]

Sarju Prasad v. Bhagwati Parsad (1), followed.

A contract for pre-emption for a fixed period of settlement would last during that period only and will not bind the representatives of the parties for all time to come. [p. 373, col. 2.]

Aulad Ali v. Ali Athar (2), distinguished.

Where a village which was a single *mahal* at the time of the preparation of the *wajib-ul-arz* is subsequently partitioned, the right of the proprietors to pre-emption under the *wajib-ul-arz* must, in the absence of evidence to the contrary, be confined to each of the *mahals* newly formed and the proprietors of one *mahal* cannot claim a right of pre-emption in respect of shares in other *mahals*. [p. 374, col. 2.]

The heir of a person entitled to pre-emption, who becomes a co-sharer by succession to the latter, is entitled to continue a suit for pre-emption instituted by the latter even though such heir was not a co-sharer when the sale-deed was executed or when the suit was filed. [*ibid.*]

Quære.—Whether a suit for pre-emption can be maintained by the heir of a deceased pre-emptor unless the heir himself has a preferential right as against the vendee. [p. 374, col. 1.]

First appeal from the decree of the Sub-Judge, Aligarh.

Mr. K. N. Laghate, for the Appellant.

Messrs. A. Sanyal and Peary Lal Banerji, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for pre-emption. A number of grounds are taken in appeal which I proceed to consider seriatim. The first point is that the Court below has erred in applying the provisions of the Agra Pre-emption Act. This contention is well-founded. The sale-deed was executed on the 23rd June, 1922, long before the new Act came into force. As held in the case of *Sarju Prasad v. Bhagwati Prasad* (1) the Agra Pre-emption Act came into force on the 17th February, 1923. Section 12, cls. (1), (2) and (3), relied upon by the Court below in its finding on issue No. 1, have, therefore, no application. The second ground of appeal challenges the finding as to the existence of custom and is intended to deny the preferential right of the present plaintiff, Musammam Mohan Kunwar. The third ground asserts that the entry in the *wajib-ul-arz* of 1872 was a record of contract which has ceased to have any binding effect after the expiry of that settlement.

(1) 88 Ind. Cas. 297; A. I. R. 1925 All. 542; 23 A. L. J. 373; L. R. 6 A. 337 Civ.

The evidence in support of the custom of pre-emption consists of entries in the *wajib-ul-araiz* of 1269 and 1281 *Faslis*. Under para. 22 of the first *wajib-ul-arz* an offer has first to be made to a near brother, and if he refuses to take it then to the *lambardar* of the other *thok*, and, if he refuses to take it, to anyone else. Under para. 18 of the second *wajib-ul-arz* the first offer has to be made to *jaddi* co-sharers, and if they refuse to take the property then to the proprietors of the village and if they also refuse to take it then to anyone else. Though there are slight differences in the two categories I do not think that these two records are contradictory. Under the first *wajib-ul-arz* it might not have been intended that a near brother would have the first right even though he was not a co-sharer. In any case there was nothing strange if subsequently the right of relations was limited and made conditional on their being co-sharers. I, therefore, think that the presumption of custom raised by the entry in the *wajib-ul-arz* of 1281 *Fasli* has not been rebutted by anything in the earlier *wajib-ul-arz*, and that a custom exists.

In this connexion I should like to dispose of the contention raised on behalf of the respondents, that even if the record were not one of custom it would, under the Full Bench case of *Aulad Ali v. Ali Athar* (2), bind the present parties. Even if we assume that the original parties to the contract of 1281 *Fasli* were dead, and their representatives were Sheobaran Singh the original plaintiff, and Bhup Singh, the vendor, the contract would not be subsisting after the expiry of the settlement. No doubt in the Full Bench case the agreement had provided that the executants can transfer the properties among themselves, that is, one executant can transfer it to the other and that in case of transfer to another person the other executant will acquire it by pre-emption, and yet the Full Bench held that the offer had to be made, not only to the executant, but to their representatives also. Even though Shah Nasiruddin, the vendor in that case, was himself a party to the contract, and the pre-emptor was a representative of the other party, the Bench have not laid any stress on this fact but have laid down that such a contract of pre-emption binds the parties and their representatives.

(2) 100 Ind. Cas. 683; A. I. R. 1927 All. 170; 25 A. L. J. 289; 49 A. 527 (F. B.).

No contention appears to have been at all advanced that on a true interpretation of the document in dispute in that case it was the intention to confine the right to the parties only. It was assumed that it did not. In cases where the contract is for a fixed period of settlement the ordinary intention is that the agreement would last during that period only, and I am unable to hold that the Full Bench case is any authority for the proposition that even when on a true interpretation of an agreement, the contract is limited to a fixed period of time it will bind the representatives of the parties for all time to come. The point considered by the Full Bench was the question of law whether the agreement bound the representatives, and not the interpretation of the deed of agreement. In the case of *Mohammad Jan v. Fazal-ud-din* (3) I had expressed the dissenting view that a contract of pre-emption was a contract *in personam* which would bind the parties thereto, and though in case of a breach by either of them it could be enforced against his representatives, neither party had any power to contract on behalf of his descendants that they should make an offer to the descendants of the other party before transferring the property to a stranger. In my opinion there was a difference between a contract entered into by the parties for themselves and one entered into on behalf of their descendants, as the breach in the latter case would be a breach committed not by any party himself but by his descendants. I had thought that such a contract could not bind an indefinite class of descendants, generation after generation, and to bind them for an indefinite length of time. It is that view which has been overruled by the Full Bench. Where, however, the intention of the parties that the contract should remain in force between themselves only, or only for a fixed period of time, is quite clear from the language of the document itself and the attending circumstances, it cannot be held that the contract nevertheless remains in force for all time to come and for all generations.

According to the admitted pedigree the original plaintiff Sheobaran Singh and the vendor Bhup Singh were the grandsons of Bhim Singh, whereas the vendee is descended not from Bhup Singh but from Bhim Singh's great-grandfather • Nazib

(3) 85 Ind. Cas. 482; 46 A. 514; 22 A. L. J. 400; A. I. R. 1924 All. 657; L. R. 5 A. 761 Civ.

Singh. It is, therefore, obvious that the plaintiff Sheobaran Singh could claim to be the *jaddi* (descended from a common ancestor) co-sharer with the vendor Bhup Singh within the meaning of para. 18 of the *wajib-ul-arz* of 1281 *Fasli*. It could never have been the intention that persons descended from a much remoter common ancestor are to be placed on the same footing as those from a nearer common ancestor. If such a view were accepted then in many cases persons of the same caste living in a village would all become of the same status if they could trace descent from some common ancestor however remote. I am, therefore, of opinion that Sheobaran Singh should be treated as a *jaddi* co-sharer with Bhup Singh as against the vendee who is descended from a much remoter ancestor.

The learned Vakil for the appellant contends that even if Sheobaran Singh had a preferential right against the vendee his widow Musammat Mohan Kunwar has not, because she is not a *jaddi* co-sharer with the vendor and that inasmuch as a successful plaintiff must have a subsisting right of preference till the time of the passing of the first Court's decree that suit cannot succeed. If the effect of the Full Bench ruling in the case of *Wajid Ali v. Saban* (4) is that the right to sue survives it would mean that the heir of a deceased plaintiff can continue the suit and obtain a decree on the strength of the right of his deceased predecessor and not necessarily on the strength of his or her own right. In this view it would be immaterial whether Musammat Mohan Kunwar has herself a preferential right as against the vendee. But the learned Vakil has invited our attention to the case of *Partap Singh v. Daulat* (5) where it was remarked that if the heir himself has no preferential right as against the vendee the suit could not succeed. The Judges who decided this last-mentioned case constituted the majority in the Full Bench. One is, therefore, constrained to hold that the two cases were distinguishable. The result would then be that the present case would be governed by the principle underlying the subsequent Division Bench case and not by that underlying the Full Bench case.

I am, however, relieved from expressing

(4) 3 Ind. Cas. 820; 31 A. 623; 6 A. L. J. 887; 6 M. L. T. 352.

(5) 22 Ind. Cas. 678; 36 A. 63; 12 A. L. J. 18.

any final opinion on this question because I think that even Musammat Mohan Kunwar comes in the second category of pre-emptors and the vendee does not.

The *wajib-ul-arz* of 1281 *Fasli* gives the second right to the proprietors of the village. When this *wajib-ul-arz* was prepared the village was a single *mahal*. It has subsequently been partitioned and co-sharers in one *mahal* have ceased to have any interest in the other *mahal*. No new *wajib-ul-arz* has been prepared, nor is there anything to show that at the time of the partition it was agreed that co-sharers in different *mahals* would, in spite of the partition, have a right of pre-emption in respect of the other *mahal*. The custom of pre-emption, no doubt, continues. But in the absence of any evidence to the contrary it must now be confined to each of the new *mahals* which have been formed, with the result that proprietors in one *mahal* cannot have any right of pre-emption as regards shares in the other *mahals*. The vendee, therefore, cannot claim to be on the same footing as Musammat Mohan Kunwar, who is a co-sharer in the very *mahal* in which the property sold is situate.

Sheobaran Singh died after the institution of the suit and before the first Court's decree. His widow, Musammat Mohan Kunwar, was brought on the record as the legal representative of the deceased. She became a co-sharer by succession to her deceased husband. Even though she was not a co-sharer at the time when the sale-deed was executed or when the suit was filed, she was entitled to continue the suit inasmuch as a right to sue survived. This point is settled by the view of the majority of the Full Bench case referred to above. The defendant-vendee is not a co-sharer in the *mahal* in which the property sold is situated. Musammat Mohan Kunwar is a co-sharer. She has thus even in her own right, preference over the vendee. The case of *Partap Singh v. Daulat* (5), even if it be assumed not to be in conflict with the Full Bench case, is, therefore, distinguishable.

The last two grounds deal with the question of consideration. The sale consideration was Rs. 6,690 out of which Rs. 450 and Rs. 1,047 were left in deposit with the vendee for payment to Sheobaran Singh, plaintiff. The vendee made payments after considerable delay, viz., of five months and two years, but he paid Rs. 38-11-11 more. It is obvious that the vendee cannot claim

credit for the excess sum paid. It was his duty to make the payments at once and, if he withheld payments he benefited by the use of the money in his hands and was himself liable for any extra interest that might accrue in the intervening period. The plaintiff is not bound to pay more than the true sale consideration mentioned in the sale-deed.

I would, therefore, dismiss the appeal with costs.

Banerji, J.—I agree in dismissing the appeal. It is clear that the Agra Pre-emption Act has no application as the sale-deed was executed on the 23rd June, 1922. The real question in the case is whether there is a custom of pre-emption and whether *Musammāt Mohan Kunwar* had a preferential right. I am of opinion that *prima facie* the *wajib ul arz* filed in the suit as evidence proves that there was a custom of pre-emption and nothing has been shown by the defendant to rebut the presumption raised by the *wajib-ul-arz*. It is unnecessary, in my opinion, to discuss the effect of the Full Bench case of *Aulad Ali v. Ali Athar* (2), as upon the finding of my learned brother with which I agree *Musammāt Mohan Kunwar* comes in the second category of the pre-emptors and the vendee does not. The result of that would be that *Musammāt Mohan Kunwar* would have a preferential right.

The last ground urged as to the claim put forward that the vendee had to pay Rs. 300 more which should be paid by the pre-emptor, has no force, as the pre-emptor cannot be asked to recoup the vendee because he had to pay interest on account of his own laches.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 16 AND 17 OF 1923.

February 11, 1927.

Present :—Justice Sir Kumaraswami Sastriar, Kt., and Mr. Justice Devadoss.

AREMALLA GURUNADHAM YOGI
AND ANOTHERS—PLAINTIFFS—APPELLANTS

versus

ARIMANDA RAGHAVAYYA (DIED)

AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Scheme

suit—Sanction obtained from Advocate-General suppressing prior refusal by Collector, effect of—Small temple in management of archakas—No proof of mismanagement or misappropriation—Scheme, whether necessary.

The mere fact that a suit is filed for a scheme on an *ex parte* sanction by the Advocate-General is not by itself a ground for a scheme being framed, [p. 376, col. 2.]

Where an application was made to the Collector for sanction to file a suit under s. 92, Civil Procedure Code and sanction was refused by the Collector but the plaintiffs without bringing this fact to the notice of the Advocate-General obtained an *ex parte* sanction:

Held, that this would not affect the right of the plaintiffs to sue though it might be taken into account in considering the *bona fides* of the petitioners. [p. 375, col. 2.]

A Court is not bound to frame a scheme for management where there is no proof of mismanagement or misappropriation by the persons managing the trust and it is not in the interests of the endowment that any scheme should be framed for its management. [p. 376, col. 2.]

Appeals against the decrees of the Court of the Subordinate Judge, Bapatla, in O. S. Nos. 69 and 70 of 1921.

Messrs. P. R. Ganapathi Aiyar and V. Krishna Mohan, for the Appellants.

Messrs. S. Varadachariar, S. Subramania Sastri and C. V. Subramania Aiyar, for the Respondents.

JUDGMENT.—These appeals arise out of two suits filed by two worshippers for a scheme for two temples.... An application was made to the Collector for sanction to file the suits but sanction to file the suit was refused by the Collector and the present plaintiffs without bringing this fact to the notice of the Advocate-General got *ex parte* sanction. As the sanction stands unrecorded (?) this would not affect the right of the plaintiffs to sue though it may be taken into consideration in considering the *bona fides* of the petitioners. The plaints were filed on the 19th July, 1921, in both the suits. They were adjourned from time to time for various reasons and finally on the 24th August, 1922, *i. e.*, more than a year after the suits were filed they came on for hearing. On that date it was adjourned to the next and on the 25th August, 1922, Exhibits were filed and the witnesses were examined. Then a compromise petition was filed and as the 2nd plaintiff on the one side and some of the defendants on the other side were absent, the case was adjourned to the 28th. On the 28th the only person who objected to the terms was the 2nd plaintiff and the Judge finding that one of the plaintiffs objected held that he

could not sanction the compromise although the other parties consented. He proceeded with the suit. The 2nd plaintiff's Vakil said he had no instruction to go on and the 2nd plaintiff did not examine any witnesses or proceed with the suit. The learned Judge upon the findings on record held that there was no ground for framing a scheme for these temples and he dismissed both the suits with costs.

Two grounds are taken in appeal. The first is that on the materials before the Court a scheme ought to have been framed and the second is that the Judge ought to have adjourned the case for the purpose of the 2nd plaintiff calling further evidence. As regards the adjournment we think that on the facts of this case the learned Subordinate Judge was right in refusing to adjourn the case any further. The parties ought to have been ready on the 25th with all their evidence; the case was one filed more than a year before the trial was taken up and the mere fact that a compromise was suggested and a short adjournment was asked for is no ground for not going on with the case if the compromise fell through. We cannot say that the Judge ought to have further adjourned the case to enable the parties to call their evidence. It is alleged that the Pleader for the 2nd plaintiff declined to proceed with the suit. No reason is, however, given as to why he declined to go on with the suit and there was no reason why if he refused, the plaintiff should not go on with any evidence he had, when the Judge refused to grant adjournment. The Vakil filed no affidavit. On this part of the case the question is, whether, having regard to the circumstances of this case, the Judge ought to have further adjourned a part heard case which was going on and which was only interrupted because the parties said they wanted to compromise. I do not think the facts in the affidavits show that there was any good ground for any further adjournment.

Turning to the merits, there is no ground shown for any scheme being framed. There is no mismanagement by the *archakas* which appears in the evidence. The evidence shows that the yield was about half a *putti* per acre. The *archakas* had not only to maintain themselves out of the income but they had to see that the *puja* of the temple was properly performed and

the *naivedyams* and offerings to the God presented daily. There is nothing in the evidence to show that the *archakas* are misappropriating the income and not performing the services of the temple. So far as the temple is concerned, it appears from the Income Register that the *archakas* have always been in possession of the lands and utilising the rents and profits for the services of the temple and for the *archaka* services which they performed. The Inam Service Register Ex. A, is dated 24th August, 1860. The statement of the then *archaka* is Ex. B. It is dated 1859 and shows that even in 1859 the *archakas* were in possession. There was no trustee of the temple and the lands were given for the performance of the *puja* and observing the daily offerings of food and light and other rites which have been going on in the same way and also for *sivarathiri*, *navarathiri* and *sankaranthi* festivals. There is nothing to show that the *puja* has not been performed by the *archakas* or that any reason exists for a scheme being framed for the purpose of taking the lands out of the possession of the *archakas* and vesting it in trustees. No malversation is proved and the record does not show that the *archakas* set up any title in themselves to deal with the property as their private property. Even in the lease-deeds which are filed they have described the property as *devadayam* property. As regards the 3 acres which are not covered by the main grant, they set up a title of their own, but, *prima facie* properties outside the *inam* grant would be private properties unless it is shown that they have been acquired with the help of the funds of the temple which is not the case that is proved now before us. The question shortly is, is there any necessity for any scheme? Has there been any mismanagement or misappropriation of the properties and would it be in the interests of the temple to have an elaborate scheme vesting the property in trustees? On the evidence the Subordinate Judge thought that there was no necessity for a scheme and we agree with him. Should the *archakas* in future do anything to the detriment of the temple or if they fail in their duty, it will be time for a proper suit being filed and a scheme being asked. We do not think the mere fact that a suit is filed for a scheme on an *ex parte* sanction by the Advocate-General is by itself a ground for a scheme being framed.

The appeals fail and are dismissed with costs.

The three miscellaneous petitions are also dismissed.

V. N. V. *Appeals and petitions dismissed.*

A. N. A.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1085 OF 1925.

May 25, 1927.

Present:—Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

BINDESHRI UPADHYA AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

SITAL UPADHYA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1903), Sch. I, Arts. 120, 126—Alienation by Hindu father—Possession not given to alienee—Suit to set aside alienation—Limitation.

Article 126 of Sch. I of the Limitation Act is not applicable to a suit by a Hindu to set aside his father's alienation of ancestral property where the alienee never gets possession of the property under the alienation. In such a case the right of the son amounts merely to obtaining a declaration that the deed is invalid and the suit will be governed by Art. 120.

Mr. A. P. Panday, for the Appellants.

Mr. Uma Shankar Bajpai, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs for a declaration that a certain mortgage-deed, executed on 22nd May, 1915; by their father, defendant No. 1, in favour of defendants Nos. 2 and 3 is invalid on the ground that their father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the Tenancy Act. Amongst other pleas the defendants took up the plea that the suit was barred by limitation. The trial Court applied Art. 126, Limitation Act, and found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge held that Art. 126, Limitation Act, was not applicable inasmuch as the plaintiffs were not asking for possession but only for a declaration. It has been explained to us that the plaintiffs could not ask for possession, inasmuch as, even if the deed in suit be set aside,

the defendants are in possession under previous mortgages.

The sole point argued before us in this appeal is that the lower Appellate Court was wrong in refusing to apply Art. 126. It is argued that Art. 126 will apply even though the father's alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical possession. We are unable to accept this proposition. It is sufficient, in our opinion, to refer to the decision of *Murajalli Hunia Goundan v. Ramaswami Chetti* (1). Article 126 is doubtless based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under s. 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit is s. 120, namely, six years. In this case six years having elapsed from the date of the alienation impugned, the suit was rightly held by the lower Appellate Court to be time-barred. For these reasons we dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

(1) 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 314 OF 1924.

March 10, 1927.

Present:—Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

YAHYA ALLY SAHEB AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF NELLORE—DEFENDANT—RESPONDENT.

Madras Irrigation Cess Act (VII of 1865), s. 1, proviso—'Engagement', meaning of—Grant of inam by Government—Increased cultivation, without use of more water—Government, whether entitled to levy water cess.

The general principles underlying the Privy Council decision in the *Utlam* case (1) are applicable also to the case of *inams*, and so long as more water is not taken by an *inamdar* than he was taking land at the time of the grant, he cannot be charged any water-cess for cultivating more land

with the same amount of water, unless the Government proves that the right of cultivation is limited as alleged by it in any particular case. [p. 384, col. 2.]

Engagements arising out of the Inam Settlements are engagements contemplated by the proviso to s. 1 of the Madras Irrigation Cess Act, 1865, just like the Permanent Settlement *sanads*. [*ibid*]

In case of grants of *inams* at least by the Government, the effect of the Inam Settlement is to vest the channels with their head sluices and branch and subsidiary channels, and the tanks or reservoirs, in the *inamdar* through whose *inams* the same respectively pass or in which they are situate. [p. 384, cols. 1 & 2.]

Per *Ramesam, J.*—Where a certain easement is granted there are two ways of increasing cultivation without enlarging the easement. One is by a more economical use of water. The second method is by improving the capacity of the tank and by converting water which might have otherwise overflowed. [p. 380, col. 2.]

Second appeal against the decree of the District Court, Nellore, dated the 14th March, 1923, in A.S. No. 232 of 1922, preferred against that of the Court of the Additional District Munsif, Nellore, dated the 10th September, 1921, in O.S. No. 1 of 1921.

Mr. S. Varadachariar, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.

Ramesam, J.—This second appeal arises out of a suit for a declaration that the defendant is not entitled to collect any water-rate, road-cess or other cesses in respect of any of the plaintiffs' lands in the village of Bhuj-Bhuj, Nellore Taluk, irrigated under Lingala Cheruvu and Patha Cheruvu.

The defendant, the Secretary of State for India in Council, is entitled to impose water-cess under Act VII of 1855 (the Madras Irrigation Cess Act) when certain conditions are fulfilled, but road-cess is levied by the District Board under the Local Boards Act of 1920 and not by the Secretary of State for India in Council. So far as the suit relates to the road-cess, the suit does not lie and must be dismissed except as to any increment in the road-cess consequent on the imposition of water-cess. But the second appeal was argued only in respect of water-cess.

The District Munsif gave a decree. On appeal the District Judge reversed the District Munsif's decision and dismissed the plaintiffs' suit. The plaintiffs have filed this second appeal.

The history of the village seems to be somewhat as follows: The village was granted originally as a personal grant

burdened with *jodi* and afterwards at about the time of the Permanent Settlement the *jodi* itself was remitted by Mr. Travers and the *inam* converted into a charitable *inam*; in the Inam Settlement of 1862, the *inam* was dealt with as a *dharmadayam inam* which was to be held free of quit-rent so long as a choultry called the *Kumundan* (vernacular corruption of Commandant) choultry situated on the road to Madras is maintained properly. In the Government Order dated 1st September, 1913, (Ex. IV) there are a number of papers which show its earlier history. The facts above set forth by me appear from the Collector's letter and it was then supposed that the assessment alone constituted the *inam*. These particulars also appear from the *inam* statement, a translation of which also appears in the same papers and show the date of the second grant by Mr. Travers to be 24th August, 1803. There is an Inam Register, which bears endorsements dated 1861 and 1864, appearing as an enclosure in the same Government order from which it appears that the total extent of the village entered was 523.04 acres. Its assessment was put down as Rs. 400. This apparently has not been made from actual calculation but is a rough estimate at a round figure. Column 10 shows that it should be held so long as the repairs are performed and the choultry is maintained. Column 11 shows that it was granted by Mr. Travers in 1803. This was in 1861. Sometime after, a portion was taken up for the trunk road and so a reduction was made. After the necessary reductions were made, the area of the village appears to have been 518.85 acres and the assessment Rs. 380-15-5. This was in 1864. Of the total area 94.49 acres appear as wet. The title deeds are not forthcoming. But as the lands changed hands, it appears that the appellants are not responsible for the non-production of the title-deeds. This is immaterial.

The contents of the *inam* title-deed correspond to the contents of the register and we may presume that the figures in the Inam Register also appeared in the title deed. The learned Government Pleader's contention is that the *inamdar* is not entitled to irrigate, free of water-cess, any excess beyond the 54.49 acres mentioned in the register. The Government order above referred to, namely, Ex. IV, says that the present extent of the village is 685.56

acres, and as it is not contended by the other party that the boundaries of the village have changed, the discrepancy between the old measurement of 1864 and the measurement of 1913 must be attributed to the use of an inaccurate unit and rough methods of survey in 1861. In the absence of any light thrown on the matter, it must be assumed that the inaccuracy has effected every part of the village uniformly. This is the principle adopted by their Lordships Benson and Miller, J.J., in A. S. Nos. 182, 183 and 184 of 1904 (*vide* judgment dated 1st May, 1908). On this supposition the 94.49 acres mentioned in the Inam Register would correspond to $\frac{94.49 \times 685.56}{518.85}$ or 124.85 acres

now. The descriptive memoir, Ex. I, shows 120 acres as wet. But even then the plaintiffs are irrigating more lands as wet lands. Exhibits VIII-a and IX-a show that for *Faslis* 1323 and 1324 the extent of wet land under Patha Cheruvu was 140.69 and 141.09 acres respectively. The question, therefore, still arises whether the excess beyond 124.85 acres (or beyond 94.49 if the method of proportionate increase is not adopted) is entitled to free irrigation. In appeal before the District Judge the Government gave up their contention with respect to the lands under Lingala Cheruvu and the second appeal has been argued only with reference to the lands under the Patha Cheruvu.

Now the contention of the Government Pleader is as I have already stated that the *inamdar* is entitled to irrigate free of water-cess only to the extent stated in the Inam Register or title-deed. In the first place, in some obvious directions this argument seems to be a little too much. For instance, there is no information available as to how much of the extent mentioned in the Inam Register was under Patha Cheruvu and how much under Lingala Cheruvu. Only the total is mentioned as 94.49 acres whether we take the old correct extent to be 125.84 acres or 94.49, there is an increase of wet cultivation in the village. In fact the total wet area in 1913 is shown as 224.48 acres though so much was not actually cultivated in 1913 and 1914. The increase must have been in respect of the lands under Lingala Cheruvu. This means that though there is an increase of cultivation and there are now more wet lands under Lingala

Cheruvu, the Government do not seek to impose water-cess in respect of these lands and the extent of wet lands as entered in the Inam Register is immaterial. This shows that the extent mentioned in the register or the deed is really not entitled to that extreme significance which is sought to be attached to it by the Government Pleader. His contention is that the *inam* lands must be distinguished from *zemindari* lands and that the principles laid down by the Privy Council in the *Utlam case* [*Kandukuri Balaswamy Prasadha Row v. Secretary of State for India*] (1) are not applicable to *inams*. *Zemindari* lands were permanently settled in 1802 under Regulation XXV of 1802, the Government reserving only the *peishcush* and *inams* were settled under the Inam Settlement in 1860 to 1864 and the claim of the Government over all the *inams* in the Presidency was fixed (known as quit-rent). Their Lordships of the Privy Council in the *Utlam case* (1) dealt also with *inams*. Though the *inams* in that case were *inams* within a *zemindari* they say that the *inamdar* can rely on the same engagement to the same extent as could a tenant of *zemindari* land authorised by the *zemindar* to use the water. There is no *zemindari* within which the suit *inam* is situated. Here the engagement was directly with the *inamdar*. In the matter of considering the effect of the engagement the same principles ought *prima facie* to apply to the engagements implied in the Inam Settlement as to the engagements implied in the Permanent Settlement. In every case we have merely to estimate the effect or the grant of easement and nothing turns upon either the time of the grant or the particular tenure under which the lands are held by the land-holder. It is said by the Government Pleader that in India the Government have by common law the right of assessing every parcel of land to Government revenue [*vide Boddupalli Jagannadham v. Secretary of State for India* (2)] and that when they exercised that right in 1862 by imposing certain amount of quit-rent on a certain area of wet land, they did not exercise their right over the remaining lands on the footing of wet land and if the *inamdar*

(1) 41 Ind. Cas. 98; 40 M. 886; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 O. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290; 44 I. A. 166 (P. C.).
(2) 27 M. 16.

has since been converting them into wet lands, imposition of water-cess is the only means of re-adjusting the rights of Government. But exactly the same argument will apply to *zemindari* lands. It may be that in 1802 only a certain area was irrigated as wet. Merely because the extent of wet land has increased the Government is not entitled to increase the *peishcush* or impose fresh water-rates so long as the easement granted has not been exceeded. A *zemindar* is entitled to make full use of the easement for the development of his *zemindari*. The possibility of improving cultivation of lands was, of course, considered at the time of the settlement. The policy was to encourage such improvement. See *Urlam case, Kandukurri Balasurya Prasadha Row v. Secretary of State for India* (1). The same considerations apply to *inams*. In the case of *inams* also quit-rent was fixed for them and was not intended to be altered. The Inam Settlement was as much a great Act of State as the Permanent Settlement and was so described by the Privy Council in *Secretary of State for India v. Maharaja of Bobbili* (3). To say that the *inamdars* cannot irrigate more than the extent of land mentioned in the register free of water-cess is really inconsistent with the concessions made by the Government in respect of the excess lands under Lingala Cheruvu. Apart from this, let us look at the facts of this particular case. The tank, Patha Cheruvu, in the suit village seems to have its main supply from a hill stream known as Udumalavagu which rises in Government land and until it comes to the suit land passes through Government land and, therefore, can be regarded as a Government source of irrigation. At a particular place it bifurcates and one of the branches goes to the suit village and is not intended for any other village. The District Judge in appeal finds that possibly the capacity of the tank must have been increased, otherwise a larger extent of land could not have been brought under cultivation. We are bound to accept this in second appeal as a finding of fact. But it is not suggested, nor has it been found, that the width of the branch leading to the suit village from the point of bifurca-

tion was increased or that any changes were made at the point of bifurcation so as to draw more water in this branch than before. So long as nothing has been done to increase the measure of the easement at the point of bifurcation, it seems to me that any improvement in the capacity of the tank is really immaterial. If the tank holds more water by its *bunds* being raised, now, it only means that water which would have flowed through the branch channel intended for the suit village, but which might have overflowed the tank because the *bunds* were not high enough to hold it, is now kept in the tank, and not that more water is drawn through the branch channel. So long as the easement is not enlarged, even if more water is conserved, it seems to me that the Government is not entitled to impose water-cess. The hill stream, the branch channel and the tank in this case correspond to the Vamsadhara river in the *Urlam case* (1). In the language of the Privy Council, "The Government could not complain if the amount of water taken were within this limit." Where a certain easement is granted there are two ways of increasing cultivation without enlarging the easement. One is by a more economical use of water. This was recognised in *Secretary of State for India v. Swami Nautheswarar* (4) and also in the *Secretary of State for India v. Ambalavana Pandarasannidhi* (5). The latter decision was confirmed by the Privy Council in *Ambalavana Pandara Sannadhi v. Secretary of State for India* (6) following the *Urlam* decision in *Kandukurri Balasurya Prasadha Row v. Secretary of State for India* (1). The second method is by improving the capacity of the tank and by converting water which might have otherwise overflowed. It is possible that this has happened in this case on the Judge's finding of fact. But as I have already observed this does not involve an extension of the easement and so long as the easement itself has not been enlarged, that is, so long as the water which might have flowed through the branch channel is not increased, apart from such variations as may be due to larger rainfall in one year and smaller rainfall in another year, the extension of irrigated lands does not jus-

(3) 54 Ind. Cas. 154; 43 M. 529; (1919) M. W. N. 775; 37 M. L. J. 724; 18 A. L. J. 1; 11 L. W. 204; 2 U. P. L. R. (P. C.) 33; 45 I. A. 302; 24 O. W. N. 446; 22 Bom. L. R. 498 (P. C.).

(4) 6 Ind. Cas. 199; 34 M. 21; 7 M. L. T. 407; 20 M. L. J. 766; (1910) M. W. N. 495

(5) 8 Ind. Cas. 357; 34 M. 366; 9 M. L. T. 47; (1911) 1 M. W. N. 119.

(6) 43 Ind. Cas. 114n; 40 M. 909.

tify the Government imposing water-cess. The learned Government Pleader relied on the decision in *Chidambara Rao v. Secretary of State for India* (7) which is cited also by the District Judge. In that decision at page 69* there is a remark: "It was the duty of the Inam Commissioner to ascertain and record in the title-deed, not the extent of the land which was actually under wet cultivation at the time of the Inam Settlement, but only [the extent to which the *inamdar* was entitled to supply of water free of charge." I do not know on what materials this sentence was based. With great deference to the eminent Judge who made this statement, I doubt if there is anything in the nature of the *inam* enquiry which justifies it. It was the duty of the Inam Commissioner to ascertain the assessment so that the quit-rent to the Government may be fixed, and for the purpose of ascertaining the assessment it may be necessary to enquire how much was wet and how much dry, and as to the wet lands irrigated with water from a Government source of irrigation, how much was cultivated with such water free of charge; but where the entry is very general, i. e., so much land wet and so much dry, I doubt if it had anything to do with the question of irrigation free of charge. Anyhow, the observations must be confined to the facts of the particular case. In that case it was a small *inam* situated in a village which was being irrigated by the Kistna anicut water and any increase of irrigation by an *inamdar* must necessarily deprive some other *ryotwari* holders or other *inamdars* of their accustomed supply of water and in that way enlarge the easement. In that case there can be no possible suggestion of increase in the extent of irrigated land not being followed by an increase in the easement. It was not the case of a tank which was the sole source of irrigation for one whole village or a branch channel irrigating one village. The water in the Kistna and Godavari anicuts is distributed to several villages through a system of channels under the control of the Government, and where any land-holder uses more water than was allotted to him by the Government he must necessarily trespass upon the rights of some other *inamdar* or land-holder. There being no possibility in that case of the

(7) 26 M. 66.

*Page of 26 M.—[Ed.]

easement solely granted for the *inam* being enlarged within the limits within which he could irrigate his lands to a larger or smaller extent as he likes, the observations of the learned Judges were justified on the facts. Anyhow we must consider that case, if it is intended to lay down anything, in the light of the decision in the *Urlam case* (1). I am unable to distinguish the second appeal before me, on principle, from the decision of the Privy Council. Following it I allow the appeal, reverse the decision of the District Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

Madhavan Nair, J.—The plaintiffs are the appellants. They are the *inamdars* of a whole *inam* village called Bhuj-Bhuj in Nellore Taluk. Originally the *inam* was a personal grant burdened with a *jodi*, but it was converted into Dharmadayam by Mr. Travers in 1803 by remitting the *jodi*. At the time of the Inam Settlement this *inam* was confirmed in the names of the ancestors of the plaintiffs and a title-deed was given to them. In the Register of *inams* the following entries appear as against this *inam*:

	acres	cents.
Dry	270	65
Wet	96	58
Garden	0	78
Poramboke	155	03

"This is followed by the statement....." The present income is less as the extent of the present wet cultivation is less.....The extent will be entered in the title-deed." The *Survey Register* shows large extent of wet waste land, which though wet was not actually cultivated at the time of the Settlement. The lands of this village were cultivated by the *inamdars* with water taken from a tank called Patha Cheruvu. The Tank Memoirs show an ayacut of 120 acres under this tank. Patha Cheruvu is fed by a stream flowing through the Government forest in Nellore Amancherla. The entire bed of the tank belongs to the Government, but its *bund* belongs to the *inamdars*. In *Fasli* 1323 the extent of wet cultivation carried on by the *inamdars* with water taken from the Government tank was 146 acres 96 cents, and in *Fasli* 1324, 141 acres 9 cents. This extent of wet cultivation being in excess over the extent mentioned as wet land in the Inam Register, viz., 96 acres 58 cents, the Government attempted to levy on the *inamdars*

water-rate for cultivating this extra area. This second appeal arises out of a suit instituted by the plaintiffs for a declaration that the defendant, i. e., the Government is not entitled to levy water-cess on the lands irrigated under Patha Oheruvu and for an injunction restraining the defendant from collecting water-rate for *Faslis* 1323 and 1324 and for subsequent *Faslis*. The contention of the defendant is that the plaintiffs are entitled to free irrigation only to the extent of 96 acres 58 cents. noted in the Inam Register and that for cultivating any land in excess of this area with water taken from the tank they are bound to pay water-rate.

On the main contention raised in the pleadings, the District Munsif found that the supply channel and the Patha Oheruvu tank, the sources of irrigation for this village, belong to Government, that the plaintiffs did not divert any water to the supply channel from the adjoining channel as was contended for by the defendant, that the capacity of the tank had not been in any way increased by the plaintiffs, that there was no evidence that more water was being taken by the plaintiffs from the tank and that the increased extent of cultivation was due to the thrifty use of water made by the plaintiffs. It was conceded in the course of arguments that the plaintiffs had somewhat raised the height of the *bund* of the tank, which they had a right to do as the *bund* belonged to them, and that probably due to the silted condition of a connected channel supplying water to the adjoining Nellore tank more water was flowing into the stream supplying Patha Oheruvu. It was also found by the District Munsif on the evidence of D. W. No. 1, the Tahsildar of Nellore, that "the water from Patha Oheruvu irrigates only the lands in Bhuj-Bhuj, Nellore, and is intended only for these lands." The learned District Judge agreed with the District Munsif in all his findings except the one regarding the capacity of the tank. On this he found that its capacity had increased and that now more water was stored in it. Even making allowance for the economic use of water and the improvement in the plug of the sluice which prevented wastage, the District Judge was of opinion that without increasing the capacity of the tank the large extent of land in question could not have been brought under cultivation. But it may be mentioned—and this fact has not

been disputed—that the plaintiffs have not interfered in any way either with the supply channel or with the tank except by increasing the height of its *bund* by a few feet.

In the circumstances found by him, the District Munsif held that the principle of the *Urlam* decision in *Kandukuri Balasurya Prasadha Row v. Secretary of State for India* (1) applied to the facts of this case and that the Government is not, therefore, entitled to levy water-rate for the excess area cultivated by the plaintiffs. The District Judge held that the decision in the *Urlam* case [*Kandukuri Balasurya Prasadha Row v. Secretary of State for India*] (1) is inapplicable and that this case is governed by the decisions in *Chidambara Rao v. Secretary of State for India* (7) and *Secretary of State for India v. Perarulala Ramanuja Jeer Swamigal* (8) following which he upheld the contentions of the Government.

The question for our consideration is whether, in the circumstances found by the lower Court, the Government is entitled to levy water-rate for the excess area of land (*viz.*, the area over and above 96 acres 58 cents.) cultivated by the plaintiffs with water taken from the Patha Oheruvu. I may state at once that, in my opinion, the finding of the District Judge that the storage of the tank had increased does not in any way affect the decision of this question, in view of the admitted fact already mentioned that the plaintiffs have not in any way interfered with the supply channel of the tank and, what is most important of all, the fact that there is no evidence to show that more water is now being taken by the plaintiffs for irrigation.

In support of its right to levy water-rate, the Government relies upon s. 1 of Act VII of 1865. Under this section, whenever water is supplied or used for purposes of irrigation from any river, stream or channel belonging to or constructed by the Government, the Government is entitled to levy a separate cess for such water, provided the *zemindar* or the *inamdar* whose land is so irrigated, is not entitled, by virtue of engagements with the Government, to irrigation free of separate charge. In order to justify the cess under this Act, it must be made out that the irrigation was caused by water supplied or obtained from a river or stream belonging to the Government. In this case the concurrent finding of the lower

(8) 30 Ind. Cas. 605; (1915) M. W. N. 636.

Courts show that Patha Cheruvu and the stream belong to the Government and, therefore, the water for irrigation is supplied from a Government source. Under the Act, exceptions from the levy can be claimed if the claimants can show engagements with the Government under which they are entitled to irrigation free of separate charge. The law is well-settled that Permanent Settlement *sanads* and engagements arising out of Inam Settlements are engagements contemplated by Act VII of 1865. As regards the precise extent to which the *zemindars* and *inamdars* were entitled to claim exemption under the cover of these engagements, *viz.*, as to whether the right of free irrigation extended only to the extents specified in these engagements and to nothing more, there has been for a long time acute difference of opinion among the learned Judges of this Court. In *Secretary of State for India v. Perumal Pillai* (9) it was held that where there is no limitation in the grant itself, the proprietor is not entitled to an unlimited water supply. In *Chidambara Rao v. Secretary of State for India* (7) it was held that an *inamdar* is not entitled to cultivate free of charge land which is in excess of what was under cultivation at the time of the grant. In *Kandukuri v. Secretary of State for India* (10), which was subsequently reversed by the Privy Council in *Urlam case [Kandukuri Balasurya Prasadha Row v. Secretary of State for India]* (1), it was held that the only engagement which can be inferred from the Permanent Settlement is that the *peishcush* being fixed with reference to the area of the land then under cultivation no further charge for the use of water should be made in respect of that area and that if any extent of land in excess of that area is cultivated by the aid of Government water, water-rate could be levied in respect of that excess extent. In *Secretary of State for India v. Kannepalli Janakiramayya* (11), Sankaran Nair, J., in an elaborate judgment dealing with the history of the permanent and Inam Settlements and the policy underlying such, controverted this view differing from Miller, J. In Letters Patent Appeal against his judgment reported as *Secretary of State for India v. Kannepalli Janaki-*

ramayya (12), Oldfield and Bakewell, J.J., (Sadasiva Aiyar, J., dissenting) upheld the views of Miller, J., and accepted the decision in *Kandukuri v. Secretary of State for India* (10). The latter decision was again followed by Sir Arnold White, C. J., and Ayling, J., in *Secretary of State for India v. Ambalavana Pandarasannidhi* (5), but this was subsequently reversed by the Privy Council in *Ambalavana Pandara Sannadhi v. Secretary of State for India* (6) following *Urlam case [Kandukuri Balasurya Prasadha Row v. Secretary of State for India]* (1). In this state of the law the Privy Council in the *Urlam case [Kandukuri Balasurya Prasadha Row v. Secretary of State for India]* (1), set aside the decision of this Court in *Secretary of State for India v. Ambalavana Pandarasannidhi* (5). Stated shortly, in that case the main question was as regards the extent of the right of the *Urlam zemindar* to cultivate the lands of his *zemindari* with water taken from the Vamsadhara river which was lying contiguous to it. Their Lordships of the Privy Council pointed out that the Permanent Settlement was an engagement with the Government within the meaning of the proviso to s. 1 of Act VII of 1865, that the effect of the settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks or reservoirs in the *zemindaris*, through or within whose *zemindaris* the same respectively passed or were situate, and to give the *zemindar* the right of easement of taking water from the river for irrigation purposes. The following passages in their Lordships' judgment describe the measure of this right at page 904*.

"Assuming that the Vamsadhara river belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his ten-

(12) 30 Ind. Cas. 609; 29 M. L. J. 389; 2 L. W. 763; 18 M. L. T. 277; (1915) M. W. N. 671.

*Page of 40 M.—[Ed.]

(9) 24 M. 279; 11 M. L. J. 117.
(10) 8 Ind. Cas. 67; 34 M. 295; (1910) M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823.
(11) 18 Ind. Cas. 770; 37 M. 322; 13 M. L. T. 235; (1913) M. W. N. 235; 24 M. L. J. 365.

ants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel." Later on occurs the following passage at page 907*:

"There being no evidence whatever that more water is being taken from the river than would be justified by the *sanads*—construed as in their Lordships' opinion they ought to be construed, it follows that the appellants must succeed in respect of the *jirayati* lands on which the cesses in dispute were levied."

In the result, their Lordships declared that the rights of the *zemindar* of Urlam under the Urlam *sanad* to irrigate the Urlam estate from the channels in question and their branches are not limited by any *mamool* and that the *zemindar* should not be charged water-cess for the extra cultivation that he carried on with the amount of water he was justified in taking from the river under the *sanad*.

In view of the findings in this case that the source of irrigation belongs to the Government and that there is no evidence to show that more water is being taken from the Government tank than would be justified under the Inam Settlement, it is argued by Mr. Varadachariar that the principle of the *Urlam decision* (1) would apply to this case as well, and that, therefore, the Government is not justified in levying any water cess. It appears to me that this contention is well-founded; but it is urged by the learned Government Pleader that the decision in the *Urlam case* (1) is inapplicable to this case, as here we are dealing with the rights of an *inamdar* as against the Government and not with the rights of a *zemindar*, and further that that decision is based upon a construction of the permanent *sanad* in that particular case. These observations, no doubt, are true, but I cannot see how these affect the application of the general principle underlying the *Urlam decision* (1). The judgment of the Privy Council is not based upon any special or distinctive feature of the *Urlam zemindari sanad*. Their Lordships point out that the effect of the Permanent Settlement is to vest the channels, with their

head sluices and branch and subsidiary channels, and the tanks or reservoirs in the *zemindaris* through or within whose *zemindaris* the same respectively pass or are situate. And then they say, as will appear from the extract that I have already quoted, that, when such a grant or settlement is made, *some right or easement of taking water from the river must pass* and that right is measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel. So long as the measure of this easement has not been enlarged by the grantee in any way the Government cannot complain. This is the general principle underlying that decision. *Inams* are Government grants subject to quit-rents, and in some instances to services. The *inam* in the present case is said to be an ancient one and it was only simply confirmed in the names of the ancestors of the present owners at the time of the Inam Settlement. There is, therefore, no question of a new contract at the time of the settlement between the Government and the *inamdar*. It is admitted that engagements arising out of the Inam Settlements are engagements contemplated by Act VII of 1865 just like the Permanent Settlement *sanads*. The *inam* title-deed has not been produced, but that does not in my view make it difficult to apply the principle of the *Urlam decision* (1) to this case. To use language similar to that employed by the Judicial Committee, when the owner of a tank and of contiguous land, in which are situated the sluices and channels for irrigation through which water passes, grants this contiguous land together with the sluices, etc., some right or easement of taking water from the tank must pass. It is obvious that such a grant involving such an easement must have been made when this *inam* was granted. Otherwise, seeing that the tank is reserved for the Government, it would be impossible for the *inamdar* to cultivate the land granted to him in *inam*. If this inference arising from the grant is not justified, it will be for the Government to disprove it by producing the title-deed to show the limitations of the *inam* grant. That has not been done in this case. It follows, therefore, that, so long as more water is not taken by the *inamdar* than he was taking from the tank at the time of the grant, he cannot be charged any water-cess for cultivating more land with the

same amount of water. Though the liability of the *inamdars* to be charged with water-cess under Act VII of 1865 for extended cultivation arose in the Privy Council case, their Lordships did not specifically deal with the question as it was thought for the special reason that the *inams* in that case were *inams* within the *zemindari*. Still their Lordships remark that, if the cess were levied upon her (appellant) as *inamdar*, she can rely on the same engagement to the same extent as could a tenant of *zemindari* land authorised by the *zemindar* to use the water.

With regard to the rights of free irrigation depending upon the implied undertaking between the Government and the grantee of the land, an *inamdar*, a *mittadar* and a *zemindar* have all been treated alike by this Court. See *Secretary of State for India v. Ambalavana Pandarasannidhi* (5). In support of this statement three cases were cited: *Chidambara Rao v. Secretary of State for India* (7), *Lutchmee Doss v. Secretary of State for India* (13), *Secretary of State for India v. Perumal Pillai* (9) and the *Urlam case* (10). When the respondent's Vakil sought to distinguish these cases on the ground that the first two relate to *inam* villages and the last to a *zemindari* formed from *haveli* lands, while the suit *mitta* was carved out of an ancient *zemindari*, the learned Judges stated:

"But it is difficult to see why the same principle should not be followed, the implied undertaking being based on precisely the same principle in the case of *zemindaris* and *inams*."

This case, as already observed, was ultimately reversed by the Privy Council on the authority of its decision in the *Urlam case* (1). But these remarks of the learned Judges of this Court are interesting in that they show that they were prepared to treat a *zemindar* and an *inamdar* alike with respect to the right claimed regarding free irrigation. Their view as regards the measure and extent of that right was not accepted by the Privy Council. In my opinion, the engagements implied in the Permanent Settlements and the Inam Settlements with respect to the matter under consideration should be interpreted in the same manner and in the light of the same principle. Unless the Government

proves that the right of cultivation is limited as alleged by it in any particular case by producing the title-deed, I think the general principles underlying the *Urlam decision* (1) should be applied to the case of an *inam* as well (at any rate, to the case of a major *inamdar*), and that an *inamdar* is not liable to be charged water-cess unless he takes more water from the Government tank. Innes, J., rightly states the principle to be applied to cases like the present thus:

"Where a channel has been constructed by Government acting as the agent of the community to increase the well-being of the country by extending the benefit of irrigation and in pursuance of that purpose a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity of a right to the unobstructed flow of water by the channel. Looking at the permanency of such works and to the permanency attaching to the object, that there was a transfer in perpetuity would seem an almost necessary conclusion, unless there were other circumstances to lead to one of an opposite character. It might, of course, be capable of being shown that the privilege was granted as a mere license and that before the water was allowed to flow to the villages, it had been left open to Government by arrangements then made to obstruct the flow at will at any future period." [See *Ponnusami Tevar v. Collector of Madura* (14)].

The decision in *Chidambara Rao v. Secretary of State for India* (7), no doubt, supports the respondent. One of the reasons mentioned as the basis of that judgment is this:

"It was the duty of the Inam Commissioner to ascertain and record in the title-deed, not the extent of land which was actually under wet cultivation at the time of the Inam Settlement, but only the extent to which the *inamdar* was entitled to supply of water free of charge....."

We have not been referred to any authority justifying this statement. On the other hand, it has been understood that the duties of an Inam Commissioner consisted in ascertaining the necessary existing facts with regard to cultivation, etc., for the pur-

(13) 3 Ind. Cas. 456; 32 M. 456; 6 M. L. T. 242; 19 M. L. J. 470.

(14) 5 M. H. C. R. 6 at pp. 29, 30.

pose of enabling the Government to fix a proper quit-rent while granting an *inam*. In this connection, the remarks of Sankaran Nair, J., regarding the construction of *inam* deeds and the interpretation of the entries therein in his judgment in *Secretary of State for India v. Kannepalli Janakiramayya* (11) may well be referred to with advantage. As those remarks are apposite in the present context I quote them [here, Though his judgment was set aside in Letters Patent Appeal, it is interesting to note that their Lordships of the Privy Council in the *Urlam* case (1) arrived at the same conclusions as he did in *Secretary of State for India v. Kannepalli Janakiramayya* (11) regarding the Government's right to levy water-cess for extended cultivation in *semindari* lands. The remarks are as follows:

"Moreover, there is nothing in the title-deeds or proceedings to show that the *inamdar* is only entitled to cultivate with channel water those lands entered as 'wet free of charge and that even those lands are entitled to exemption only for the first crop. Neither in the despatch from the Government of Madras to the Secretary of State, Revenue, dated 9th August, 1859, with the enclosures thereto, giving full information of the intended proceedings to enfranchise *inams*, nor in the final report of Mr. Blair on the operations of the commission, dated 30th October, 1869, the proceedings of the Madras Government and the despatch of the Secretary of State thereon, dated 10th August, 1871, nor in the mass of records relating to the enfranchisement of *inams*, is there any indication that it was the intention of the Government to advance any claim on account of any excess cultivation or that the *inamdar's* right was confined to the wet area mentioned in the title-deeds. If it was so, the Government could very easily prove it without asking the Courts to upset a practice upon theories. The available records support the contrary conclusion: when water was supplied from Government anicut works, no cess was levied on the *mamool* wet presumed to have been under wet cultivation at the time of the Permanent Settlement or the enfranchisement of the *inams*, but cess was levied on water taken for the irrigation of the rest. That the claim was so restricted to water from Government works is not without significance. The copies of the *inam* title-deeds

show that the *inam* is only 'claimed to be of acres of dry land and acres of wet land'. All information had to be given in the registers as the assessment was fixed at the discretion of Government; no inference can be drawn, therefore, that any fact therein mentioned was the basis of any contract. In asking the Government to cancel their order that *inams* limited to a limited number of lives should not be interfered with, the Inam Commissioner said: 'It is superfluous to add that in all such settlements every care is taken that the interests of Government do not suffer. A fair addition is made to the present value of the village on account of the prospective improvement from the cultivation of waste lands.'"

Perhaps it is possible to distinguish *Chidambara Rao v. Secretary of State for India* (7) by noting the special facts that it is a case of a small *inam*, that possibly the source of irrigation in that case was common to many *inamdar* and *ryotwari* holders of lands and that increased cultivation by one *inamdar* meant necessarily enlargement of the easement enjoyed by him to the detriment of the other *inamdars*. But in view of the Privy Council decision in *Urlam Case*, [*Kundukuri Balasurya Prasada Row v. Secretary of State for India*] (1), I am inclined to think that the correctness of the decision in *Chidambara Rao v. Secretary of State for India* (7) is open to question. The same may be said about the decision in *Secretary of State for India v. Perarulala Ramanuja Jeer Swamigal* (8) also. That decision is not of much use as it does not contain any discussion of the question under consideration. The decision in *Secretary of State for India v. Srinivasa Chariar* (15) relates to the question whether the full right to the quarries and minerals in a village granted as *shrotriem inam* passed to the grantee and the decision depended upon the true construction of that grant. It does not lay down any principle useful for the decision of this case.

The amount of quit-rent to be paid by an *inamdar* being once for all fixed at the time of the Inam Settlement, it follows as in the case *peishcush* that the Government cannot by levying water-cess increase that

(15) 60 Ind. Cas. 230; 44 M. 421; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43; 48 I. A. 56 (P. C.).

amount. In these circumstances, applying the decision of the Privy Council to this case I would hold that the Government is not entitled to charge water cess for the increased extent of land cultivated in their *inam* village by the appellants in *Faslis* 1323 and 1324. I would, therefore, set aside the decree of the District Judge and restore that of the District Munsif with regard to the plaintiff's suit for a declaration and injunction as regards *Patha Cheruvu* with costs here and in the lower Appellate Court; but as the Government is the defendant it is not necessary—as it is not usual—to include in the decree the relief by way of injunction.

V. N. V.

A. N. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 135 OF 1924.

June 20, 1927.

Present :—Mr. Justice Sulaiman and Mr. Justice Banerji.

B. N. W. RAILWAY—DEFENDANTS—

APPELLANTS

versus

BAIJ NATH PRASAD AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Railway Company—Reserved Accommodation—Company agreeing to make endeavours to provide reserved carriage—Issue of necessary tickets—Contract, whether complete—Failure to supply carriage—Passengers' right to damages.

The plaintiffs applied to a Railway Administration for a reserved carriage. The Officiating Traffic Manager replied that endeavours will be made to supply the carriage and issued orders to his subordinates that a reserved carriage should be supplied. The necessary tickets were also issued to the plaintiffs by the booking clerk. No reserved carriage was available when the train arrived and the plaintiffs instituted a suit for damages against the Railway Company:

Held, that there was no complete agreement between the plaintiffs and the defendant Company inasmuch as the Company had merely stated that endeavours would be made to provide such a carriage, that the fact that the necessary tickets were issued did not amount to a completion of the contract, and that the plaintiffs were not, therefore, entitled to damages. [p. 388, col. 2.]

First appeal from a decree of the Additional Subordinate Judge, Gorakhpur.

Dr. K. N. Katju, for the Appellants.

Messrs. Peary Lal Banerji, Narmadeshwar Prasad Upadhiya, A. P. Pandey and Rudra Narain Srivastava, for the Respondents,

JUDGMENT.—This is an appeal by the Bengal and North Western Railway Company arising out of a suit brought for damages by the plaintiffs. The plaintiffs' case was that they had come to Deoria Station to celebrate the marriage of a relation and for their return journey required a reserved third class bogie for the marriage party from Deoria to Cawnpore. The Railway Company agreed to supply the reserved accommodation required provided it was engaged from Bhatni. They then went on to allege that as the arrangement of reserved accommodation was necessary the plaintiffs agreed to pay the additional charge from Bhatni to Deoria, and it was finally settled between the plaintiffs and the defendant that a third class bogie would be attached to 1 Up Passenger train from Bhatni. In accordance with this alleged arrangement the plaintiffs sent their servant to Bhatni to purchase 92 third class tickets and asked the station staff to attach the reserved carriage to the train. It is suggested that the station staff were not honest because they wanted some illegal gratification, which was not paid, and that owing to their wilful neglect they omitted to attach the bogie carriage to the train by which the plaintiffs' party was to go to Cawnpore. The result was that when the train arrived there was no reserved carriage available at Deoria and the plaintiffs' party was put to considerable inconvenience, annoyance and disappointment. They claimed Rs. 5,000 as damages, and Rs. 17-4-0 the excess amount of fare realised from them for the journey from Bhatni to Deoria.

The defendant Company denied that there was any complete contract between the parties under which the Company was bound to provide reserved accommodation. They also denied that there was any dishonesty on the part of their servants and pleaded that owing to a mistake, the carriage which was intended to be reserved, had been returned to Gorakhpur by an earlier train.

The learned Subordinate Judge on the question of fact came to the conclusion that there was no mistake committed and that a bogie carriage was available at Bhatni, but was not attached to the train by which the plaintiffs' *pairakar* returned. He did not believe the defendants' story that the carriage had been sent on by mistake earlier in the day. On the question of completeness of the agreement he was of opinion that, although the Railway did not make a

definite promise to provide reserved accommodation but only promised to make an endeavour to supply the required bogie carriage, nevertheless the plaintiffs' agent did go to Bhatni to purchase the tickets, and 92 were sold to him on the understanding that reserved accommodation would be available. In his opinion, therefore, the contract was complete as soon as the tickets were issued.

Before us there has been much controversy as to whether the carriage was available at Bhatni and had been dishonestly kept back or whether it had been previously despatched by mistake. The papers relating to Bhatni Station do show that the carriage had been despatched by an earlier train. The evidence of the station staff at Bhatni is also to the same effect. No papers of the Gorakhpur Station showing that the carriage had been returned by an earlier train were produced by the Company and it is contended before us that such papers have since been destroyed. As, however, we think that the suit must fail on the ground that no complete undertaking to provide a reserved carriage had been given, it is not necessary for us to go into the question whether the finding of the Court below that there was dishonesty practised by the station staff at Bhatni, is or is not correct. The plaintiffs' case in the plaint was that the contract was complete long before their agent went to Bhatni. This has not been accepted by the Court below and is contradicted by the purport of the reply sent by the Railway Company to the plaintiffs' application. On the 5th of July, 1922, the plaintiffs had applied for a reserved carriage from Deoria to Cawnpore. The Officiating Traffic Manager replied to this letter saying that he regretted that a reserved carriage could not be provided by the train from Tahsil Deoria but that endeavours were being made to provide one from Bhatni to Cawnpore by the same train. In pursuance of this suggestion he no doubt issued orders to the subordinate staff that a reserved carriage should be supplied. A carriage intended to be reserved subsequently was undoubtedly despatched from Gorakhpur to Bhatni but no reserved carriage was available when the train arrived at Deoria. There is no doubt that the plaintiffs were put to considerable inconvenience, annoyance and disappointment, and there is also no doubt that the failure to provide reserved accommodation was not

due to any disinclination on the part of the Assistant Traffic Manager to provide one, but to the carelessness, to say the least, of the staff at Bhatni.

At the same time it cannot be disputed that the Officiating Traffic Manager never agreed to provide the reserved carriage unconditionally. He never guaranteed that any such carriage would be available but promised that endeavours would be made to provide one. This reply, in our opinion, successfully establishes the fact that there was no complete agreement between the plaintiffs and the Railway Company for providing a reserved carriage. The mere fact that necessary tickets were issued by the booking clerk at Bhatni does not amount to a completion of any fresh contract. As pointed out above, it was not even the plaintiffs' case that the contract was completed as soon as the tickets were sold to the plaintiffs' agent.

The plaintiffs' party travelled from Deoria to Cawnpore. The Company, therefore, had no right to charge for the fares from Bhatni to Deoria. They, however, offered to refund Rs. 17-4, the excess fare charged for journey between Bhatni and Deoria.

We are, therefore, of opinion that in view of there being no complete contract, the claim for damages cannot be allowed. The plaintiffs, however, are entitled to recover Rs. 17-4 which they paid as excess fare to the Company. It is also clear that the whole trouble has arisen owing to the gross neglect of the station staff at Bhatni, and that the plaintiffs have undoubtedly been put to considerable inconvenience. We accordingly allow this appeal and modifying the decree of the Court below dismiss the plaintiffs' claim for damages, but uphold the decree for Rs. 17-4, the excess fare. In view of the circumstances stated above we direct that the parties should bear their own costs in both Courts.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 1391
OF 1924.

October 31, 1927.

Present:—Mr. Justice Das and

Mr. Justice Wort.

MADHO LAL AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

MAHADEO RAI AND OTHERS—DEFENDANTS

—RESPONDENTS.

Co-sharer—Partition—Settlement granted by former co-owner, how far binding on co-sharer to whom property is allotted.

A person to whom a parcel of land has been allotted by a decree for partition does not take it subject to a settlement made by his former co-sharers without his concurrence when the land was the joint property of all the co-sharers.

Nrisingha Ranjan Mukherjee v. Soudamini Dasi (1), followed.

Appeal from a decision of the Additional Subordinate Judge, Shahabad, dated the 16th August, 1924, reversing that of the Munsif, Arrah, dated the 28th July, 1923.

Mr. S. N. Ray, for the Appellants.

Mr. B. Prasad Sinha, for the Respondents.

JUDGMENT.

Das, J.—In this case the plaintiffs, who are the appellants before us, sued for recovery of *khas* possession of two plots of land which were recorded in the Record of Rights under two *khewats*. Plot No. 1410 is in *khewat* No. 3/1 which was the *khās khewat* of the defendants second party. Plot No. 1395 was recorded in *khewat* No. 3/6 which was the *khewat* of the defendants first party and the defendants second party jointly.

The case of the plaintiffs is that they took a settlement of the disputed lands from the defendants second party and that they are entitled to recover possession thereof. It is not disputed that at the date of the settlement in question the estate was under partition and that the disputed lands have now been allotted to the *takhta* of the defendants first party who contest the suit.

The learned Judge in the Court below has found that there was a private arrangement between the defendants first party and the defendants second party under which the former were in possession of the joint *bakashat* lands and the latter were in possession of the joint *raiyati* lands.

The learned Advocate for the appellants contends that the defendants second party being in possession of these lands were

entitled to settle the same with them. I am unable to agree with this contention. It is well settled that a co-sharer has no right to deal with joint property in such a way as to affect the rights of the other co-sharers. The case of waste lands stands on a different footing altogether; but so far as tenancy lands are concerned, a co-sharer cannot prejudice the interest of the other co-sharers. As I have pointed out the disputed lands have fallen to the *takhta* of the defendants first party and I can see no ground whatever for holding that the defendants first party would have this encumbrance on their property. The case rests on a principle and is covered by authorities. It is not necessary to refer to all the authorities; it will be sufficient for us to refer to a decision of the Full Bench of the Calcutta High Court in *Nrisingha Ranjan Mukherjee v. Soudamini Dasi* (1) where it was pointed out that a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.

This appeal must be dismissed with costs.

Wort, J.—I agree.

B. K. P.

Appeal dismissed.

(1) 95 Ind. Cas. 516; 30 C. W. N. 511; 43 C. I. J. 333; A. I. R. 1926 Cal. 714; 53 C. 694 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1066 OF 1925.

May 25, 1927.

Present:—Mr. Justice Ashworth and

Mr. Justice Iqbal Ahmad.

GANGA CHARAN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

RAM CHANDRA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Suit for possession by trustee against trespasser—Sanction, whether necessary—Hindu Law—Religious endowment—Temple—Founder's right to appoint shebait.

Section 92 of the Civil Procedure Code has reference to those cases, and those cases alone, where there is an allegation of breach of any express or constructive trust created for public or charitable purposes, or where the direction of the trust is deemed necessary for the administration of any such trust. It has no application to suits where the plaintiff

claims possession of an endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser. [p. 390, col. 2.]

Inayat Husain v. Faiz Muhammad (1), *Muhammad Abdul Majid Khan v. Ahmad Saeed Khan* (2), *Puttu Lal v. Daya Nand* (3) and *Nilkanth Devrao v. Ramkrishna Vithal* (4), relied on.

In the case of a temple, in the absence of a provision in the deed of endowment prescribing the mode of devolution to the office of *shebait* and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder of the trust and a *shebait* has no right to appoint a successor to himself. [p. 391, col. 1.]

Second appeal from a decree of the Additional District Judge, Bareilly, reversing that of the Additional Subordinate Judge.

Mr. Uma Shanker Bajpai, for the Appellants.

Dr. K. N. Katju, for the Respondent.

JUDGMENT.—This is a defendants' appeal and arises out of a suit for possession of certain property that was dedicated to a certain deity by one Pandit Manni Ram by a deed of endowment, dated the 10th of January, 1899. By that deed Manni Ram appointed himself and one Gulab Shankar as *sarbarakars* of the endowed property. Manni Ram died in or about the year 1900 and Gulab Shankar alone continued to act as *sarbarakar* of the endowed property.

By a deed, styled as a deed of gift, dated the 17th of December, 1912, Gulab Shankar appointed the defendant-appellant as trustee and manager in his place. About three months prior to the institution of the suit giving rise to the present appeal Gulab Shankar died, Udho Ram, the heir of Manni Ram, on the 15th of December, 1922, executed a document in favour of the plaintiff by which he appointed the plaintiff as trustee and *sarbarakar* of the endowed property.

The plaintiff's case was that Gulab Shankar had no right to nominate a successor of his own, or to appoint a trustee of the endowed property, and that, notwithstanding the execution of the deed of gift of 1912, Gulab Shankar continued to act as *sarbarakar* till the date of his death and that after Gulab Shankar's death the right to appoint a *sarbarakar* and trustee of the endowed property vested in the heirs of the founder of the trust. The plaintiff maintained that the defendant was in possession of the endowed property as a trespasser and accordingly claimed the relief referred to above.

The suit was contested by the defendant on various grounds, but as only two points have been argued in the present appeal, we need not notice the points other than those argued before us. It was contended by the defendant that the suit was barred by s. 92 of the Civil Procedure Code and that Gulab Shankar was competent to appoint the defendant as a *sarbarakar* and trustee and that the defendant-appellant was rightfully in possession of the endowed property.

Both the Courts below overruled the plea based on s. 92, Civil Procedure Code. The trial Court accepted the other contention advanced on behalf of the defendant mentioned above and accordingly dismissed the plaintiff's suit. The lower Appellate Court came to the conclusion that the defendant Gulab Shankar had no right in preference to the heirs of the founder of the trust to appoint a successor of his own and that the defendant had not been validly appointed and the plaintiff was a duly appointed trustee and was entitled to the relief sought.

In our judgment the decision of the lower Appellate Court is perfectly correct and ought to be affirmed. It is well settled that s. 92, Civil Procedure Code, has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser. *vide Inayat Husain v. Faiz Muhammad* (1) and *Muhammad Abdul Majid Khan v. Ahmad Saeed Khan* (2). It has also been decided by this Court in the case of *Puttu Lal v. Daya Nand* (3) that s. 92, Civil Procedure Code, does not apply to a suit between persons who individually claim a right to succeed to the office of trustee. In view of these authorities it is impossible to hold that the present suit was a suit of the nature contemplated by s. 92, Civil Procedure Code. It is to be noted that s. 92 has reference to those cases, and to those cases alone, where there is an allegation of breach of any express or constructive trust created for public purposes of charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust. In the present case there was no allegation of any breach of the trust nor was it alleged that the direction of the

(1) 71 Ind. Cas. 767; 45 A. 335; 21 A. L. J. 191; A. I. R. 1923 All. 319.

(2) 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673.

(3) 68 Ind. Cas. 786; 44 A. 721; 20 A. L. J. 712; A. I. R. 1922 All. 499.

Court was necessary for the administration of the trust and in the absence of any such allegation s. 92, Civil Procedure Code, could not apply. The view that we take is in consonance with the view taken in the case of *Nilkanth Devrao v. Ramkrishna Vithal* (4). We accordingly agree with the Courts below in holding that s. 92 was not a bar to the suit.

In our judgment there is no substance either in the second point argued by the learned Counsel for the appellant. We are in the present case dealing with a temple as distinguished from a *math*. In the case of a temple the endowed properties are deemed vested in the presiding god treated as a juristic person, the management being vested in a trustee. The manager or trustee of a temple is designated as a *shebait*.

"The devolution of the office of *shebait* depends primarily on the terms of the deed by which the trust is created. In the absence of any provision in the deed as to the devolution of the office of *shebait* the title to the property or to the management and control of the dedicated property, as the case may be, follows the line of inheritance from the founder, in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution, e. g., devolution on a single heir;" *vide*, Mulla's Principles of Hindu Law, 5th Edition, page 408 of the cases cited therein. As already stated, in the absence of a provision in the deed prescribing the mode of devolution to the office of *shebait* and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder of the trust and a *shebait* has no right to appoint a successor to himself, *vide* the cases of *Chandra Nath Chakrabarti v. Jadabendra Chakrabarti* (5), *Sheo Prasad v. Aya Ram* (6) and *Sheoratan Kunwari v. Ram Pargash* (7). In the present case it has been held by both the Courts below that Udho Ram is the heir of Manni Ram, the founder of the trust. Therefore, the appointment of the plaintiff by Udho Ram as a *shebait* is a valid appointment and the plaintiff has a right to enter into possession

of the endowed property as a trustee. The defendant has not a shadow of title to remain in possession and the decree passed against him is perfectly correct. The remaining grounds taken in the memorandum of appeal have not been pressed. Accordingly we dismiss the appeal with costs.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 67 OF 1926.

February 17, 1927.

Present:—Mr. Justice Srinivasa Aiyangar.

KONATAM KOTIGADU—APPELLANT

versus

KOTTURI SUBBAYYA AND ANOTHER—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5), Expl. I—Joint decree against several judgment-debtors—One judgment-debtor dead and legal representative not brought on record—Application against other judgment-debtors, whether saves limitation as against legal representative of deceased judgment-debtor.

Under Art. 182 of Sch. I of the Limitation Act, where there is a joint decree against several judgment-debtors, an application for execution against one of the judgment-debtors has the effect of saving limitation even against the legal representatives of a deceased judgment-debtor, who were not parties to such application.

Appeal against an order of the Court of the Subordinate Judge, Guntur, in A. S. No. 116 of 1925 (A. S. No. 87 of 1925, District Court, Guntur) preferred against that of the Court of the District Munsif, Narsaraopet, in E. P. No. 1262 of 1924 (O. S. No. 235 of 1910, Additional District Munsif's Court, Guntur).

Mr. A. Lakshmayya, for the Appellants.

Mr. Ch. Raghava Rao, for the Respondents.

JUDGMENT.—The legal representative of the first judgment-debtor deceased is the appellant in this civil miscellaneous second appeal. Two contentions were raised on his behalf in the Court below. One was an objection based on some ground of *res judicata*. That has not been argued here. The second ground is one of limitation. It has been contended by the learned Vakil for the appellant that the third execution petition made on the 29th June, 1923, about two years and more after the death of the first judgment-debtor did not apply for execution against the legal re

(4) 64 Ind. Cas. 353; 46 B. 101; 23 Bom. L. R. 876; A. I. R. 1923 Bom. 67.

(5) 28 A. 689; A. W. N. (1906) 173.

(6) 29 A. 663; 4 A. L. J. 565; A. W. N. (1907) 210.

(7) 13 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N. S.) 58.

presentative of that deceased judgment-debtor and cannot, therefore, be regarded as an execution application in accordance with law within the meaning of cl. (5) of Art. 182 of the Limitation Act. At one stage I understood the learned Vakil for the appellant to contend that the uncontradicted allegation on his part was that the execution-creditor-petitioner knew of the death of the first judgment debtor and that in spite of such knowledge he made the application against the deceased person without claiming execution against his legal representative as he would have done. But I found no such allegation in the affidavit filed by his client in the Court of first instance. It is, therefore, difficult to see how an execution application filed by the decree-holder in such circumstances can be held not to be in accordance with law. My attention has been drawn to the decision in the case of *Madho Prasad v. Kesho Prasad* (1). In that case the learned Judges, who had before them the case of a money decree and an attachment that was set aside by the Executing Court on a claim petition made by a stranger, held that a series of subsequent execution applications without claiming relief against the judgment-debtor's legal representative could not save limitation. But if I understand the learned Judges in that case correctly, they seem to think that if there had been a subsisting attachment at the time of the application or an order for sale the matter might be different. Here, however, it is not the case of a mere money decree. The relief granted was relief in the first instance by sale of the property and may be of the interest of the judgment-debtor in the property. The *raison d'être*, therefore, of that decision would not apply to the present case because the learned Judges have in their very judgment pointed out a distinction which would really cover the present case. But I do not think for my purpose it is really necessary to rely upon that case at all because it is admitted before me by the learned Vakil for the appellant, that even though in the execution petition of the 29th June, 1923, the legal representative of the first judgment-debtor was not shown, still the execution application was against the other judgment-debtor under the decree, and under the Explanation in Art. 182 when there is a joint decree against several judg-

ment-debtors an application for execution against any one of them has the effect of saving the running of time even as against the other judgment-debtors. I have not been satisfied by the learned Vakil for the appellant that the application for execution of the 29th June, 1923 was not in accordance with the law or that otherwise the application now in question is barred by the law of limitation.

The appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

ODH CHIEF COURT.

SECOND CIVIL APPEAL No. 144 of 1927.

October 24, 1927.

Present:—Mr. Justice Hasan and
Mr. Justice Raza.

Sheikh MUHAMMAD ALI—DEFENDANT—
APPELLANT

versus

JHAO LAL AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Debts—'Avyavaharika debt', meaning of—Institution of deliberately false suit—Dishonest resistance to suit—Decree for costs—Liability of sons and grandsons.

'Avyavaharika debt' means a debt incurred for a cause repugnant to good morals. [p. 395, col. 1.]

Where a Hindu knowingly brings a false case against another and knowingly on false grounds defends the suit brought by that man against him, his sons and grandsons are not liable to pay the costs for which decrees are passed against him in those suits. [*ibid.*]

Second appeal against a decree of the Subordinate Judge, Lucknow, dated the 17th January, 1927, setting aside that of the Munsif, Lucknow, dated the 22nd September, 1926.

Messrs. H. Husain and A. C. Mukerji, for the Appellant.

Messrs. Ali Zaheer and Mahabir Prasad Srivastava, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge, Lucknow, dated the 17th January, 1927, setting aside a decree of a Munsif in Lucknow, dated the 22nd September, 1926.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:—

Sheikh Muhammad Ali (defendant No. 1) had obtained two decrees for costs against

(1) 19 A. 337; A. W. N. (1897) 75; 9 Ind. Dec. (N. s.) 221.

Dayal (defendant No. 2), father of Jhao Lal (plaintiff No. 1) and grandfather of Babu Lal (plaintiff No. 2). The decrees were passed under the following circumstances:—In September, 1910, Dayal sold to Sheikh Muhammad Ali, a 4-annas share in village Chaurasi out of the 7-annas share in the possession of *Musammāt Menda* and *Musammāt Dhānu*. Sheikh Muhammad Ali was to sue jointly with Dayal for the recovery of the entire 7-annas share and was to defray expenses of the litigation. They brought the suit and eventually the claim was decreed by the Court. In 1916 Dayal sued Sheikh Muhammad Ali for possession of a $7\frac{1}{2}$ pies share which the latter had got under a compromise filed in the former suit. Dayal's suit against Sheikh Muhammad Ali was based on the allegation that the sale-deed executed by him in favour of Sheikh Muhammad Ali was void, as it was without consideration and an unconscionable transaction. Sheikh Muhammad Ali also brought a suit against Dayal for possession of a 3-annas $4\frac{1}{2}$ pies share on the ground that he was entitled to a 4 annas share under the terms of the sale-deed executed by Dayal, but had obtained possession over a $7\frac{1}{2}$ pies share only. Dayal's suit was dismissed, but Sheikh Muhammad Ali's suit was decreed by the Court. Costs were awarded to Sheikh Muhammad Ali against Dayal in both the suits. Sheikh Muhammad Ali took out execution of the decree for costs and attached an 8-annas *zẽmindari* share to realize the decretal amount (Rs. 454-4-0). Jhao Lal, son of Dayal and Babu Lal, grandson of Dayal, then brought the present suit for a declaration that the said *zẽmindari* share is not liable to attachment and sale in execution of the decrees for costs obtained by Sheikh Muhammad Ali against Dayal. The suit was dismissed by the first Court, but decreed by the lower Appellate Court on plaintiffs' appeal.

Sheikh Muhammad Ali has now come to this Court in second appeal.

It appears that Dayal died after the appeal was heard by the learned Subordinate Judge. The learned Subordinate Judge has decreed the appeal holding that Dayal's conduct in both the suits mentioned above in which costs were decreed against him was 'like that of a dishonest man.'

It is contended on behalf of the appel-

lant that Dayal's conduct could not be said to be immoral and it was the duty of the son and the grandson of Dayal, under the Hindu Law, to pay off the debts of Dayal which were not tainted with immorality.

In our opinion there is no substance in this appeal.

The appellant's learned Counsel has referred to the following cases:—

Shambhu Bhan Singh v. Chandra Shekhar Bakhsh (1), *Mata Din v. Mahraj Din* (2), *Ramkrishna Trimbak v. Narayan Shivrao Aras* (3), *Sumer Singh v. Liladhar* (4), *Chakouri Mahton v. Ganga Proshad* (5), *Kirpal Singh v. Balwant Singh* (6) and *Venugopal Naidu v. Ramanadhan Chetty* (7).

It was held in *Shambhu Bhan Singh v. Chandra Shekhar Bakhsh* (1) that under the Hindu Law a decree for mesne profits passed against the father alone as the result of a litigation in which he unsuccessfully defends his position to the family estate can be executed against the joint family property. It is hardly possible to characterize such conduct of the father as immoral or illegal.

It was held in *Mata Din v. Mahraj Din* (2) that the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, creates a debt which may justly be recovered from the ancestral property in the hands of the son.

It was held in *Ramkrishna Trimbak v. Narayan Shivrao Aras* (3) that sons cannot escape liability for payment of the debts of their father contracted in a trade carried on by him in contravention of Government Servants' Conduct Rules on the ground that the conduct of their father in contracting debts in such trade was "avyavahar."

It was held in *Sumer Singh v. Liladhar* (4) that under the Hindu Law money

(1) 80 Ind. Cas. 17; 1 O. W. N. 343; 10 O. & A. L. R. 912; A. I. R. 1925 Oudh 230.

(2) 85 Ind. Cas. 959; 1 O. W. N. 960; 12 O. L. J. 33; A. I. R. 1925 Oudh 325.

(3) 31 Ind. Cas. 301; 40 B. 126; 17 Bom. L. R. 955.

(4) 9 Ind. Cas. 624; 33 A. 472; 8 A. L. J. 306.

(5) 12 Ind. Cas. 639; 39 C. 862; 15 C. L. J. 228; 16 O. W. N. 519.

(6) 17 Ind. Cas. 666; 40 C. 288; 13 M. L. T. 5; 11 A. L. J. 1; 9 P. W. R. 1913; 17 O. L. J. 137; 15 Bom. L. R. 79; 17 C. W. N. 302; 28 P. L. R. 1913; 24 M. L. J. 318; (1913) M. W. N. 58; 26 P. R. 1913 (P. C.).

(7) 14 Ind. Cas. 705; 37 M. 458; 11 M. L. T. 427; 2 M. L. J. 61.

borrowed by the father to defend a suit for defamation is a debt for which a Hindu son and grandson are liable.

It was held in *Chakouri Mahton v. Ganga Proshad* (5) that a decree obtained by a person for damages on account of injury done to his crops, by the obstruction of a channel through which he was entitled to irrigate his lands, against one B, who was governed by the Mitakshara School of Hindu Law, could be executed on his death against his son where it could not be said that the decree obtained was due to an act of the judgment-debtor, which was a wanton interference with the rights of the decree-holder, and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt.

In *Kirpal Singh v. Balwant Singh* (6) the ruling in *Devi Ditta v. Saudagar Singh* (8) that a "just debt" means "a debt which is actually due, and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioner", was approved of by their Lordships of the Judicial Committee.

It was held in *Venugopal Naidu v. Ramanadhan Chetty* (7) that the liability of a Hindu father, who as a member of a *devastanam* committee, unauthorisedly spends the *devastanam* funds for expenses of a litigation, and is afterwards directed by the Court to pay the costs out of his own private funds, constitutes a debt which his sons and grandsons are under a pious obligation to discharge. The expression '*avyavaharika*' debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice. The following observations were made by Sadasiva Aiyar, J., in his judgment in that case:—

"I am inclined to adopt Colebrook's paraphrase, namely, 'debt incurred for a cause repugnant to good morals' as more nearly approaching the true import of the expression than any of the meanings given by the other authorities. If I might venture upon giving my own translation of the expression '*avyavaharika*' I would paraphrase an '*avyavaharika* debt' as a debt which is not supportable as valid by legal

arguments and on which no right could be established in the creditor's favour in a Court of Justice . . . As regards the case in *Ramiengar v. Secretary of State for India* (9) also relied on strongly by the appellant's learned Vakil, that decision rested 'on its own special circumstances', for, the learned Judges found in that case that the father knowingly brought a false case as a pauper. When he lost the suit and was made liable for the Government costs, it was held that his sons were not liable to Government for such costs so incurred. Without saying that I agree with the reasons given in the said decision, that decision is easily distinguishable from the present case. The judgment in *Alagiri-sami Naicker v. Subbayyar* (10) does not establish that the committee members (three of whom joined in the appeal to the High Court with the concurrence of the remaining two) dishonestly preferred the appeal to the High Court which appeal costs they were directed to bear out of their private funds. Imprudent and even 'unconscientiously' imprudent debts of the father are not in my opinion, immoral, illegal or '*avyavaharika* debts."

In the case of *Darbar v. Khachar* (11) a Hindu father erected a dam which obstructed the passage of water to the property of his neighbour. The Court found that the father had no right in law to erect the dam and a decree was passed against the father for damages. It was held by Knight, J., that the sons were not liable for the amount of the decree as such a debt is '*avyavaharika*', i. e., a debt which a father ought not "as a decent and respectable man" to have incurred. A Hindu son is answerable for the debts legitimately incurred by his father, not for those attributable to his (father's) failings, follies or caprices. This interpretation of the word '*avyavaharika*' appears to be too narrow, for it excludes debts for which the sons might be held legitimately liable and the view taken in this case has been dissented from by the High Courts of Calcutta, Madras and Allahabad [see *Chakouri Mahton v. Ganga Proshad* (5), *Venugopal Naidu v. Ramanadhan Chetty* (7) and *Sumer Singh v. Laladhar* (4).]

It appears that the learned Sanskrit scholars have differed as to the meaning

(9) 4 Ind. Cas. 105; 20 M. L. J. 89; 6 M. L. T. 308.

(10) 21 M. 278; 7 Ind. Dec. (N. S.) 552.

(11) 32 B. 348; 10 Bom. L. R. 297.

(8) 65 P. R. 1900; P. L. R. 1900, p. 322.

of the expression '*avyavaharika* debt'. We are inclined to adopt Colebrooke's paraphrase, namely, a debt incurred for a cause repugnant to good morals.

Cases Nos. 1 to 6 referred to by the learned Counsel for the appellant are not in point, so far as the decision of the point under consideration is concerned. We have carefully considered the 7th case—*Venugopal Naidu v. Ramanadhan Chetty* (7), referred to by the appellant's learned Counsel, and the case of *Ramiengar v. Secretary of State for India* (9) referred to by the respondents' learned Counsel. In *Ramiengar's case* (9) a Hindu father brought a suit *in forma pauperis* as next friend of one of his sons to establish his adoption and the suit was dismissed on the ground that the adoption set up was false. The father was ordered accordingly to pay the costs due to Government under s. 440, Civil Procedure Code of 1882. The question arose as to whether the sons were liable to pay such costs. It was held that the liability to pay the costs was imposed as a penalty for the father's misconduct in bringing a suit which he must have known to be false, that such liability might be regarded as in the nature of a fine and that the debt incurred by the father being thus tainted with immorality, his sons were not bound to pay it.

In our opinion *Ramiengar's case* (9) was rightly decided. We agree with the decision and the reasons for the decision in that case.

We agree with the learned Subordinate Judge that the grounds on which Dayal based his claim against Sheikh Mohammad Ali and also the grounds on which he resisted the suit brought against him by Sheikh Mohammad Ali were false and dishonest. He had knowingly brought a false case against Sheikh Mohammad Ali and had knowingly on false grounds defended the suit which Sheikh Mohammad Ali had brought against him. We hold, agreeing with the learned Subordinate Judge, that the plaintiffs are not liable to pay the costs for which the decrees in question were passed against Dayal.

The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects.

G. H.

Appeal dismissed.

A. N. A.

MADRAS HIGH COURT.

SECOND CIVIL MISCELLANEOUS APPEAL

No. 47 of 1925.

May 5, 1927.

Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.

PARAMBATH PARKUM MATTOLE
KUNHAMMAD HAJI (DEAD) AND OTHERS—
APPELLANTS

versus

CHATHOTH PARKUM KOZHUVAMMAL
(DEAD) AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—*Limitation Act* (IX of 1908), Sch. I, Art. 182 (5)—*Compromise decree in mortgage suit—Composite decree—Final decree; whether necessary—Application for final decree, whether step-in-aid of execution.*

A compromise decree in a mortgage suit provided that the mortgaged properties may be sold if the decree amount was not paid within a certain time and that, if the proceeds of the sale were insufficient, the judgment-debtor was to be personally liable to pay the balance to the decree-holder. After obtaining this decree, thinking that a final decree was necessary in the case, the decree-holder applied on three occasions, for obtaining a final decree. On each of these occasions, his application was dismissed. He then applied for execution of the original decree:

Held, (1) that the decree was a composite one and though it was irregular and was not strictly warranted by the provisions of O. XXXIV of the Civil Procedure Code it was executable; [p. 396, col. 1.]

(2) that the decree in question being a compromise decree and the parties having agreed that the decretal amount should be realised in a particular way, the Court had full jurisdiction to carry out the intentions of the parties whatever was the nature of the decree; [*ibid.*]

Abir Paramanik v. Jahar Mahmud Mandal (1) and *Sital Singh v. Baijnath Prasad* (2), relied on.

(3) that though an application for final decree is not an application for execution, yet the three prior applications were steps-in-aid of execution inasmuch as the plaintiff was asking the Court to make an order which was thought necessary, before taking out actual execution of the decree and the ultimate object of the petitions was to hasten the actual realisation of the decree amount. [p. 396, col. 2.]

Appeal against an order of the District Court, North Malabar, in A. S. No. 441 of 1923, preferred against that of the Court of the District Munsif, Payyoli (in R. E. P. No. 761 of 1922, in O. S. No. 748 of 1914).

Mr. K. P. M. Menon, for the Appellants.

Mr. K. P. Ramakrishna Iyer, for the Respondents.

JUDGMENT.—The mortgagee decree-holder is the appellant. This civil miscellaneous second appeal arises out of an application filed by him to execute the decree which he obtained in a suit for sale of the mortgaged properties. The decree sought

to be executed is a compromise decree. It provides for the sale of the properties if the decree amount is not paid within a certain time. It also provides that, if the proceeds of the sale are insufficient, the judgment-debtor is to be personally liable to pay the balance to the decree-holder. After obtaining this decree, thinking that a final decree was necessary in this case, the appellant applied on three occasions for obtaining a final decree. On each of these occasions, his application was dismissed. Then he made an application under O. XXI, r. 11 of the Civil Procedure Code for the execution of the original decree.

The respondent contended that the decree being only a preliminary decree, there could be no execution till a final decree has been obtained and that the application was barred by limitation. The learned District Munsif overruled both these contentions. On appeal the learned District Judge upheld the contentions and dismissed the appellant's petition for execution.

The same contentions against the execution of the decree are urged before us by the judgment-debtor respondent. As regards the first contention, we are of opinion that it is not necessary to get a final decree in this case. The 1st and the 2nd paragraphs of the decree comply with the requirements of the usual preliminary and the final decrees in a mortgage decree for sale, and the third paragraph distinctly makes provisions for the usual personal decree. The decree is a composite one; and though it is irregular and is not strictly warranted by the provisions of O. XXXIV of the Civil Procedure Code, it cannot be said to be inexecutable on that account. Further, even if it is held that there is no final decree, the decree in question being a compromise decree and the parties having agreed that the decretal amount should be realised in a particular way, the Court has full jurisdiction to carry out the intentions of the parties. That this can be done has been held in *Abir Paramanik v. Jahar Mahmud Mandal* (1). The fact that it was a decision under s. 89 of the old Transfer of Property Act does not affect the principle enunciated in it. See also the observation of the learned Judges in *Sital Singh*

v. Baignath Prasad (2) that strictly speaking O. XXXIV, r. 5 has no application to a compromise decree. On both these grounds we think it was not necessary for the appellant to obtain a final decree in the circumstances of this case.

The respondent's next contention is that the suit is barred by limitation. If the three applications for the final decree can be considered to be steps-in-aid of execution, then, it is admitted that the execution is not barred. It is first urged that there is no executable decree at all in this case and, therefore, there can be no application which may be called a step-in-aid of execution. To this, the reply is, as we have already held, that in this case there is an executable decree and, that being a compromise decree the parties are entitled to agree as to how the decree amount should be realised. The next argument is that an application for a final decree is not an application for execution. This is no doubt true, but the question is whether the applications in question, though styled applications for final decree can, with reference to their contents be considered to be "steps-in-aid" of execution. The decree-holder by applying for a final decree was endeavouring to get an order which he thought at the time as necessary before executing his decree. Afterwards due to better advice he gave up that attempt and applied for execution of the decree without getting a final decree as that was necessary. This was what has happened in this case. In these circumstances, we fail to see why the Court should not consider that the prior three applications were steps-in-aid of execution, for, as we have already said, the plaintiff was asking the Court to make an order which was thought necessary, before taking out actual execution of the decree. As the ultimate object of these petitions was to hasten the actual realisation of the decree amount, we are satisfied that they were "steps-in-aid" of execution. In this view the execution application which has given rise to this civil miscellaneous second appeal is not barred by limitation.

We set aside the decree of the District Judge and restore that of the District Munsif with costs here and the Court below.

V. N. V.

Appeal allowed.

(1) 34 C. 886; 6 C. L. J. 95; 11 C. W. N. 879.

(2) 75 Ind. Cas. 485; 44 A. 668; 20 A. L. J. 602; A. R. 1922 All. 383.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE No. 31 OF 1927.

September 6, 1927.

Present :—Mr. Kotval, A. J. C.

MOHAMMAD HAMID—APPELLANT

versus

MUNICIPAL COMMITTEE, DRUG—

RESPONDENT.

C. P. Municipalities Act (II of 1922), s. 83 (2)—Haisiyat-tax—Assessment—Matters to be considered—Exclusion of income-tax, insurance premia and house rent.

The question of liability mentioned in s. 83 (2) of the C. P. Municipalities Act is not the question of the amount fixed in respect of the liability but of a person's liability to pay the tax at all. [p. 397, col. 2.]

According to the rules of Drug Municipality in assessing a person to *haisiyat* tax, his relative tax paying capacity, i.e., the circumstances, social position and the size of his family, must be considered. [*ibid.*]

Income-tax paid by an assessee must be wholly excluded from his gross income. Exclusions on account of insurance premia and house-rent are matters within the discretion of the Committee in the first instance or in appeal by the Deputy Commissioner or other officer entitled to hear it under law, to be decided on the facts of each case. [p. 398, col. 1.]

Reference made by the Deputy Commissioner, Drug, dated the 20th January, 1927.

Mr. D. T. Mangalmurti, for the Respondent.

ORDER.—Mr. Muhammad Hamid, Tahsildar, was assessed by the Municipal Committee of Drug to *haisiyat*-tax for the year 1926-27 on Rs. 3,300, his gross salary for that year. He appealed to the Deputy Commissioner claiming that the amounts paid by him as income-tax, house-rent and life insurance premia should have been deducted from his gross salary and the tax levied on the balance Rs. 2,469-12-0 "which he is capable of spending at Drug proper."

The Deputy Commissioner was of the opinion that deduction on account of income-tax should be allowed but not on account of house-rent. He was doubtful whether provident fund payments and insurance premia should be deducted, though he was inclined to think that they should be to the extent permitted by income-tax rules. He has referred the case to this Court under s. 83 (2) of the C. P. Municipalities Act, 1922, as he considered that a question of liability to and the principle of assessment of the tax was involved.

The points referred are whether in assess-

ing the appellant to the *haisiyat*-tax the Municipal Committee should have made allowance for house-rent, income tax and insurance premia paid by him and for the contributions made by him to the provident fund. No question as to contributions to the provident fund arises in this case for the record discloses no claim made by the appellant in respect of them. He alleged that he paid Rs 86 4 0 for income-tax, Rs. 240 for house-rent and Rs. 54 for life insurance and claimed a deduction in respect of these items only. The reference in respect of provident fund contributions is made apparently because in answer to the notice issued to the Municipal Committee it alleged that in respect of Government servants the gross annual salary was the basis of assessment, no deduction being allowed on account of house-rent, income-tax, provident fund and insurance premia. As the point as to provident fund contributions did not arise in the appeal, it must be excluded from the reference which, in my opinion, must be confined to such questions as arise in the particular case in which it is made.

In this Court the Municipal Committee has been represented by an Advocate but no appearance has been made by or on behalf of the appellant.

In my opinion, no question of liability to the tax within the meaning of s. 83 (2) arises in this case for that is admitted. The question of liability mentioned in s. 83 (2) is not the question of the amount fixed in respect of the liability but of a person's liability to pay the tax at all. Mr. Hamid's liability to pay the tax is not denied. He only contests the amount which the Municipal Committee requires him to pay.

As regards the question of the principles of assessment, the Municipal Committee has overlooked the rules framed by it and sanctioned by Government by Notification No. 190-617-S-18, dated the 31st July, 1919. Rule 5 (b) of these rules lays down the principles of assessment applicable to the present case. According to that rule the relative tax paying capacity, i. e., the circumstances, social position and the size of the family of each person liable to be taxed must be considered. The measure of the tax-paying capacity of a Government servant, who, we assume, like Mr. Hamid, has no other income or property in the Municipality, does not depend solely upon the amount fixed as his salary. The tax is in-

tended to be elastic and contemplates a greater nicety of adjustment to the means of the payer than is usually possible in the matter of taxation. The possibility of Government servants earning the same salary and having no other income or property paying different amounts as *haisiyat-tax* is within the contemplation of the rule. The difference in the amount may be due to difference in the circumstances, social position or the size of the family.

It is not possible to define what is included in the terms 'circumstances' and 'social position', but for the purposes of this case it may be said that the outgoings under the heads referred to above are matters requiring consideration in determining the tax-paying capacity of the appellant. Except in the case of income-tax it cannot be laid down as a rule that in determining the tax paying capacity these items or any of them must be wholly deducted from the salary.

As far as income-tax is concerned that part of the salary which is paid as such is as good as never received and cannot be considered to be at all contributing to the occupier's tax paying capacity. Insurance premia and house rent are items of expense which depend for their extent on the occupier's choice and obviously he cannot, as a matter of principle, be allowed to claim deduction for the whole of the amounts paid by him for these purposes, for he might choose to make them so large as to swallow the greater part of his income. The extent to which allowance should be made in respect of these items is a matter to be decided in connection with each case by the Municipal Committee or the Deputy Commissioner, Commissioner or other officer hearing the appeal and no principle can be laid down on the point.

G. R. D.

Reference answered.

MADRAS HIGH COURT.

Civil Revision Petition No. 609 of 1927.

August 22, 1927.

Present:—Mr. Justice Reilly.

KOPPULA SUBBIAH—PETITIONER

versus

THAMMANA MANIKKAM AND ANOTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—

Madras District Municipalities Act (V of 1920)—Rules for conduct of Elections, rr. 14, 15, 17—Interpretation of rules by Election Court—Interference by High Court.

Where an election Judge acting under the Madras District Municipalities Act, by interpreting rr. 14, 15 and 17 of the Rules for the conduct of elections, found that certain ballot papers had been improperly rejected by the returning officer:

Held, that the High Court would not interfere in revision even if the finding of the Judge that the ballot papers were improperly rejected was wrong inasmuch as he had jurisdiction to interpret the rules.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Judge, West Godavari at Ellore, in O. P. No. 53 of 1925.

Sir K. V. Reddi, for the Petitioner.

Mr. P. Venkatarama Rao, for the Respondents.

JUDGMENT.—K. Subbiah, the petitioner here, was declared to be elected as a Municipal Councillor of Ellore as having got 196 votes at the election against 195 for T. Manikkam respondent No. 1. On an election petition presented by T. Manikkam the District Judge found that the result of the election had been materially affected by the improper rejection of 16 ballot papers, which, if accepted would have left each of these candidates with 205 votes. Whether the District Judge's finding that the 16 ballot papers were improperly rejected was right or wrong, he arrived at that finding by interpreting rr. 14, 15 and 17 of the Rules for the conduct of elections of Municipal Councillors. I find no defect in his jurisdiction to interpret those rules as he has done nor any illegality nor material irregularity in his procedure. On his finding his order that a new election would be held was within his jurisdiction.

The petition is dismissed. The petitioner will pay respondent's costs in this Court. Respondent No. 2 will bear his own costs in this Court.

V. N. V.

A. N. A.

Petition dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 123 OF 1925.

April 27, 1927.

Present:—Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Kulwant Sahay.**Maharaja UDAI PRATAP NATH SAHIDEO—PLAINTIFF—APPELLANT***versus***Maharaja Kumar JAGAT MOHAN NATH SAHI DEO—DEFENDANT—RESPONDENT.***Impartible Raj—Maintenance grant—Grantee's right to minerals—'Sab sudha', meaning of—Principles of English Common Law, applicability of—Maintenance grant, whether conveys proprietary rights—Limitation Act (IX of 1908), Sch. I, Art. 120—Declaratory suit—Fresh invasion—Fresh cause of action.*

In the case of a maintenance grant where the reversion remains with the grantor minerals do not pass to the grantee without words of express grant or by clear implication. [p. 404, col. 1.]

Tituram Mukerji v. Cohen (2), *Hari Narayan Singh v. Sri Ram Chakravarti* (3), *Jyoti Prasad Singh v. Lachipur Coal Co.* (4), *Durga Prasad Singh v. Braja Nath Bose* (5), *Biswa Nath Gorai v. Surendra Mohan Ghose* (6), *Christian v. Telkaini*, *Narbada Koei* (7), *Kunja Behari Seal v. Raja Durga Prasad Singh* (8), *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (9), *Girdhari Singh v. Megh Lal Pandey* (10), *Megh Lal Pandey v. Rajkumar Thakur* (11), *Raghunath Roy Marwari v. Raja of Jheria* (12) and *Secretary of State for India v. Srinivasa Chariar* (13), relied on.

The words 'sab sudha' (including all) in a grant are not sufficient to pass minerals. [*ibid.*]

Girdhari Singh v. Megh Lal Pandey (10), relied on.

In an impartible Raj the junior members of the family have not the ordinary co-parcenary rights which members of a joint Hindu family have; and a grant of maintenance by the holder of the Raj to the junior members of the Raj cannot and does not amount to a partition and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and sub-soil rights. [p. 412, col. 2.]

A fresh invasion of the plaintiff's title arising from an entirely new situation gives the plaintiff a fresh cause of action for the institution of a suit for declaration of title. [p. 407, col. 2.]

It is not safe to apply the principles of the English Common Law relating to the rights to minerals to India as there is a fundamental difference between land tenures in England and in India and the peculiarities of the feudal system of tenures are not to be found in India. [p. 416, col. 2; p. 417, col. 1.]

First appeal from a decision of the Subordinate Judge, Ranchi, dated the 4th July, 1925.

Sir B. C. Mitter of the Calcutta Bar (with him Mr. B. C. De), for the Appellant.

Mr. Pugh (with him Messrs. S. Sinha, P. K. Sen, C. C. Das, M. Imam, M. Prasad, G. S. Prasad, K. P. Sukul, S. N. Banerji, S. N. Palit and B. N. Mitter), for the Respondent.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiff from a decree of the Subordinate Judge of Ranchi, dated the 4th July, 1925, dismissing the plaintiff's suit for a declaration of his right to the minerals in Pargana Tori.

The main question for determination in the appeal is whether a grant of Pargana Tori made in 1867 by Maharaja Jagannath Sahi Deo of Chota Nagpur to his younger son descendible in the direct male line of the grantee and resumable on failure of lineal male heirs passed not only the surface rights but also the right to the minerals thereunder.

The plaintiff, the present Maharaja of Chota Nagpur, is the elder son of Maharaja Jagannath Sahi Deo the grantor and succeeded to the Raj on his father's death in 1869. The first defendant who may be referred to as the Maharaj Kumar is the plaintiff's younger brother being the son of the same father by a different mother. It was to this defendant that Pargana Tori was granted by way of maintenance by his father in 1867. The second and third defendants are licensees of the Maharaj Kumar under a prospecting license, dated the 27th May, 1921. The defendant No. 5, the Tori Syndicate Limited, claims to be the assignee of the rights of the second and third defendants. This defendant was added on his own application. The fourth defendant, the Tori Coal and Minerals Prospecting Company, Limited, claims under a prospecting license granted by the plaintiff and supports the plaintiff's case. The remaining defendants numbered 6(a) and 6(b) who were also added on their own application claim as licensees of the Maharaj Kumar under a prospecting license granted to their deceased father on the 23rd May, 1924, alleging that the previous license to the second and third defendants had been cancelled.

The plaintiff claimed (a) a declaration of his right to the minerals in Pargana Tori and the right of access thereto for himself, his servants and agents, (b) a permanent injunction against the contesting defendants restraining them from interfering with the exercise of the plaintiff's right, and, (c) a permanent injunction against the said defendants restraining them from working the mines and removing the minerals in Pargana Tori.

The contesting defendants pleaded that the minerals passed to the Maharaj Kumar under the grant of 1867 either by its terms or by custom and, further, that they have acquired title by adverse possession and that the suit is barred by limitation. A further plea was raised that the plaintiff had relinquished his rights, if any, in favour of the Maharaj Kumar by instruments of release and confirmation, dated the 10th March, 1893.

Eleven issues were settled for determination but two of them originally numbered 6 and 9 were struck out before trial by the learned Judge without objection by the Maharaj Kumar as being irrelevant and unnecessary. They raised the question whether the Chota Nagpur Raj bearing Tauzi No. 1 on the revenue roll of the Collector of Ranchi was a permanently settled estate and whether the villages in Pargana Tori appertained to that estate. The defendants Nos. 2 and 3 objected to their deletion but as they admitted that the villages in Pargana Tori appertained to the Chota Nagpur Raj estate the learned Judge did not consider it necessary to determine the nature of that estate. Of the remaining issues re-numbered 1 to 9 the first four were not pressed by the defendants at the trial or in this appeal. The remainder were as follows:—

5. Is the suit barred by limitation?

6. Have the mineral rights in Pargana Tori passed to and vested in the defendant No. 1 either by virtue of custom as alleged by him or by virtue of the alleged lease, dated *Magh Sudi 7, 1923, Sambat*?

7. Has the plaintiff got any title to the minerals in Pargana Tori and is he entitled to the declaration and injunction prayed for?

8. Did the plaintiff abandon and relinquish his rights, if any, to the mines and minerals in the aforesaid Pargana by the instruments of release and confirmation of the 10th of March, 1893?

9. What relief, if any, is the plaintiff entitled to?

If the grant were merely a lease either for a term or in perpetuity or a maintenance grant for the life of the grantee I consider that the question would be concluded by a series of authorities binding on this Court notwithstanding that there are words of general import in the grant itself which, taken in their widest significance, would be sufficient to pass all rights in the property to the grantee and the heirs

male of his body. The learned Subordinate Judge before whom the case came for trial held that none of the decisions upon which reliance was placed by the plaintiff governed the present case. He was further of opinion that the nature of the estate created by the grant bore a close resemblance to what in England would be called an estate in tail male and was in the nature of a freehold estate passing the underground, as well as the surface, rights. He further relied upon evidence of surrounding circumstances when the grant was made as showing the intention of the grantor. He further held that the suit being one for a declaration was barred by Art. 120 of the Schedule to the Limitation Act. He also decided the eighth issue in favour of the defendants holding that the plaintiff had by the transaction of the 10th March, 1893, abandoned and relinquished his rights in the minerals to the Maharaj Kumar.

The translation of the grant of 1867 used in the lower Court and printed with the record was imperfect, certain important words being entered as illegible. We accordingly had a translation made by an official translator of this Court which is as follows:—

"Sri Sri Basudev Rai Sahi
Sign Manual

"Maharajadhiraj Sri Jagannath Sah Deo.

"This *patta* is granted in respect of *brit jagir* on the auspicious 7th day of *Magh Sudi Sambat*, 1923, by the great and powerful Maharaj Sri Jagannath Sah Deo.

"I have granted the entire Pargana Tori *khas bhandar*, original with dependency, appertaining to the Collectorate and District *Kismat Lohardagga*, Sub-District Ranchi, (together with) *jalkar*, *bankar*, trees, *Parjapur* (tenants' houses), four boundaries, all included, in *brit jagir* to Manjhil Lal Sri Jagat Mohan Nath Sah Deo for his maintenance. He with his sons and grandsons and so on shall realise from the former and present *elakadars* rents fixed in respect of the *jagirs* granted previously and at present, in accordance with the *patta*, together with the *rakumats*. So long as the sons and grandsons and so on of Manjhil Lal Sri Jagat Mohan Lal Sah Deo will live, (they shall take possession of) *bhandar khas* at every place and realise rents in respect of the entire Pargana Tori, *khas bhandar* and the *elakadari* and enjoy the same peacefully, and pay to *huzur* an annual rental of Rs. 300 (Rupees three hundred) in the

Company's coin together with *rakumat*. So long as Manjhil Lal is not fit to sign his name by his own pen, the papers of his villages (*dehat*), such as *thika patta*, receipts, acquittance, etc., shall be executed under the Sahi signature of *huzur* and Manjhil Lal shall continue to get all the income from the aforesaid villages (*dehat*). He shall remain in possession and occupation of the said villages (*dehat*) and peacefully enjoy the same. It is, therefore, witnessed by Dudhbaiya Sri Puran Sahi Bakhsh Sri Nilamar Das Mirdaha Sri Ganesh Ram. Signature (scribe?) Pande Bhupal Rai of Bhoro.

(On the margin)

Witnessed by

Swami Sri Trambak Nath Deo.

Purohit Sri Gobind Ram, Guri Sri Manik Ram.

Jubraj Sri Pratap Udainath Sah Deo.

Thakur Sri Padumlochan Nath Sah Deo."

The words "four boundaries, all included" are a literal translation of the words "*chatur sima sab sudha*" and might perhaps be rendered in idiomatic English as "including 'every thing within four boundaries.'" The words "*bhandarkhas*" refer apparently to the villages or portions of the estate in the direct possession of the proprietor himself and not rented or farmed to others. The Chota Nagpur Raj to which Pargana Tori appertains is admittedly an impartible estate and succession thereto is governed by the rule of male lineal primogeniture, females being excluded. Such an estate according to the decision in the case of *Sartaj Kuari v. Deoraj Kuari* (1) is alienable at the will of the Maharaja for the time being except in so far as there may be any custom to the contrary and no such custom has been shewn in this case. The younger sons of the family although they have no right to partition or to restrain alienation are entitled by the custom prevailing in the family to a maintenance grant of a portion of the estate which descends in the direct male line of the grantee in the same manner as the parent estate and is resumable on failure of that line. According to the evidence of the defendants' witness No. 3 the third son of the plaintiff, there is no hard and fast rule as to the kind of property to be given in *khorphosh*. There is no set form for the documents executed in evidence of the grants. The terms of such grants may not be exactly similar but

(1) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.).

the substance is the same. At the time of making grants calculation is made on the basis of the income derivable from the Pargana concerned. This witness adds that up to now no mines in Chota Nagpur have to his knowledge been worked. Except Chhota Lal none of the *khorphoshdars* in the Raj has as yet worked any mines in their respective villages and he adds "I do not know in what village or villages the said Chhota Lal has worked mines but I have heard that he has got some mines working". Chhota Lal there referred to is the fourth son of the Maharaja. He was also called as a witness and agrees with his brother that there is no fixed rule as to the extent of *khorphosh* grants in reference to the parent estate. There is no *dastur* on the point. If any disputes arise in the matter the same have to be decided either in Court or by arbitration. It does not appear from his evidence that he ever worked any mines within his *khorphosh* grant but he appears to have excavated clay or earth on his estate for the purpose of making bricks for his house without any opposition from the plaintiff. In fact it may be stated at once that except for the evidence of Lal Jogendra Nath Sahi Deo, a son of the present *khorphoshdar* of the Jharia Estate, held under the Chota Nagpur Raj, there is no evidence of any of the *khorphoshdars* having worked the minerals upon their estates. The evidence of this witness is of the vaguest description. He says that some 40 or 50 years ago some iron mines used to be worked on that estate. The operations went on for two or three years. The greatest depth reached was about 15 feet and the excavations were made along a ditch 100 to 150 steps in length. This village is in a remote part of the country 44 or 45 miles from the nearest Railway Station and it does not appear that the Maharaja of Chota Nagpur had any knowledge of the matter. I think that it may safely be assumed that in 1867 when the grant in question in this suit was made the question of mineral rights was not present to the mind of any one.

Several cases have been drawn to our attention of maintenance grants and leases in which it has been held that the mineral rights did not pass except by express words of grant or by necessary implication. In *Tituram Mukerji v. Cohen* (2) the Judicial

(2) 33 C. 203; 32 I. A. 185; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920; 3 A. L. J. 59; 8 Sar. P. C. J. 908 (P. C.).

Committee held that a *khorphosh* grant for the lifetime of the grantee could not be presumed to be more than a grant of the rents and profits and did not carry with it the right to open mines and remove minerals which are a portion of the soil. In that case there was no direct evidence as to the terms of the grant. In *Hari Narain Singh v. Sri Ram Chakravarti* (3) it was held that a perpetual lease to a certain idol at a nominal rental did not pass the mineral rights in the absence of any evidence that the grantor had parted with them. Again the document in this case relied on by the lessees was not produced. In *Jyoti Prasad Singh v. Lachipur Coal Co.* (4) it was held in the Calcutta High Court that a permanent *moghali brahmottar* grant which had existed before the Permanent Settlement, nothing being known about the intentions of the parties at the time of the inception of the lease, did not pass the mineral rights. In *Durga Prasad Singh v. Braja Nath Bose* (5) it was held by the Judicial Committee that a *digwari* grant in Manbhūm did not pass the mineral rights to the Dighwar the presumption being that they remained with the *zemindar* in the absence of proof that he parted with them. In *Biswa Nath Gorai v. Surendra Mohan Ghose* (6) it was held by the Calcutta High Court that the interest of a *khorphoshdar* heritable in the male line, being a limited interest liable to defeasance by failure of heirs and thereupon resumable by the proprietor for the time being, was not an interest sufficient to carry with it the sub-soil rights. That was a case arising in Chota Nagpur and would appear to be indistinguishable from the present case unless it should appear from the words of the grant now relied on that the mineral rights were transferred. The case of *Christian v. Tekaitni-Narbada Keori* (7) does not carry the matter any further. It was the case of a maintenance grant for the lifetime of the

grantee and as the deed did not contain any express provision authorising the grantee to open new mines and to appropriate the minerals therefrom it was held that the minerals did not pass. The grant, however, was made in 1894 and was governed by s. 108 of the Transfer of Property Act. In *Kunja Behari Seal v. Raja Durga Prasad Singh* (8) the previous decisions of the same Court in the cases above referred to decided in 1910 and 1911 were followed and it was held that a *moghali brahmottar* grant of a *mauza* did not pass the minerals to the grantee. The case of *Shashi Bhushan Misra v. Jyoti Prasad Singh Deo* (9) was decided by their Lordships of the Privy Council in 1916. It was the case of a permanent *mukarrari* grant made before the Permanent Settlement to certain Brahmins and the question for determination was whether such a grant carried with it the mineral rights in the soil. The Lord Chancellor in delivering the judgment of the Board pointed out that it was important to avoid giving words used in connection with legal transactions in India the special and technical meaning which they possess in England and added "According to our law, the word 'grant' is strictly applicable to the conveyance at Common Law of remainders, reversions, and incorporeal hereditaments which do not lie in livery, or of which livery could not be given. But, in connection with the present dispute, the word has no such meaning and it is important at the outset to bear this in mind." Previous decisions of their Lordships' Board were referred to and from those decisions a principle was enunciated which in their Lordships' opinion was conclusive of the case before them. The principle so enunciated was "that when a grant is made by a *zemindar* of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect. In *Girdhari Singh v. Megh Lal Pandey* (10) it was held that a *mukarrari* lease of land of a

(3) 6 Ind. Cas. 785; 37 C. 723; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J. 633; 20 M. L. J. 569; 12 Bom. L. R. 495; 8 M. L. T. 51; (1910) M. W. N. 309; 37 I. A. 136 (P. C.).

(4) 12 Ind. Cas. 482; 38 C. 845; 14 C. L. J. 361; 16 C. W. N. 241.

(5) 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133 (P. C.).

(6) 29 Ind. Cas. 429; 19 C. W. N. 102.

(7) 27 Ind. Cas. 471; 19 C. W. N. 796; 20 C. L. J. 527.

(8) 25 Ind. Cas. 819; 42 C. 346; 20 C. L. J. 304; 19 C. W. N. 203.

(9) 40 Ind. Cas. 139; 44 C. 585; 1 P. L. W. 361; 21 C. W. 377; 15 A. L. J. 209; 32 M. L. J. 245; (1917) M. W. N. 226; 25 C. L. J. 265; 21 M. L. T. 303; 19 Bom. L. R. 416; 6 L. W. 2; 44 I. A. 46 (P. C.).

(10) 42 Ind. Cas. 651; 45 C. 87; 22 M. L. T. 358; 15 A. L. J. 851; 33 M. L. J. 687; 3 P. L. W. 169; 26 C. L. J. 584; (1917) M. W. N. 232; 22 C. W. N. 201; 7 L. W. 90; 20 Bom. L. R. 64; 44 I. A. 246 (P. C.).

permanent and heritable character did not pass the minerals unless by the terms thereof there was an express or plainly implied grant of the underground rights. In that case just as in the present the grant contained words of general import. The terms of the grant appear from the report of the case in the Calcutta High Court in *Megh Lal Pandey v. Raj Kumar Thakur* (11). They are as follows:—

"I settle in *mukarrari* the whole of *Mouza Baramasia* with all rights (*mai hak hakuk*) as per boundaries given below, appertaining to my *zemindari*, etc."

Their Lordships held that in spite of the wide general terms the minerals did not pass. "It is unavailing to urge" said Lord Shaw in delivering their Lordships' judgment, "that the right granted by the *mukarrari patta* to the lessee is of a permanent, heritable, and transferable character, as even although this be the case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary, unless there be by the terms of the lease an express or plainly implied grant of those rights they remain reserved to the *zemindar* and are part of his *zemindari*." Again in *Raghunath Roy Marwari v. Raja of Jheria* (12) it was held that the principle enunciated in the previous cases applies as well to rent-free grants as to grants of tenures at fixed rates. The grant in that case was of rent-free *brahmottar* land. Sir John Edge in delivering the judgment of their Lordships said: "The result at which their Lordships have arrived after a consideration of the decisions of the Board is that where a *zemindar* grants a tenure in lands within his *zemindari*, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee." In 1920 the case of the *Secretary of State for India v. Srinivasa Chariar* (13) was decided by the Judicial Committee. In that case a village had been granted as a *shrotriyam inam* in 1750 by the Nawab of

the Carnatic. The grant provided that the grantee having appropriated to his own use the produce of the seasons each year might pray for the prosperity of the Empire and that he should pay a fixed yearly sum to the Sirkar. The *inam* was enfranchised in 1865 and the *inam* title-deeds purported to convert the tenure into a permanent free-hold upon payment of a quit-rent. In 1905 the Madras Government imposed upon the successors of the original *inamdars* royalties in respect of stone which they had quarried in the village. The latter sued for a declaration of their full rights to the rocks and hills within the village and claimed a refund of the royalties already paid. It was held that upon a true construction of the grant the full right to the quarries and minerals did not pass to the grantee and that having regard to Madras Act VIII of 1869 the *inam* title-deeds could not vest in the *inamdars* a subject-matter not vested in them by the grant; consequently the Government was entitled to impose royalties on stone quarried in the village. It was further held that the terms of the grant being in evidence neither the *inam* title-deeds nor certain admissions made by the Government in land acquisition proceedings were evidence as to its effect. At most those proceedings could amount to no more than action taken under a misapprehension of the Government's legal rights and this could not make the law one way or the other, nor could it affect the Government's title. It was further stated by Sir Lawrence Jenkins in delivering the judgment of the Board that the rules of English Law as to real property in England could afford no guidance as to what passed under the grant of a village in *inam*. This latter point has frequently been insisted upon and I think it may now be said that the feudal laws of England are no guide to the principles affecting land tenures in Bengal. The learned Subordinate Judge has been at some pains to draw an analogy between the present grant and an estate tail in England and because the tenant in tail enjoys the mineral rights he infers that the holder of a *putra paustradi* tenure can enjoy the same rights. But the analogy is not supported by authority nor would it, in my opinion, bear close inspection. A tenant in tail has a free-hold estate and is for all practical purposes on an equal footing with a tenant in fee simple. Under the present

(11) 34 C. 358 at p. 364; 11 C. W. N. 527; 5 C. L. J. 208.

(12) 50 Ind. Cas. 849; 47 C. 95; 17 A. L. J. 597; 36 M. L. J. 660; 1 U. P. L. R. (P. C.) 43; 23 C. W. N. 914; 26 M. L. T. 76; 30 C. L. J. 160; 21 Bom. L. R. 895; 10 L. W. 347; 46 I. A. 158 (P. C.).

(13) 60 Ind. Cas. 230; 44 M. 421; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43; 48 I. A. 56 (P. C.).

grant—it appears to me that the interest created, although not strictly a lease as defined in the Transfer of Property Act, bears most of the essential features of an interest created between landlord and tenant a rent being reserved and the reversion in the event of failure of lineal male heirs remaining in the landlord. On the face of it the document is a maintenance grant and the presumption upon the authorities quoted must, I think, be that the minerals did not pass without words of express grant or by clear implication. From the terms of the grant itself it would appear that the enjoyment of the rents was the main object of the grant. From the authorities quoted I think the principle emerges that where the reversion remains in the grantor the minerals do not pass without express words. If this is so even in the case of a permanent lease, I think the same principle should apply to the present grant where the interest terminates on the failure of male lineal descendants.

An argument was addressed to us upon the meaning of the words "*sab sudha*" "all included" or "including everything" which it was contended were sufficient to pass not merely the surface rights but also the subject minerals. But this part of the case appears to me to be concluded by the decision of the Privy Council in the case of *Girdhari Singh v. Megh Lal Pandey* (10) in which it was held that similar words (*mai hak hakuk*) (with all rights) in a *mukarrari* lease did not add to the true scope of the grant or cause minerals to be included within it. In my opinion there is nothing to be gathered from the terms of the grant itself which indicate an intention to pass the mineral rights.

It was argued, however, that the parties being governed by the Mitakshara Law the property of the Raj remained joint family property except in so far as the custom of the family modified the Mitakshara Law. It was, therefore, contended that a *khorphosh* grant, which the younger sons were entitled to insist on, was analogous to a partition and that they took, under such a grant, the whole of the proprietary rights in the estate within the area of the grant itself and that on the failure of male descendants of the grantee, the estate granted did not revert to the parent estate as in the case of a lease but went back by survivorship. In support

of this contention the case of *Bairnath Prasad Singh v. Tej Bali Singh* (14) was relied on. There the previous decisions including the case of *Katama Natchiar v. Rajah of Shrivangana* (15) and *Sartaj Kuari v. Deoraj Kuari* (1) were reviewed and it was held that the successor to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara Law is designated by survivorship subject to the custom of impartibility; the eldest member of the senior branch of the family, therefore, succeeds in preference to the direct lineal senior descendant of the common ancestor if the latter is more remote in degree. It seems to me, however, that the right of the junior members of the family to maintenance out of an impartible estate does not arise out of co-ownership but out of the custom which is a modification of the ordinary Mitakshara Law. In *Venkata Mahipathi Gangadhara Rama Rao v. Rajah of Pittapur* [The *Second Pittapur case*] (16) frequently referred to as the second Pittapur case, it was held that in the absence of special custom the grandsons of a deceased *zemindar* are not entitled to maintenance out of the impartible estate in the hands of his successor. The right to maintenance is a personal and not a real right, otherwise the younger sons would be entitled to a charge upon the property for their maintenance in the hands of a transferee of the proprietor for the time being which is not the case. Moreover, the argument that the *khorphosh* estate goes back to the parent Raj by survivorship and not by reversion, although it has certain attractions, will not bear examination. Alienability is an incident both of the parent estate and of the *khorphosh* grant. Suppose a Maharaja should transfer his estate to another the reversion to the *khorphosh* grant in the event of failure of male descendants of the grantee would pass to the transferee who certainly could not take by survivorship. Again if the *khorphosh* grant should

(14) 60 Ind. Cas 534; 43 A. 228; 19 A. L. J. 317; 33 O. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 25 O. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 8 U. P. L. R. (P. O.) 35; 29 M. L. T. 358; 48 I. A. 195 (P. O.).

(15) 9 M. I. A. 539; 2 W. R. P. O. 31; 1 Suth. P. O. J. 520; 2 Sar. P. O. J. 25; 19 E. R. 843.

(16) 47 Ind. Cas. 354; 41 M. 778; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 28 O. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 O. W. N. 173; (1918) M. W. N. 922; 45 I. A. 148 (P. O.).

be alienated the transferee would take subject to defeasance on failure of the direct line of the original *khorphoshdar*. In this case also it could not be said that the *khorphosh* grant went back to the parent estate by survivorship.

Reliance was also placed on the fact that the two main junior branches of the family had their *gaddis* called *quarkari gaddi* and *thakurai gaddi* just as the Maharaja has the *raj gaddi* and from this we were asked to infer that they held some special proprietary interest in the property constituting their *horposh* grants. This suggestion, however, is discounted by the witness who speaks to it for he says that there is no difference in the rights possessed in their *khorphosh* grants by the first three sons and those of the junior ones and he adds that the assignment of *khorphosh* properties to the first three sons does not amount to a partition of the Raj. The word '*gaddi*' conveys an idea of superiority in the possession of the holder thereof. He adds:

"The estate in my possession cannot be called *gaddi*."

This was the evidence of the fourth son of the Maharaja.

A point was also made of the fact that in a previous suit in 1915 the plaintiff in giving evidence had described the second and third sons as the *maliks* of their *gaddis*. A chance expression of this sort may be appropriate enough in the context in which it was used but it does not necessarily mean more than that the persons so designated have complete powers of disposal over the interests which they hold. The question of mineral rights was not then under consideration; nor can such an expression afford any guide to the intentions of the grantor expressed in a document made by the deponent's father nearly fifty years earlier.

The learned Subordinate Judge has also been greatly influenced by what he describes as the peculiar circumstances existing when the grant was made. At that time both the plaintiff and the Maharaj Kumar were children under a year old having been born within a month of each other in the previous year. Their father, the Maharaja Jagannath Sahi Deo who was then over sixty years of age and apparently of somewhat weak intellect, had a few years earlier placed his nephew and heir presumptive Upendra Nath Sahi Deo, known as Burra Lal, in charge of his estate

as manager but owing to a quarrel between the Maharaja and his nephew in 1863 the latter was dismissed and ill feeling arose between them. In 1865 the Maharaja left his ancestral home at Palkote and settled at Bhanro in another part of his estate and his two sons were born in the following year. The chances of Burra Lal succeeding to the Raj were thus put an end to, but he appears to have circulated rumours to the effect that the plaintiff and his brother were not the sons of the Maharaja and his Ranis, and in 1869 on the death of the Maharaja he sued the Ranis and the Court of Wards, under whose management the estate had been placed, to establish his title thereto on the allegation that the two sons were supposititious children. In this he succeeded in the trial Court but the judgment was reversed on appeal. A copy of the judgment of the trial Court has been put in evidence on behalf of the defendants and marked Ex. F (1). From this document further particulars of this incident may be gathered. I have referred to it merely because the learned Subordinate Judge has attached great weight to it as showing that the Maharaja in 1867 was apprehensive that the Raj might be wrested from his sons by the machinations of his nephew and, therefore, in order to secure some property at least to the family, in case his fears should prove well founded, he made the grant of Tori to his younger son. From this the learned Judge deduces that there could be no room for doubt that the Maharaja intended to convey full rights to the grantee subject to the reservations expressly mentioned. With great respect to the learned Judge I think the intention must be gathered from the language of the grant itself and not from considerations of such a speculative nature. Had it been his intention by this grant to secure the future welfare of both his children, as the learned Judge finds, I hardly think he would have made provision for the younger of his children only. It would have been equally easy to secure the future of his elder son by a similar grant and, had he felt any real apprehension as to the succession being diverted, I think the strong probabilities are that he would have made provision for both. The story told by the defendant as to what he heard from the Ranis concerning the Maharaja's intentions is at most

hearsay. It is contradicted by the plaintiff and I do not think any reliance can be placed on it. I presume the evidence was admitted by the learned Judge as evidence of *contemporanea expositio*. But where the document is produced in evidence and contains no latent ambiguity extrinsic evidence of intention can hardly be admissible.

The learned Judge also found that the plaintiff in 1893 abandoned his right to the minerals. The question as to the right to the minerals does not appear to have received much, if any, attention until the year 1890 when the Maharaj Kumar for a consideration of Rs. 25,000 granted to Mr. Max Anderson of Calcutta by a *thika patta*, Ex. B (1), dated the 10th November, 1890, a license to prospect for minerals in Pargana Tori for a period of five years with power during that period to dispose of the mineral rights to any person or company for a term of 25 years, the consideration for the lease to be shared between the licensor and licensee in certain proportions. By another document of the same date, Ex. B-1/1, he granted Mr. Anderson for a period of five years the mining rights in three of the villages of the Tori Estate. At that time it would appear that the Maharaj Kumar anticipated that his right to dispose of the minerals might be questioned by the plaintiff, for by the terms of the prospecting license, in case the plaintiff or his successors should dispute the right, the Maharaj Kumar undertook at his own expense to defend any suit that might be brought against the licensee and to hold him harmless against all loss, costs, damages and expenses arising therefrom. Shortly afterwards the plaintiff did dispute his brother's right to deal with the minerals but the dispute between them appears to have been amicably settled by the intercession of their respective mothers. Mr. Anderson was anxious to get an extension of his prospecting license but apparently was not content with a grant from the Maharaj Kumar alone. In the result the plaintiff and his brother in 1893 agreed that Mr. Anderson's license should be extended for a further period of 10 years and that he should have power during the extended period to grant a lease of the mining rights for 50 years. Accordingly two agreements were executed both, dated the 10th March, 1893. These are Ex. B-1/2 and Ex. 10. The former is the extension of the prospecting license in favour of Max Anderson and is signed by both brothers. The latter is a

deed of release signed by the plaintiff relinquishing in favour of Max Anderson his rights to the minerals in Pargana Tori during the term created by the prospecting license and the lease, if any, that might be granted thereunder. The recitals in this document are important. After referring to the *pattas* granted in 1890 by the Maharaj Kumar it contains a recital to the effect that the Maharaja claims that all rights to minerals and metals lying in and under the lands comprised within the Chota Nagpur Raj including Pargana Tori belong to him as Maharaja of the said Raj, and that on failure of the heirs male of the Maharaj Kumar he has the right to resume the said Pargana free of all encumbrances. It then states that Mr. Anderson has applied to the Maharaja to release to him his rights in the minerals in the lands described in the two previous *pattas* for the purpose of perfecting his title. It then continues

"And whereas by an agreement on an eight annas stamp paper, dated the 5th February one thousand eight hundred and ninety-three, it has been mutually agreed between the said Kumar Jagat Mohan Nath Shah Deo and myself for ourselves, our heirs and assigns that from that day henceforth we shall equally enjoy all profits and benefits to be derived from the produce of any mines or minerals in the said Pargana Tori or the sale price or rent or other benefit thereof * * Now I do hereby release to you and your Syndicate and to your and their assigns all my rights whatsoever the same be to the metals and minerals and precious stones of every description and under the surface of all the lands in Pargana Tori." For the term mentioned in the two *thika pattas*, the learned Judge relied upon these documents of 1893 as showing that the plaintiff, "Expressly and in unmistakable terms admitted that the defendant No. 1 was the sole master of the mines and minerals and as such had every right to deal with the same." I do not think that any such inference can be drawn from the transaction evidenced by these two documents. In the deed of release (Ex. 10) the plaintiff distinctly asserted his exclusive right to the minerals and entered into the transaction because he and his brother had come to an agreement to share equally between them the profits to be derived from the minerals in Pargana Tori under an agreement, dated the 5th February, 1893, and not because the Mah-

raj Kumar had any other title. There is no admission that the minerals had passed by the grant of 1867. If the agreement of the 5th February, 1893, referred to in the deed of release were valid and enforceable, then the rights of the parties would be governed by that agreement in this case; but neither party is now relying upon it for it appears that it was never registered and cannot be enforced or put in evidence by either party. It may be mentioned here that Mr. Anderson's license expired in 1905 and, as no advantage was taken of the terms to execute a lease of the mineral rights, it has long ceased to be operative. I must hold, therefore, that there was no relinquishment by the plaintiff of his mineral rights in Pargana Tori in favour of his brother.

In 1908 the Tori Estate was being administered by a manager under the Encumbered Estates Act. In order to pay off the debts and get the estate released the Maharaj Kumar obtained a loan from Sirkar Bernard and Company of rather more than a lakh of rupees on mortgage and promised to release the minerals in Pargana Tori to the lender. A prospecting lease was in fact granted to Sirkar Bernard and Company but it was never registered and nothing came of it. The next transaction was in 1921 when the Maharaj Kumar granted a prospecting license to the defendants Nos. 2 and 3, dated the 17th May that year. The present suit was instituted in August, 1922. The learned Subordinate Judge said he was inclined to the view that a suit for a declaration was barred by Art. 120 of the First Schedule to the Limitation Act by reason of the fact that the cause of action arose in 1900, and in 1903 when the Maharaj Kumar asserted a right to lease the minerals to Mr. Anderson and that in any event even if a fresh cause of action arose in 1921 he was of opinion that this was not a case in which the Court would be justified in passing a declaratory decree. I think on both points he was wrong. In 1893 the situation was entirely different. The parties then purported to compromise the dispute existing between them and on the strength of that compromise the plaintiff agreed to grant a prospecting lease in favour of Mr. Anderson and to share the proceeds with his brother. The compromise between the plaintiff and his brother now turns out to be inoperative owing to lack of registration and the Maharaj

Kumar himself is repudiating it and claiming to be exclusively entitled to the mineral rights. Thus, an entirely new situation arose in 1921 and, in my opinion, a fresh cause of action accrued and a suit for a declaration would not be time-barred. Further if the plaintiff can make out his title to the minerals I can see no reason why he should be refused the relief sought in the circumstances of this case, merely because in declaratory suits the Court has, in proper circumstances, a discretion in the matter. That discretion should not be arbitrarily exercised. The discretionary refusal to grant declaratory relief would not determine the question of title and the only effect of exercising a discretion in favour of the defendants would be to involve the parties in additional expense and litigation as soon as the defendants began to work the minerals and deprive the plaintiff of possession. The facts necessary to arrive at a determination have been fully gone into in the present suit and I can see no reason for refusing the relief claimed as a matter of discretion in the present suit if we consider that the plaintiff has established his title.

The only question of limitation raised and determined in the lower Court was that to which I have referred and which is based on Art. 120 of the Schedule to the Limitation Act. No issue as to adverse possession was raised or determined, although the point was taken in para. 5 of the written statement of the second and third defendants, but there is no evidence in the case to support the view that the defendants, or any of them, by working the minerals acquired any adverse title. In my opinion the suit is not barred by limitation.

The learned Judge expressed the view that the mineral rights passed to and vested in the defendant No. 1 by virtue of the immemorial custom obtaining in the family and the grant as evidenced by the deed of 1867. I do not know on what grounds the learned Judge concluded that the mineral rights passed by custom. There can be no instance of the mineral rights passing before 1867 as up to that time the minerals had not been worked and it is difficult to see how there could be any custom one way or the other. The Maharaj Kumar himself when asked in cross-examination whether in Chota Nagpur *putra pau* *tradi* grants conveyed minerals stated that he could give

no opinion and apart from his own case he did not know of any other.

A cross-objection was filed on behalf of the defendant No. 3 complaining that issues Nos. 6 and 9 as originally framed were improperly deleted by the Subordinate Judge and should be restored for hearing and determination. It was admitted, however, by this defendant when the matter was dealt with by the learned Subordinate Judge on the 17th June, 1925, that the villages comprising Pargana Tori appertained to the Chota Nagpur Raj. The point raised, however, is that unless the Chota Nagpur Raj is a permanently settled estate the minerals do not belong to the plaintiff. The defendants other than those numbered 2 and 3 did not dispute at the trial that the Chota Nagpur Raj was a permanently settled estate and indeed the interest claimed by the principal defendant himself, through whom the others claimed, depends upon the assumption that the plaintiff's father was in possession of the minerals and able to pass them by the grant of 1867. The title of the defendant No. 3 himself also depends upon the right of the first defendant through whom he claims. The plea, therefore, will not avail him unless he can show some title apart from that derived from the Maharaj Kumar. The argument is that the defendant No. 3 is in possession of the minerals and is, therefore, entitled to resist the plaintiff's claim in the absence of proof of the plaintiff's title. There is, however, no evidence on the record to show that the defendants Nos. 2 and 3 or any of the other defendants are in possession of the minerals and the claim asserted by these defendants must stand or fall upon the rights of the defendant No. 1 who does not himself dispute that the Chota Nagpur Raj is a permanently settled estate or that the mineral rights were vested in the plaintiff's predecessor before the grant of 1867.

In my opinion the decree of the trial Court should be reversed and the appeal should be allowed with costs here and in the Court below against the contesting defendants and the cross-objection should be dismissed with costs, the costs to carry interest at 6 per cent. per annum from this date until realisation. The plaintiff is entitled to a declaration of his title to the mines and minerals in Pargana Tori and to an injunction restraining the defendants other than the defendant No. 4 from enter-

ing upon, working or removing any mines or minerals within the said Pargana or from interfering with the plaintiff, his servants or agents in doing all acts reasonably incidental to the enjoyment of the plaintiff's right in the mines and minerals in the said pargana.

Kulwant Sahay, J.—The principal questions for determination in this appeal are: First, whether the defendant No. 1 acquired rights to the mines and minerals in Pargana Tori under the grant of February, 1867 or by custom; secondly, if the plaintiff had abandoned or relinquished his rights, if any, to the mines and minerals in Pargana Tori; and thirdly, whether the suit was barred by limitation.

I shall first deal with the question of interpretation of the deed of February, 1867, which has been marked as Ex. 8 in the case.

[His Lordship after satisfying himself that the translation of the deed was correct proceeded as follows:]

It is contended on behalf of the plaintiff that by this grant the rights to the mines and minerals in Pargana Tori did not pass to the defendant No. 1. On the other hand, it is contended on behalf of the respondents that all sub-soil rights including the mines and minerals passed to the defendant No. 1. Reliance was placed on behalf of the plaintiff-appellant on the term of the grant whereby the grantee and "his sons and grandsons and so on" were to realize from the former and present *elakadars* the rents fixed in respect of the *jagirs* granted previously and at present, in accordance with the *patta*;" and also to the term that "so long as the sons and grandsons and so on" of the grantee "will live they shall take possession of *bhandar khas* at every place and realize rents in respect of the entire Pargana Tori *khas bhandar* and the *elakadari* and enjoy the same peacefully," and further on the term that the grantee "shall continue to get all the income from the aforesaid villages." It is contended that these terms clearly show that what was granted was merely the rents and profits of the villages comprised in Pargana Tori and that it was not the intention of the grantor to demise the sub-soil and mineral rights in the Pargana. It is contended that the grant was for the purpose of maintenance of the grantee and maintenance grants have always been held

to pass only the surface rights and not the sub-soil rights to such grantees. As regards the generality of the terms used in the document it was contended that they referred only to the surface rights and not to the sub-soil rights.

On behalf of the respondents it is contended that the document makes no reservation whatsoever and that the entirety of the rights possessed by the grantor were transferred to the grantee. Great reliance was placed upon the word "*sab sudha*" translated as "all included" occurring in the document. It was contended on behalf of the respondent that "*sab sudha*" meant everything comprised in the land. The contention of the respondent was that the word "*sudha*" in Sanskrit meant the soil, the earth, and that "*sab sudha*" meant all the earth, and that, therefore, it included the sub-soil rights. It is true the etymological meaning of the word "*sudha*" in Sanskrit is earth, but the popular significance of the word "*sab sudha*" is everything included. The words "*sab sudha*" follow the words "four boundaries". Now, the grant of "four boundaries" would be meaningless. What was actually intended to convey was everything included within the four boundaries. Reliance has been placed upon the word "*darobast*" which occurs thrice in the document. "*Darobast*" is a Persian word and means entire, and the grant was of the *darobast* Pargana Tori *khas bhandar darobast* original with dependencies. The word "*darobast*" does not carry the defendants any further. It merely means that the entire Pargana Tori with the entire *khas bhandar* was granted. "*Bhandar*" according to Fallon's Dictionary means villages managed by the Raja or *zemindar* himself, his own peculiar estate not rented or farmed to others. "*Khas Bhandar*", therefore, means such villages as were held by the grantor in his own direct possession and were not let out or farmed to others. This was in contradistinction to the villages settled in *jagir* with the *elakadars* and the deed expressly says that the grantee was to realize the rents and profits of the villages of the *khas bhandar* as well as those held by the *elakadars* under *jagirs* granted by the grantor.

On a construction of the terms of the deed, therefore, it seems clear that there was nothing in it to indicate that the grant was of the sub-soil or mineral rights. It

was a grant of rents and profits of the villages included in Pargana Tori. The grant was a "*putra pautradi*" grant and such grants mean that the grantee's male descendants in direct line were to hold the Pargana, and that in the event of failure of male descendants in the direct male line the properties were to revert to the grantor. If reversion be left in the grantor, then in the absence of express grant minerals remain with the grantor. The defendants' evidence shows that at the time of making the maintenance grants in the family calculation is made on the basis of the income derivable from the property granted, and the object of the grant is to secure to the grantee sufficient income in order to enable him to maintain himself in accordance with his dignity and this, it appears, is the case even when grants are made to the third and succeeding sons of the Maharaja. At the time the grant was made it was never in contemplation of the grantor to grant the minerals. The generality of the terms used cannot be held to include the corpus in the grant because it gives the grantee only the right to the usufruct and no power is given to him to consume the property itself and the general enumeration must be taken to be *ejusdem generis*. The word "*sab sudha*" appears to have the same meaning as the word "*hak-hakuk*" which was construed by the Privy Council in *Girdhari Singh v. Megh Lal Pandey* (10), as not to increase the actual corpus of the subject affected by the grant. Having regard, therefore, to the plain meaning of the terms used in the document, I am unable to say that the grant included the minerals or sub-soil rights.

I may here refer to the contention of the appellant to the effect that the grant is really, a lease, and as such the minerals could not pass. In this connection I am disposed to agree with the learned Subordinate Judge that the deed Ex. 8 cannot be held to be a lease. It is not a transfer for a certain time express or implied or in perpetuity. It is contended on behalf of the appellant that the grant was of a tenure and the relationship between the parties is that of a landlord and tenant, and reference was made to three suits for rent instituted by the plaintiff against the defendant No. 1 for rent under the provisions of s. 139 (3) of the Chota Nagpur Tenancy Act (VI of 1908 B. C.).

Exhibit 3 is a plaint of a suit for rent against the defendant No. 1 where the rent is claimed in respect of a tenure or *jagir* in lieu of services for 1970, 1971 and 1972 *Sambat*. Exhibit 7 is a written statement in that suit, Ex. 4 is the judgment, and Ex. 5 is the decree in that suit. It is argued that in the written statement (Ex. 7) there was no denial of the relationship of landlord and tenant between the parties, or that the suit was not one under s. 139 of the Chota Nagpur Tenancy Act. Exhibit 4 (a) is a judgment in another rent suit for the years 1974-76 *Sambat*. Exhibit 4 (b) is the judgment in a third rent suit. Now, these documents do not go to establish that the deed Ex. 8 was a lease. Section 139 of the Chota Nagpur Tenancy Act applies not only to cases of rents properly so-called but also to dues which are recoverable as if they were rents. These suits do not go to establish that the relationship between the parties was that of landlord and tenant and that the defendant No. 1 was holding as a lessee under the plaintiff. It was contended that it was a lease in perpetuity subject to a condition of reversion in the case of failure of male issue. In my opinion, having regard to the terms of the document, it cannot be considered to be a lease in perpetuity. Reference may in this connection be made to the decision of Sir Lawrence Jenkins in the *Municipal Corporation of Bombay v. Secretary of State for India* (17). I would, therefore, hold that there is no substance in the contention of the appellant that the deed was really a lease. It is a *khorphosh* grant for a term which is not certain and not a grant in perpetuity.

The learned Subordinate Judge has held that the words used in the deed are ambiguous, and in order to ascertain the intention of the grantor he has considered the circumstances existing at the time the deed was executed and the subsequent conduct of the parties. Mr. Pugh on behalf of the respondent No. 1 has also referred to those circumstances and to the subsequent conduct of the parties. Reliance has been placed by the learned Subordinate Judge upon the fact that the Chota Nagpur Raj forms an impartible estate and the succession thereto is governed by the rule of primogeniture and that no females are entitled to succeed. It is the common case

of the parties that according to the custom of the family grants for maintenance of portions of the estate are made either by the Maharaja in his lifetime to his sons, or if no grant is made to the sons by the reigning Maharaja then after his death the eldest son who succeeds to the Raj makes grants of maintenance to his younger brothers. It appears from the evidence that the eldest son of the Maharaja succeeds to the Raj. His second son is called the Kuar, the third son is called the Thakur and other younger sons are called Lals. The eldest son who succeeds to the Raj has the *Rajgi gaddi* assigned to him. The second and the third sons also appear to have *gaddis* in this Raj which are called the *Kuarkari gaddi* and the *Thakurai gaddi*. It is the case of the defendants that the properties given as maintenance to the second and to the third sons are really portions of the original estate which are severed from the Raj and allotted to the second and the third sons as appertaining to their respective *gaddis*, and that the maintenance grant is not a grant of the rents and profits of the villages only but it is a complete severance or partition of the villages from the Raj and they belong to the *gaddis* of the second and the third sons and that the occupiers for the time being of the *Kuarkari* and the *Thakurai gaddis* are absolute proprietors of the villages comprised in the grant in the same way as the Maharaja for the time being is the proprietor of the main estate assigned to the *Rajgi gaddi*. Mr. Pugh contends that such grants to the Kuar and to the Thakur really amount to a partition of the joint family estate under a peculiar custom of the Chota Nagpur Raj family, and that although the Chota Nagpur Raj itself is impartible, yet by custom there is a partition so far as the maintenance grants are concerned. The rules of succession to the *Rajgi gaddi* and to the *Kuarkari* and the *Thakurai gaddis* are the same, i. e., the rule of primogeniture and the exclusion of females applies to all the three *gaddis*. Reference was made to the deposition of the plaintiff given in a previous suit, a certified copy whereof has been admitted in evidence and marked as Ex. A-(1) and printed at page 58 of Part III of the record, where the Maharaja admits that there are three *gaddis* in his family, viz., the *Maharaja gaddi*, the *Kuarkari gaddi* and the

Thakurai gaddi, and that the occupiers for the time being of these *gaddis* are the *maliks* of their respective *gaddis*. Reference was also made to the fact that the Tori Pargana which was granted to the defendant No. 1 was itself a separate Raj at one time subordinate to the Chota Nagpur Raj and it was resumed by the Maharaja sometime in the year 1819 and then re-granted to the defendant No. 1 who holds a very dignified position, is himself the holder of a *gaddi* and enjoys the privilege of *danka* and *nishan* as it appears from the evidence in the case. The history of the Tori Pargana is given in the Final Report of the Survey and Settlement Operations in the District of Palamau by Mr. T. W. Bridge at page 47, para. 19 and the subsequent pages of the report. It is contended that it is not a grant to a petty tenure-holder but the grant of a Pargana which was a Raj in itself, and that, therefore, the grant was an absolute grant conveying the proprietary interests including the sub-soil and the mineral rights in the villages. The Todi Pargana consists of a large number of villages having an area of 665 square miles. Mr. Pugh's contention is that it is settled law that the members of the family of an impartible Raj are governed by the Mitakshara Law as regards succession, that they are members of a joint Hindu family and the succession is governed by the rules of succession obtaining in joint Hindu families, the only difference being that according to the particular custom of the Raj only one member of the family succeeds to the Raj and the others get maintenance allowance, but argues Mr. Pugh, that the maintenance allowance to the junior members of the family in this particular Raj always consists of portions of the estate, and that by such grant the portions allotted are really severed from the parent estate and made over to the junior members of the family, and this rule amounts to a partition of the joint family according to the peculiar custom in the family. The grants are always *putra putradi* grants and revert to the Raj on the failure of male descendants of the grantee, but this reversion is not really a reversion to the grantor in the true sense of the term but the grantor takes the estate on the failure of the male line of the grantee by right of survivorship in the same way as on the death of the Maharaja for the time being

the eldest son of the Maharaja takes it by survivorship according to the rules governing Mitakshara joint Hindu families. Mr. Pugh distinguishes the case of *khorphosh* grants from the ordinary *mukarrari* grants in Chota Nagpur and the adjoining estate of Ramgarh, and contends that such grants have no resemblances to *thika* or *mukarrari* grants.

Reference is made by Mr. Pugh to the decision of their Lordships of the Privy Council in *Bajinath Prasad Singh v. Tej Bali Singh* (14). In this case Lord Dunedin reviewed almost all the cases dealing with the subject of succession to impartible estates, and on a review of the cases beginning with the *Shivagunga's case* (15) which was decided in the year 1863 and ending with the case of *Rajah Rup Singh v. Rani Baisni* (18) which was decided in the year 1884, his Lordship observed that up to this point the law was all one way and affirmed these propositions:—

(1) The fact that a Raj is impartible does not make it separate or self-acquired property.

(2) A Raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

(3) If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, i. e., the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the Raj without the others sharing it.

His Lordship then referred to the case of *Sartaj Kuari v. Deoraj Kuari* (1) which was decided in the year 1888. The question raised in this case was as to whether the holder of an impartible Raj could alienate the properties appertaining to the Raj even when there were no purposes of legal necessity, and it was held that he had the power to alienate. This finding was based on the principle that there was no such co-parcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. His Lordship then refers to *Rama Krishna Rao v. Court of Wards*

(18) 7 A. 1; 11 I. A. 149; A. W. N. (1884) 246; 4 Sar. P. O. J. 533; 3 Ind. Dec. (N. S.) 902 (P. O.).

[*The First Pittapur case*] (19) and to the [*The Second Pittapur case*] (16) and to the other cases subsequent to *Sartaj Kuari's case* (1) and the conclusion come to was that the *zemindari* being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the *Mitakshara Law*, and that the respondent in that case being the person who in a joint family would, being the eldest of the senior branch, be the head of the family is the person designated in the impartible Raj to occupy the *gaddi*.

The contention of Mr. Pugh is that what has been laid down by the Privy Council in the case of *Bajinath Prasad Singh v. Tej Bali Singh* (14) is that the members of the family of the Maharaja for the time being of an impartible Raj are members of a joint Hindu family, unless there is a separation and partition amongst them, and that the maintenance grants of the nature with which we are concerned in the present case are really allotments of a portion of the estate to the members of the joint family, and that they are absolute conveyances which revert to the Raj not by right of reversion but by right of survivorship as in an ordinary Hindu family.

The argument is ingenious; but, in my opinion, there is no substance in it. It is true that the members of the family of an impartible Raj are governed by the rules of a joint Hindu family, but such rules apply only for the purposes of succession and there is no co-parcenary in an impartible estate such as exists in ordinary *Mitakshara* families and there is no such co-ownership as to entitle the junior members of the Raj to demand a portion of the estate by partition, as appears to be laid down in *Sartaj Kuari's case* (1) and as was held by the Calcutta High Court in *Protap Chandra Deo v. Jagdish Chandra Deo* [*Dalbhumi's case* (20)]. Lord Dunedin referring to *Sartaj Kuari's case* (1) observed as follows: "Even, however, if their Lordships thought the decision in *Sartaj Kuari's case* (1) wrong—an opinion which they do not pronounce—the case has stood too long to be now touched."

The rule of law laid down in *Sartaj Kuari's case* (1) must be considered to be good law even now; and if *Sartaj Kuari's case* (1) lays down the correct law then it is clear that in impartible estate there is no real co-ownership in the proper sense amongst the members of the family of the holder of an impartible Raj and in determining the question of succession the right of survivorship is to be presumed, but only for the purposes of succession and for nothing else. The principle of *Sartaj Kuari's case* (1) was applied to Wills in *The First Pittapur's case* (19). In *Tara Kumari v. Chaturbhuj Singh* [*Telwa's case*] (21) it was found that there had been a complete separation and that, therefore, the widow of the last holder was entitled to succeed to the estate in priority to the next male reversioner. Towards the end of the judgment in that case Sir John Edge observed that the learned Judges of the High Court had overlooked the fact that Bhupat Narayan Singh and his son, who were the junior members of the family, had no co-parcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh, the holder of the impartible estate, from alienating that estate in such a way as to determine any contingent interest they had in it under the custom, and that their contingent interest under the custom was liable to be defeated by an alienation of the estate of Thakur Ranjit Narayan Singh even if the family had remained joint. I am of opinion that in an impartible Raj the junior members of the family have not the ordinary co-parcenary rights which members of a joint Hindu family have; and the grant of maintenance by the holder of the Raj to the junior members of the Raj cannot and does not amount to a partition and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and sub-soil rights.

Sir Binode Mitter on behalf of the appellant points out that the contention of Mr. Pugh that on the failure of male descendants in the line of the grantee the holder

(19) 22 M. 383; 26 I. A. 83; 1 Bom. L. R. 277; 3 C. W. N. 415; 7 Sar. P. O. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.).

(20) 82 Ind. Cas. 886; 40 C. L. J. 331; A. I. R. 1925 Cal. 116

(21) 30 Ind. Cas. 833; 42 C. 1179; 19 C. W. N. 1179; 29 M. L. J. 371; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1031; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M. W. N. 717; 42 I. A. 192 (P. C.).

of the Raj takes the property by survivorship is fallacious, because if there is a separation in the Maharaja for the time being could it take the property by survivorship. If the grantee sells the properties given to him to a stranger then in the case of failure in the main line the Maharaja cannot be held to take it by survivorship but he takes it only in exercise of his right of reversion. If the Maharaja for the time being transfers the entire Raj the transferee could not enforce the right of survivorship but takes it only by right of reversion. The contention of Mr. Pugh must, therefore, fail.

The learned Subordinate Judge observes that the circumstances existing at the time the deed of February, 1867, was executed and the subsequent conduct of the parties go to show that what was granted was an absolute estate and that the sub-soil and the minerals also passed. The circumstances referred to by the learned Subordinate Judge are that there is evidence of a custom in the family that the Maharaja for the time being makes grants to his sons or brothers of portions of the estate for their maintenance, and that this custom is capable of being enforced by arbitration, and, if necessary, by suit. This circumstance does not lend support to the contention that the grants of maintenance include the sub-soil rights in the properties granted. On the other hand the evidence is that an account is taken of the rents and profits of the properties proposed to be granted, and that the extent of the properties granted is such that the income thereof may be sufficient for the maintenance of the grantee. No doubt there is evidence of the fact that there are three *gaddis* in the Chota Nagpur Raj and that the plaintiff in his evidence in a previous suit (Ex. A-1) has stated that the holders of the *Kuarkari* and the *Thakurai gaddis* are the *maliks* of the properties granted to them; but this to my mind does not take the case further. The evidence on the record is not sufficient to establish a custom that the grants to the holders of these *gaddis* are absolute grants, and the term "*malik*" by itself does not indicate that an absolute interest, including the sub-soil rights, is granted to the holders of these *gaddis*. It is true that the grants are not mere life grants but devolve upon successive male heirs

in the main line of the grantees; but this contention also does not go to show that the intention of the grantor was to grant more than the right to enjoy the usufruct of the properties granted. No doubt, the properties granted can be transferred to strangers, but they can do so only so long as the male line of the grantee continues, and on extinction of male line the property reverts to the grantor. The learned Subordinate Judge has held that the estate created by grants like these are peculiar to the family, being the offspring of immemorial custom, and such estates created by such grants are unknown to and not recognized by the ordinary Hindu Law and that they are peculiar estates similar to estates tail of the English Law. The circumstances set forth above, either singly or taken together, do not lend support to the contention that grants such as the one now under consideration pass the mines and minerals in the properties granted.

The other circumstance referred to by the Subordinate Judge as existing at the time of the grant is the fact disclosed by the plaint (Ex. E-1) and the judgment (Ex. F-1) of the suit brought by Opendra Nath Sahi Deo against Rani Luchun Kower and Rani Komal Kower, the widows of the late Maharaja and the mothers of the plaintiffs and the defendant No. 1, respectively. In the first place the judgment (Ex. F-1) is not legal evidence as regards the circumstances alleged to exist at the time of grant. This judgment was admittedly set aside on appeal and a copy of the judgment of the Court of Appeal has not been produced. Moreover, the judgment is of a date subsequent to the date of the grant in question in the present suit and it is not evidence of circumstances contemporaneous with the execution of the deed. There is no evidence that at the time of the grant there was any litigation which would induce the then Maharaja to have recourse to proceedings which would amount to an absolute transfer of a portion of the estate. If this was the intention of the Maharaja in making the grant such intention could have been expressed and given effect to in a much more definite and conclusive manner than the method adopted by the Maharaja in making the grant under the deed (Ex-8). The oral evidence of the circumstances referred to by the

learned Subordinate Judge existing at the time of the grant is not such as to enable one to hold that the father of the plaintiff and the defendant No. 1 intended to make provision for the defendant No. 1 and through him for the plaintiff also in case Burra Lal Opendra Nath Sahi Deo succeeded in wresting the Raj from him, and that the object of the grant was that the Maharaja intended to convey full rights thereby to the grantee.

As regards the subsequent conduct of the parties the evidence to my mind is not such as to lead to the conclusion that the intention of the parties to the grant was that full rights, including sub-soil rights, did pass. The letter Ex. D-1 (c) of the Deputy Commissioner to the Manager of the Chota Nagpur Estate and letter Ex. D-1 (d) from the Deputy Commissioner to the defendant No. 1 do not in any way refer to the minerals. It appears that the estate of the plaintiff as well as that of the defendant No. 1 were under the Court of Wards and that the direction given in the letter Ex. D-1 (c) was merely a direction as regards the management of the respective estates. There is nothing in these letters to indicate any conduct of the parties which would go to show that the minerals passed to the defendant No. 1. Moreover, any admission made by the Deputy Commissioner as representing the Court of Wards would not be binding upon the plaintiff. Furthermore, although evidence of subsequent conduct of the grantor or the grantee can in certain cases be taken into account in order to find the intention of the grantor and the grantee, the conduct of other persons is of no value for this purpose.

Reference is then made to the conduct of the defendant No. 1 and the plaintiff in connection with the grants of certain prospecting licenses. Exhibit B (1) is a *thika patta*, dated the 10th of November, 1890, granted by the defendant No. 1 to one Max Anderson. Under this deed Max Anderson was granted the right to prospect and search for metals and minerals and precious stones of every description in and under the surface of all the lands in Pargana Tori. The defendant No. 1 in this deed claimed to be the sole and absolute owner of the Pargana Tori and of all rights to minerals or metals therein. Exhibit B-1/1 is another *patta* of the same date by the defendant No. 1 to

Max Anderson in respect of rights to metals, ores, minerals and precious stones in two villages of Pargana Tori. Three years later in the year 1893 the term of the previous lease in favour of Max Anderson was extended. Exhibit B-1/2, dated the 10th March, 1893, is an agreement between the defendant No. 1 and Max Anderson to extend the term. This deed bears the seal of the plaintiff, and, although the executant of the deed is the defendant No. 1 alone, towards the end of the deed it is stated that he undertakes and agrees to execute and register further *pattas* for the purpose of extension of time as provided for in the previous portion of the deed and to have it sealed and delivered to the said Max Anderson by the defendant No. 1 as well as by Maharaja Uday Pratap Nath Sahi Deo, the plaintiff. The next document is Ex. 10 of the same date (10th of March, 1893) as the agreement Ex. B-1/2. This purports to be an instrument of release and confirmation by the plaintiff in favour of Max Anderson. In this document there is a recital of the fact that an agreement had been executed on the 5th February, 1893, whereby it had been mutually agreed between Kumar Jagat Mohan Nath Sahi Deo, the defendant No. 1, and the Maharaja, plaintiff, that from the date of the said agreement each of them shall equally enjoy all profits and benefits to be derived from the produce of any mines or minerals in the said Pargana Tori or the sale price, or rent or other benefit thereof. The Maharaja, plaintiff, in this document also asserts that although the *thika patta* of 1890 had been executed by the defendant No. 1 in favour of Max Anderson yet the Maharaja, plaintiff, claimed that all rights to minerals and metals lying in and under all the lands comprised within the Raj or estate of Chota Nagpur including the said Pargana of Tori belong to him as the Maharaja of the said Raj or estate, and that he (the Maharaja) had the right to resume the said Pargana Tori free of all encumbrances in the event of the failure of heirs male of Kumar Jagat Mohan Nath Sahi Deo, the defendant No. 1. The Maharaja by this document purported to release in favour of Max Anderson all rights whatsoever that he may have to the metals and minerals in Pargana Tori and to release and relinquish all claims to demands of rents or royalties in respect of such metals and minerals.

during the term or period of the *thika pattas* granted by the defendant No. 1. Now, these documents, to my mind, do not constitute evidence of conduct of parties which would go to show that the parties themselves understood that the sub-soil rights and minerals in Pargana Tori passed to the defendant No. 1 under the grant of February, 1867. The two *pattas* of 1890, no doubt, show an assertion of title to the mines and minerals by the defendant No. 1; but in the document of 1893 (Ex. 10) we have a clear assertion by the plaintiff that he claimed all the sub-soil rights in Pargana Tori. The agreement of the 5th of February, 1893 referred to in Ex. 10 has not been produced and neither party, relies upon it, and it is not possible to say what the nature of the agreement between the parties actually was. It might be that it referred only to the term of the lease granted to Max Anderson. In my opinion the acting of the parties evidenced by the deeds of 1890 and 1893 gives us no assistance in construing the deed of 1867. The lease granted to Max Anderson, however, was not operative and Max Anderson did not work any mines under the lease.

The next set of documents showing the conduct of parties consists of certain *pattas* and maintenance grants made by the plaintiff. Exhibit C—1/2 is a *patta*, dated the 24th April, 1891, executed by the plaintiff in favour of Srimati Kuarani Alakh Manjari Koeri, the wife of the defendant No. 1. By this deed the plaintiff granted one *mauza* to the lady as *jagir* descendible to children and the mines in the said *mauza* were expressly excluded. Exhibit G (1) is an indenture made on the 5th of April, 1916, between the Maharaja, plaintiff, and his son Jagat Kishore Nath Sahi Deo. It appears that certain properties had previously been granted by the Maharaja, plaintiff, to his said son by way of maintenance but the income of all those properties was not found to be sufficient and there was a dispute between the parties as regards the amount of income of the villages given as maintenance. The matter appears to have been referred to the Raja of Saraikala, who is the father-in-law of the plaintiff, who made an arbitration between the parties and under this arbitration the plaintiff granted certain other villages to make up the deficiency. This indenture (Ex. 1) evidenced this fact and it acknowledged that the son got certain villages to make up the

deficiency in the maintenance grant. In this document there is nothing to show that the mines were excluded as was expressly done in the *patta* Ex. C—1/2 granted by the plaintiff to the wife of the defendant No. 1. Exhibit O (1) is a *khorphosh* grant, dated the 13th June, 1917, by the plaintiff to another son of his named Gopeshwar Nath Sahi Deo. In this deed also there is no reservation as regards the mines. Exhibit H (1), dated the 13th June, 1917, is another *patta* by the Maharaja, plaintiff, to another son of his named Aseswar Nath Sahi Deo granting him certain villages by way of maintenance. Here also the mines, etc., were not excluded. Exhibit C—1/3 is a *patta* by the defendant No. 1 to Braj Kishore Nath Sahi Deo, one of the sons of the plaintiff. In this document the defendant No. 1 made a grant of *Mauza* Murpa to the plaintiff's son including mines of all kinds existing in the village. The last document is Ex. C—1/1 a *patta*, dated the 22nd April, 1921, granted by the plaintiff in favour of his son Gopeshwar Nath Sahi Deo. The son had purchased certain villages which had previously been granted in *jagir* to certain persons. By this document the plaintiff granted to his said son one of the *mauzas* purchased by him as *jagir* descendible to children, and in this document mines of all kinds have been excluded. The argument based on behalf of the respondent upon these documents is that although mines were excluded in the document Ex. C—1/2 granted in favour of the wife of the defendant No. 1, there is no such express reservation of the mines in the maintenance grants executed by the plaintiff in favour of his sons, and that when there was an intention to exclude the mines such intention was expressly expressed in those documents. In the first place these documents are of no help to us in construing the deed of 1867. In the next place we find that in 1890 the defendant No. 1 in his lease to Max Anderson had already made an assertion of title to the mines and minerals, and there is no wonder that when the plaintiff executed the document, Ex. C—1/2, in favour of the wife of the defendant No. 1 on the 24th of April, 1891, he expressly excluded the mines from the *patta*. The documents G(1), C(1), H(1) and C—1/1 came into existence in the years 1916, 1917 and 1921 respectively after there was some sort of agreement come to between the plaintiff and the defendant No. 1 as evi-

denced by the release (Ex. 10), dated the 10th March, 1893. In any event, the mere fact of no mention being made as regards the mines, either excluding the same or granting the same, in some of the documents executed by the plaintiff and mention thereof being made in others after the question had become prominent is not sufficient to enable us to construe the deed of 1867 and to hold that the minerals and sub-soil rights passed to the defendant No. 1 under the grant (Ex. 8).

As regards the custom pleaded by the defendant No. 1 the evidence is not sufficient to prove the same. The defendant's witness No. 2, who is the fourth son of the plaintiff, says nothing about the custom in his examination-in-chief. In his cross-examination he admits that the *khorphosh* grants made to him and to the other junior members of the family are of the same character as the grants made to the Kuar and to the Thakur. He further states that there is no difference in the rights possessed in the *khorphosh* grants by the first three sons and by the junior sons. It follows, therefore, that the fact of the existence of the three *gaddis* makes no difference in the character of the grant made to the holders of the Kuarkari and the Thakurai *gaddis* and to the other junior members of the family. This witness further admits that the assignment of *khorphosh* properties to the first three sons does not amount to a partition of the Raj. Defendant's witness No. 3 is the third son of the Maharaja, plaintiff. He too does not prove the custom. He states that at the time of making the grants calculation is made on the basis of the income derivable from the Pargana concerned. His deposition shows that up till now no mines in Chota Nagpur have been worked to his knowledge, and excepting Ohhote Lal none of the *khorphoshdars* under the Raj has yet worked any mines in their respective villages (by Ohhote Lal he means the second witness for the defendant). The fourth witness for the defendant is the holder of an estate granted in *khorphosh* by one of the ancestors of the present Maharaja. This grant was made long before the Permanent Settlement and the deed is not forthcoming. He states that 40 or 50 years ago some iron mines used to be worked in the Pargana granted to him, but his cross-examination shows that this statement is not supported by any reliable evidence. The next witness is the defendant No. 1 himself. His evidence

also does not prove the custom alleged. He, no doubt, asserts that coal and other minerals have been extracted from several *mauzas* comprised in Pargana Tori granted to him but he is unable to produce any satisfactory evidence, such as the account papers or to call witnesses who worked the mines. The instances he gives are not instances sufficient to prove the working. As regards Max Anderson, we have seen that the Maharaja in confirming the grant made to him by the defendant No. 1 distinctly asserted his claim to the minerals. As regards Sarkar Barnard and Company, it appears that they advanced money on mortgage of defendant No. 1's wife's property and not on a prospecting license granted by the defendant No. 1 to them and that, therefore, this is no evidence as regards the working of the mines. Moreover, even if there was working of the mines by the defendant No. 1 there is nothing to show that this was done with the knowledge of the plaintiff. I am of opinion that the evidence on the record is not sufficient to prove the custom alleged by the defendant No. 1.

The learned Subordinate Judge then observes that the estate granted to the defendant No. 1 resembles estates-tail of the English Law, and that, as the ordinary Hindu Law does not recognize an estate such as that created by the grant under consideration, and as no light can be had in the matter from the provisions of the Hindu Law, and as in all cases for which no specific statutory directions are to be found in the Indian Law, the Courts are to act according to justice, equity and good conscience, and as the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England and as the nearest approach to the estate created by the grant under consideration is to be found in the estate known as an estate-tail male in the Common Law of England, he proceeds to examine the nature of such an estate under the Common Law of England and to hold that as estates-tail male in England carry the right to work mines and quarries beneath and within the lands, the grant under consideration also included the right to the mines and the sub-soil rights in the villages comprised in Pargana Tori. In this connection I need only observe that it is not safe to apply the principles of

the Common Law of England to the grant under consideration. As was observed by Jenkins, J., in *Kally Dass Ahiri v. Manmohini Dassee* (22) to draw an analogy from the English Law of real property is wholly misleading. There is a fundamental difference between the land tenures in England and India and peculiarities of the feudal system of England are not to be found in India. I would, therefore, not base any decision on the point under consideration on a reference to the law of real property of England.

It has been contended on behalf of the appellant that the decisions of the Privy Council as well as of the High Courts in India show conclusively that the defendant No. 1 cannot under the grant of 1867 claim any right to the mines and minerals in Pargana Tori; and reference has been made to *Tituram Mukerji v. Cohen* (2), *Hari Narayan Singh v. Sri Ram Chakravarti* (3), *Jyoti Prasad Singh v. Lachipur Coal Co.* (4), *Durga Prasad Singh v. Braja Nath Bose* (5), *Biswa Nath Gorai v. Surendra Mohan Ghose* (6), *Christian v. Tekaitni Narbada Koeri* (7), *Kunja Behari Seal v. Raja Durga Prasad Singh* (8), *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (9), *Girdhari Singh v. Megh Lal Pandey* (10), *Raghunath Roy Marwari v. Raja of Jheria* (12), and *Secretary of State for India v. Srinivasa Chariar* (13). Most of these cases have been considered by the learned Subordinate Judge. These cases mostly relate to *mukarrari* grants of *debottar* or *brahmottar* grants. In *Tituram Mukerji v. Cohen* (2) the grant itself was not available, but from the circumstances appearing from the evidence it was taken to be a life grant. In *Hari Narayan Singh v. Sri Ram Chakravarti* (3) the grant was to an idol. In this case also the deed was not produced. In *Jyoti Prasad Singh v. Lachipur Coal Co.* (4), the grant was of a permanent lease and the deed was not produced. It was to a stranger and not to a member of the family. In *Durga Prasad Singh v. Broja Nath Bose* (5) the grant was a *dighwari* grant and made to a stranger. The judgment of the High Court which went up in appeal to the Privy Council is reported as *Brojonath Bose v. Durga Prasad Singh* (23), and *Hari Narayan Singh v. Sri Ram Chakravarti* (3) was followed. In *Biswa Nath*

Gorai v. Surendra Mohan Ghose (6) the case was of a *khorphosh* grant to a junior member of the family, and in this case it appears the question was raised as to whether the sub-soil rights passed. In *Christian v. Tekaitni Narbada Koeri* (7) the grant was a maintenance grant to a widow for life. In *Kunja Behari Seal v. Raja Durga Prasad Singh* (8), the grant was a *moglai brahmottar* grant. In all these cases it was held that the sub-soil and mineral rights did not pass. In *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (9) the Lord Chancellor after considering some of the cases referred to above observed as follows:

"These decisions, therefore, have laid down a principle, which applies to and concludes the present dispute. They establish that when a grant is made by a *zemindar* of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

In this case the Lord Chancellor further observed that in considering the question raised in the appeal, viz., as to whether the *mukarrari* grant in that case carried with it the mineral rights in the soil it is important to avoid giving the words used in connection with legal transactions in India a special and technical meaning that they possess in England, and the meaning of the word "grant" was not the same in India as in England. The grant which was under consideration by the Privy Council in *Girdhari Singh v. Megh Lal Pandey* (10) is set out in the judgment of the High Court [*Brojonath Bose v. Durga Prasad Singh* (23)]. It was the case of a *mukarrari* lease and the expression "*mai hak hakuk*" was used in the lease, and it was held that unless there be by the terms of the lease an express or plainly implied grant of mineral rights they remain reserved to the *zemindar*, there being no evidence of his having parted with them. The word "*sub sudha*" in the document under consideration in the present case has the same significance as the word "*hak-hakuk*" in the case before their Lordships of the Privy Council in *Girdhari Singh v. Megh Lal Pandey* (10). The grant under consideration was produced in *Raghunath Roy Marwari v. Raja of Jheria* (12). The terms were:

"I hereby grant you rent-free *brahmottar* land in *Mauza Qhandkuia* in Pargana Jharla

(22) 24 O. 440; 1 C. W. N. 321; 12 Ind. Dec. (N. S.)

(23) 34 C. 753; 5 C. L. J. 523; 12 C. W. N. 193.

You should enjoy it comfortably by cultivating and by getting the same cultivated by others and to bless me. Hence, this *patta* is granted to you."

In the present case also there is a direction to realise rents and profits from the *elakadars* and to enjoy the income. It was held by their Lordships in the Privy Council that where a *zemindar* grants a tenure of lands within his *zemindari* and it does not clearly appear by the terms of the grant that a right to the minerals beneath the soil is included the minerals do not pass to the grantee, and that this principle applies as well to rent-free grants as to grants of tenures at fixed rents. In *Secretary of State for India v. Srinivasa Chariar* (13) the grant under consideration was an "*inam*" grant by the Government which existed prior to the British Government to a Brahmin and the grantee was to appropriate to his use the produce of the seasons of each year, the grantee in return being expected to be assiduous in offering up prayers for the lasting prosperity of the Empire. It was held that it was not a complete transfer and that the grantee had not the power to consume the subject-matter of the grant by quarrying operations. These cases, therefore, hold that unless there is an express or implied grant of the minerals such grants which formed the subject-matter of consideration in those cases did not pass the minerals. It is noticeable that none of the cases cited is a case of a *khorporosh* grant similar to the one under consideration, except perhaps the case of *Biswanath Gorai v. Surendra Mohan Ghose* (6) but there the fact that the *khorporoshdars* did not possess the sub-soil rights was conceded by all the parties other than defendants Nos. 1 and 2 and they did not very strenuously contest the point. The authorities, therefore, do only go to the extent of showing that it is settled that in *mukarrari* grants or in grants for life or in *debottar* or *brahmottar* grants minerals do not pass without an express provision to that effect. To my mind they are not conclusive so far as the question in the present case is concerned and, as I have observed, with the exception of the case of *Biswanath Gorai v. Surendra Mohan Ghose* (6) no other case has been cited which deals precisely with the point raised in the present case.

In *Satya Niranjan Chakravarti v. Ram*

Lal Kaviraj (24) which was a case which went up to the Privy Council from a decision of a Division Bench of this Court, the question turned on the interpretation of a *patni* lease and on a construction of the lease which contained the words "*adha*" and "*urdha*" it was held that the sub-soil rights passed. The High Court had held that *patni* leases stand on the same footing as *mukarrari* tenures. Their Lordships of the Privy Council, however, considered the cases which have been cited in the present case and observed that not one of these was a tenure of a *patni taluq* in the hands of a *patnidar* and their Lordships were of opinion that the question as to whether *patni* leases did convey mineral rights was still open and they expressed no opinion on that point. Similarly, the authorities cited in the present case if they do not apply to *patni* leases they cannot be said to apply to *khorporosh* grants of the nature we are now concerned with. I would, therefore, hold that the authorities cited, except *Biswanath Gorai's case* (6), do not directly apply to the present case. On a construction of the deed itself, however, and on the evidence in the case I am of opinion that there was no intention to pass the minerals and the defendant No. 1 did not acquire the right to the minerals under the grant.

On the question as to whether the plaintiff abandoned or relinquished his rights, if any, to the mines and minerals in *Pargana Tori*, the argument is based upon Ex. B-1/2 and Ex. 10. I have already considered these documents and I am of opinion that it cannot be said that the plaintiff did abandon or relinquish his rights. All that can be said was that the plaintiff agreed to confirm the grant made by the defendant No. 1 to Max Anderson and it related only to the term of the grant to Max Anderson. Max Anderson, however, did not work the mines under the grant and the matter was dropped. There is a clear assertion of title made by the plaintiff in Ex. 10.

The next question is the question of limitation. The Article applicable is Art. 120 of Sch. I to the Indian Limitation Act, and the period of limitation is six years from the time when the right to sue accrues.

(24) 86 Ind. Cas. 289; 4 Pat. 244; A. I. R. 1925 P. C. 42; 6 P. L. T. 42; 21 L. W. 289; 48 M. L. J. 328; 29 C. W. N. 725; 27 Bom. L. R. 753; 23 A. L. J. 712; 52 I. A. 109 (P. C.).

It is contended on behalf of the defendant that the right to sue for a declaratory decree and injunction accrued to the plaintiff in 1884, and for this purpose reliance is placed upon the deposition of the defendant No. 1 where he states that when he attained majority in 1884 he commenced working the mines. On the other hand, the cause of action alleged by the plaintiff is the grant of the prospecting license by the defendant No. 1 to the defendants Nos. 2 and 3, which is dated the 17th of May, 1921, and the suit was instituted in August, 1922. In my opinion the cause of action accrued to the plaintiff in 1921 and the suit is not barred by limitation. In the first place the evidence is not sufficient that the defendant No. 1 worked the mines in 1884, nor does it appear that if there was a working of the mines it was of such an open character as to be said that the plaintiff knew about it. In any event the cause of action is a recurring one, and unless it can be shown satisfactorily by evidence that the working of the mines by the defendant No. 1 was of such an open nature as to lead to a presumption that the plaintiff knew about it, or unless there is direct evidence of the fact that the plaintiff had knowledge of the working of the mines by the defendant No. 1 more than six years before they filed the suit, I am of opinion that the present suit cannot be said to be barred by limitation.

The only other point left for consideration is the one raised by the defendants Nos. 2 and 3 in their cross-objection. Issue No. 6 as originally framed was as to whether the estate bearing Tauzi No. 1 on the Revenue Roll of the Ranchi Collectorate, commonly known as the Chota Nagpur Raj, was a permanently settled estate and as to whether it had the legal status of such an estate; if not, has the plaintiff any right to bring the suit. The question raised by this issue arose upon the pleadings. Paragraphs 1—3 of the plaint did make an assertion that the estate commonly known as the Chota Nagpur Raj was a permanently settled estate. Paragraphs 9—11 of the written statement of the defendants Nos. 2 and 3 raised the question that the Chota Nagpur Raj is not a permanently settled estate. Upon the pleadings the issue raised did properly arise. It appears, however, that this issue was cancelled by the learned Subordinate Judge by his order No. 85 in the order-sheet, dated the 16th of June, 1925,

the issue was cancelled as being irrelevant and unnecessary. This appears to have been done in the absence of the defendants Nos. 2 and 3. It appears from order No. 89, dated the 17th June, 1925, that the defendants Nos. 2 and 3 filed a petition praying that the original issue No. 6 which was cancelled the previous day might be restored. The learned Subordinate Judge rejected this application with the observation that it was admitted by the learned Vakil for these defendants that the villages making up Pargana Tori do appertain to Tauzi No. 1 of the Ranchi Collectorate as now constituted and that it was not disputed by the said defendants that Pargana Tori concerned in the present suit appertained to the Chota Nagpur Raj estate held by the plaintiff and that it was also not disputed that the defendant No. 1 claimed the said Pargana by virtue of a grant or lease from the last Maharaja as representing that estate. In view of these facts the learned Subordinate Judge was of opinion that the question of the nature of the estate held by the plaintiff did not arise for decision in the present case and he, therefore, did not see any reason why the original issue No. 6 should be restored. In my opinion it cannot be said that the learned Subordinate Judge was in error in striking out issue No. 6. It is argued that if the estate of the plaintiff is not a permanently settled estate the question did arise as to whether he had a right to the minerals in the Chota Nagpur Raj, and unless he proved his right to the minerals in the Chota Nagpur Raj it cannot be said that he was entitled to a declaration that he had the rights in the minerals in Pargana Tori. The defendants, however, have no title or possession. The defendant No. 1 did not dispute the title of the plaintiff apart from the grant of 1857, as in fact he could not do so inasmuch as he claimed title through the predecessor-in-title of the plaintiff. The defendants Nos. 2 and 3 who claim through the defendant No. 1 also cannot raise the question having no title by possession, and, in my opinion, there is no substance in the cross-objection.

In the result, therefore, I would allow this appeal and decree the suit with costs here and in the Court below and dismiss the cross-objection of the defendants Nos. 2 and 3.

A. N. A.

*Appeal allowed;
Cross-objection dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 142 OF 1925.

September 29, 1925.

Present :—Mr. Findlay, J. C.

THE G. I. P. RAILWAY COMPANY

—DEFENDANT—APPLICANT

versus

MAHADEO BARI—PLAINTIFF—

NON-APPLICANT.

Railways Act (IX of 1890); s. 113—Duty of passenger to produce ticket on demand—Failure to produce—Levy of penalty—Subsequent production of ticket—Passenger's right to refund—'With him', meaning of.

A passenger from whom excess fare and penalty are realised by a Railway Administration for failure to produce his ticket on demand is not entitled to a refund of the same on producing the ticket later on. [p. 421, col. 1.]

The words 'with him' in s. 113 of the Railways Act must be construed as meaning that the ticket is on the passenger's person, and under the said section it is the duty of a Railway passenger to have in his possession immediately available throughout the journey, the ticket which entitles him to travel. [*ibid.*]

Civil revision against a decree of the Judge, Small Cause Court, Nagpur, dated the 7th February, 1925

Mr. K. K. Gandhe, for the Applicant.

Mr. R. W. Date, for the Non-Applicant.

JUDGMENT.—This is an application by the defendant G. I. P. Railway Company for revision of the judgment and decree of the Judge, Small Cause Court, Nagpur, dated the 7th February, 1925, granting a decree for Rs. 21-10-0 in favour of the non-applicant Mahadeo against the said Railway Company. On the 11th May, 1924, the plaintiff with some 34 other people, who constituted a marriage party, had booked from Dhamangaon Railway Station to Nagpur. On arrival at the latter station one of his party was sent out with some 28 tickets and their holders to arrange for *tongas* in the station yard. The plaintiff meanwhile with 6 others came shortly afterwards to the gate, but he found to his utter surprise that he had not got the 7 tickets in question. He accordingly was charged with excess fare and penalty amounting to Rs. 21-10-0, and obtained a receipt therefor.

Plaintiff's case further was that he no sooner came out into the station yard than, on enquiry from his companions, he found the missing tickets and took them back to the Ticket Collector. The Ticket Collector, however, referred him to the proper authorities for a refund. Various applications therefor to the higher Railway Authorities were rejected.

The defendant Railway Company admitted the realization of the Railway fare and penalty in question and pleaded that, as the plaintiff had not the tickets in his possession when he passed out of the wicket gate, he has rightly been charged as above. It was further denied that the plaintiff non-applicant had returned with the tickets a few minutes later, but, in any event a plea was taken that, even if this were so, this circumstance would not derogate from the right of the Railway Company to have recovered the charges in question and to have refused a refund.

It is, first of all, necessary to determine whether the plaintiff a few minutes later returned with the missing tickets and offered them to the Ticket Collector as alleged. The plaintiff has given *prima facie* satisfactory evidence on the point and he is confirmed so far by the evidence of P. W. No. 2 Balkrishna, his companion. He (P. W. No. 2) had the tickets in his possession and he had gone in the station yard to procure *tongas*. Apart from letters from the Chief Traffic Manager and the like containing a denial that the Ticket Collector was shortly afterwards shown the missing tickets by the plaintiff non-applicant, the defendant Railway Company produced no evidence whatever on the point. It is obvious that the fact whether plaintiff did or did not produce the tickets within a few minutes after the original episode, may be an important one. On the question of fact involved, therefore, it is perfectly clear that the oral evidence of plaintiff and Balkrishna, in the absence of any rebutting evidence, establishes the fact that, some 10 minutes after he had to pay the penalties, etc., he returned with the tickets to the Ticket Collector, who in his turn referred the plaintiff to higher authorities for a refund.

The question I have to determine, therefore, is whether, in view of the terms of s. 113 of the Railways Act, the plaintiff is in the circumstances entitled to a refund of the Rs. 21-10-0 in question which was levied from him. Reliance has been placed in this connection on the decision in *Hart v. Buskin* (1), but that decision is somewhat inapposite in that therein ss. 17 and 31 of the Railways Act of 1879 were concerned whereas, in the present instance, the opposite provision of s. 113 of the Act of 1890 is concerned. In this connection it must be noted that the

(1) 12 O. 192; 6 Ind. Dec. (N. S.) 130.

words "with him" occur in s. 113. These words did not occur in s. 31 of the Act of 1879. I think these words must be construed as meaning that the tickets are on the passenger's person. This avowedly the plaintiff-non-applicant did not have when he attempted to pass from the station premises. The provision of law in s. 113, is one of a very special nature, which was no doubt enacted by the Legislature in view of the difficulties which arise in practice with reference to persons travelling without tickets, and although the case is a somewhat hard one from the point of view of the non-applicant, I feel it my duty, although with regret, to decide that in the circumstances the amount was properly realized from the plaintiff-non applicant, and that the mere fact that he produced or was willing to produce the tickets later does not entitle him to a refund. The risks of fraud upon the Railway Company which arise if tickets were to be allowed to be produced subsequently are too obvious to require emphasis. In those circumstances I am of opinion that the Judge of the Small Cause Court erred in granting the plaintiff the decree he did.

It is important that passengers should realize, with reference to s. 113 of the Indian Railways Act, that they must have in their possession immediately available throughout the journey the tickets, which entitle them to travel. There is no room in the phraseology of the provision in question for a loose interpretation of its terms, and it has obviously been framed, as it has, with a view to preventing the enormous inconvenience and trouble which would otherwise arise in the matter of checking and collecting tickets from passengers by Railway.

The judgment and decree appealed against are accordingly reversed and the plaintiff's suit is dismissed. In the peculiar circumstances of the case, however, the plaintiff has undoubtedly a strong material grievance if not a legal one, and, in view of this fact, I order the parties to bear their own costs both in this Court and in the lower one. It seems to me that the Railway Company might well have made *ex gratia* without any sacrifice of principle a refund in the peculiar circumstances of the case if on inquiry it was found, as I believe was the case, that the non-applicant produced the tickets a few minutes later.

A. N. A.

*Suit dismissed.***MADRAS HIGH COURT.**

SECOND CIVIL APPEAL No. 944 of 1924.

March 22, 1927.

Present: Mr. Justice Devadoss.THINA RUNA ANA VELLACHAMI
SERVAI AND OTHERS—DEFENDANTS Nos. 2, 3
AND 4—APPELLANTS*versus*SAMUSUVA ROWTHER AND ANOTHER
—PLAINTIFF AND DEFENDANT No. 1

—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 3—Standing "timber"—Karuvela and velvela trees.

Even if the term "timber" in s. 3, Transfer of Property Act, is taken to mean only such trees as are fit to be used in building and repairing houses, *karuvela* and *velvela* trees are "timber" as they are used for building purposes in the Southern Districts of the Madras Presidency.

Obiter.—The term "timber" in s. 3, Transfer of Property Act, cannot be limited to the class of trees the timber of which is used for building purposes. *Krishnarao v. Babaji* (1), disapproved.

Second appeal against the decree of the Court of the Subordinate Judge, Sivaganga, dated the 9th February, 1924, in A. S. No. 18 of 1923, preferred against that of the Court of the District Munsif, Sivaganga, in O. S. No. 78 of 1921.

Mr. T. M. Krishnaswami Iyer, for the Appellants.

Mr. V. Ramaswami Iyer, for the Respondents.

JUDGMENT.—Defendants Nos. 2 to 4 are the appellants in this case. The first contention of Mr. Krishnaswami Iyer for the appellant is that his clients are not liable for damages for breach of contract by the first defendant. The Subordinate Judge has not made the appellants liable for breach of contract by the first defendant but he has made them liable for the value of the number of cart loads of firewood removed by them.

The facts are:—The first defendant sold the trees standing on a piece of land to the plaintiff. Before the plaintiff could cut and remove the trees he seems to have interfered with his possession and defendants Nos. 2 to 4 joined the first defendant and cut and carried away the trees. The allegation that they purchased the trees from the first defendant without the knowledge of the sale to the plaintiff was found against. The simple question, therefore, is whether defendants Nos. 2 to 4 were justified in carrying away timber trees the property in which had already passed to the plaintiff. They, having cut and carried away the

trees belonging to the plaintiff, are liable to the extent of the loss caused by them.

It is next urged by Mr. Krishnaswami Iyer that his clients carried away only 50 cart loads of wood and, therefore, they should not be made liable for anything more. The finding of both the Courts is that 300 cart loads were removed by defendants Nos. 2 to 4 as well as by the first defendant. They acted in concert and, therefore, they are liable to the amount of the firewood which was actually removed by them and by the first defendant. It is suggested by Mr. Krishnaswami Iyer that there is nothing to support the finding, but Mr. Rajah Iyer has drawn my attention to the evidence of P. W. No. 1 to the effect that the defendants removed 300 cart loads. The quantity of wood removed being found by both the Courts and there being evidence in support of the finding it cannot be interfered with in second appeal.

Another point was feebly raised by Mr. Krishnaswami Iyer, that the trees being immoveable property, there should have been a registered deed for the sale of them. The Transfer of Property Act specifically says that immoveable property does not include standing timber, growing crops or grass. Mr. Krishnaswami Iyer relies upon *Krishna Rao v. Babaji* (1), and contends that "by the term 'timber' is meant properly such trees only as are fit to be used in building and repairing houses." Granting that the decision *Krishna Rao v. Babaji* (1) lays down the correct meaning of the term 'timber', the trees sold to the plaintiff were *karuvela* trees the timber of which as is well known in Southern Districts is used for building purposes. I hold that *karuvela* and *velvela* trees are timber within the meaning of the decision in *Krishna Rao v. Babaji* (1). But with great respect to the learned Judges I do not think that the term 'timber' can be limited to the class of trees the timber of which is used for building purposes. In that case the learned Judges held that a mango tree did not come within the term 'standing timber' whatever may be the use to which mango wood is put in the Bombay Presidency, in Southern India mango planks are used not only for making doors and windows but also for making boxes, tables benches, etc.

The judgment of the Subordinate Judge

is correct. The second appeal fails and is dismissed with costs.

V. N. V.

N. H.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 223 OF 1920.

July 20, 1921.

Present:—Mr. Justice Ross.

JEO NATH JHA AND OTHERS—APPELLANTS
versus

Mahanth BISHAMBHAR DAS AND OTHERS
—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 30 (b), 153.—Enhancement of rent—Rise of price of staple food crops—Land not used for raising such crops—Rent, whether could be enhanced—Question of right to enhance—Second appeal.

No enhancement of rent can be claimed on the ground of rise in the price of staple food crops in respect of land which is used, with the acquiescence of the landlord, in such a way that food crops cannot be raised thereon.

In a suit for enhancement of rent, the plea that no enhancement could be decreed in respect of that portion of the land which is covered by trees and buildings, is a question relating to the right to enhance on which a second appeal lies.

Mr. Lakshmi Narayan Singh, for the Appellants.

Mr. H. B. Mukharji, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit for enhancement of rent on the ground of rise in price of staple food crops. The defence was that the major portion of the land was covered by trees and a house and that consequently the rent was not enhanceable under s. 30, cl. (b) of the Bengal Tenancy Act. The learned Subordinate Judge, without coming to any finding as to whether there was a house on the land, held that because, the tenant paid a fixed rent for a certain land and the price of staple food crops had risen, therefore, he was bound to pay an enhanced rent whether he grew food crops on the land or not and whether he planted trees and raised a house.

It is contended that it is contrary to principle that enhancement on this ground should be allowed for land which is not producing or capable of producing food crops in its present state, a state which has been acquiesced by the landlord as is clear from the fact that he has brought this suit. In reply it is urged that no appeal lies under the provisions of s. 153.

It is argued that the only question at issue is the amount of the enhancement and

(1) 24 B. 31; 1 Bom. L. R. 489; 12 Ind. Dec. (N. S.) 557.

not the right to enhance. In my opinion this is not a correct way of looking at the defence in this suit. The plea of the defendant is that as regards the land covered by trees and the house there is no right to enhance the rent and that is a question on which a second appeal must lie.

On the main question in the case there seems to be no authority, but it is, in my opinion, clear as a matter of principle that, on the ground that there is a rise in price of staple food crops, no enhancement can be claimed in respect of land which is used in such a way, with the acquiescence of the landlord, that food crops cannot be raised thereon.

The appeal must, therefore, be decreed and the appeal remanded to the District Judge for re-hearing. He must arrive at a finding as to whether there is a house on the land in suit and if so, what area is covered by the house and the trees. The decree for enhancement will be limited to the balance of the land.

Cost will abide the result.

A. N. A.

Appeal remanded.

MADRAS HIGH COURT.

ORIGINAL PETITION No. 43 OF 1927.

April 28, 1927.

Present:—Mr. Justice Beasley.

P. R. DORAISWAMI AYYAR—PETITIONER

versus

THE COIMBATORE EASWARA?
SAHAYA NIDHI, LTD., BY ITS MANAGING
DIRECTOR—RESPONDENT.

*Company Law—Failure of Company to pay debt—
Bona fide dispute—Winding up of Company.*

The mere failure on the part of a Company to comply with a demand for payment from one of its creditors does not entitle the creditor to come before the Court and ask as a matter of right for winding up of the Company.

Where there is a *bona fide* dispute as to the Company's liability to pay a debt, the creditor must be referred to a suit and cannot be allowed to force payment of the debt by invoking the assistance of the provisions of the Companies Act.

Application for winding up of the defendant Company.

Mr. A. C. Sampath Ayyangar, for the Petitioner.

JUDGMENT.—The petition for winding up is dismissed. The only ground seriously put forward is that there is a debt owing to the petitioner, the payment of which he has demanded and there has been a failure by the Company to comply with that demand within 21 days, the statutory period, and that entitles the petitioner to

come before the Court and ask as a matter of right for the winding up of the Company. It is vague statement made in the petition about the Company being unable to pay its debts. That is not supported by a single figure or by any fact which will enable me to come to the conclusion that the Company is not able to pay beyond its failure to comply with the statutory demand. That is not sufficient. The Company in its affidavit puts forward the defence whilst submitting that the money is with it in fixed deposit that it is entitled to a claim against this money because under the Articles of Association and Rules of the Company, that money is deposited as security as it were for the conduct of the depositor, the Secretary in this case, and that where a Director has negligently recommended clients to the Bank, the Bank is entitled to claim against that Director any loss occasioned by such recommendation. This is denied by the petitioner but there is an issue with regard to that. I cannot say that there is no *bona fide* dispute as to the Company's liability to pay this debt. Courts will never allow creditors of a Company to invoke the assistance of the Companies Act for getting payment of their debt. If there is a genuine dispute with regard to the debt, then the creditors of the Company must be referred to a suit. In this case, the petitioner will be referred to a suit. As the Company admits having in its possession the money which, subject to its defence, is money belonging to the petitioner, the Company will have to pay that money into this Court within one week after the re-opening of the Court. If the money is not paid into Court within that time, the petitioner is at liberty to come before this Court with a fresh application. No order as to costs.

V. N. V.

Petition dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 189
OF 1920.

April 24, 1923.

Present:—Mr. Justice Das and
Mr. Justice Kulwant Sahay.

Musammatt PRANLACHHI KUER—

APPELLANT

versus

JAGESHAR SAHI AND OTHERS—

RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Hindu

reversioner, whether entitled to sue for declaration of his right—Right, meaning of—Useless declaration, granting of.

Section 42 of the Specific Relief Act applies only to vested rights, and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession. [p. 425, col. 1.]

Greeman Singh v. Wahari Lal Singh (1) and *Janalai Ammal v. Narayanasami Aiyar* (3), followed.

A Court will not grant a declaration which is perfectly useless. [p. 426, col. 1.]

Plaintiffs, alleging that they were presumptive heirs of the last male holder, sued for a declaration that the defendant, a Hindu widow, was in possession of certain properties not as heiress to her husband but as mother and heiress of her son, and that the plaintiffs were the future heirs to the property after the defendant's death. A daughter of the defendant and the daughter's son who were in existence and who would be entitled to succeed the defendant in preference to the plaintiffs if she was holding as heiress to her husband were not impleaded as parties:

Held, that the declaration could not be granted inasmuch as the plaintiffs had no legal right but only a mere *spes successionis*, and inasmuch as the declaration would further be an entirely useless one as it would not bind those persons who may claim the estate upon the death of the defendant. [*ibid.*]

Appeal from a decision of the Subordinate Judge, Muzafferpore, dated the 28th April, 1920.

Messrs. S. M. Mullick and Jalgobind Prasad Sinha, for the Appellant.

Mr. Sorishi Charan Mitter, for the Respondents.

JUDGMENT.

Das, J.—This was a suit by the respondents for a declaration in the following circumstances.

The properties which are the subject-matter of the suit admittedly belonged to one Garib Sahi. He died on the 29th March, 1912, leaving a widow Pranlachhi Kuer who was the defendant in the action and the appellant before us. It is alleged by the plaintiffs that Garib Sahi also left a son Babuna Sahi and that Babuna Sahi succeeded to the properties which were of Garib Sahi's and that Babuna Sahi died on the 4th October, 1914, leaving Pranlachhi Kuer as his heiress under the Hindu Law. It appears that in the Land Registration proceedings *Musammam Pranlachhi Kuer* applied to be recorded as the heiress of her husband Garib Sahi. The plaintiffs allege that they are the presumptive heirs of Babuna Sahi and they contend that the assertion of the widow in the Land Registration proceedings has thrown a cloud upon their title and they are accordingly entitled

to a declaration that the widow is in possession not as the heiress of Garib Sahi but as the mother of Babuna Sahi. The relief actually claimed by the plaintiffs is as follows:—

"That it may be held by the Court that Garib Sahi, husband of the defendant, died while living joint in family, leaving him surviving his son, Babuna Sahi, and the said Babuna Sahi died during his minority leaving his mother *Musammam Pranlachhi Kuer*. The properties detailed below constitute the estate of Babuna Sahi. The estate does not belong to Garib Sahi and the defendant in this suit as mother and heiress of the deceased Babuna Sahi holds possession of the properties in suit with limited life-interest".

An objection being taken to the maintainability of the suit under s. 42 of the Specific Relief Act, the plaintiffs applied for and were allowed to amend the relief claimed in the manner following, that is to say, they were allowed to ask for a declaration that "the plaintiffs are the future heirs of the said Babuna Sahi after the death of the defendants".

It will be noticed that the plaintiffs do not dispute that the defendant is properly in possession of the properties. The only controversy between the parties is as to whether *Musammam Pranlachhi Kuer* is in possession as the widow of Garib Sahi or as the mother of Babuna Sahi. If she is actually in possession as the mother of Babuna Sahi the plaintiffs may have some title to succeed to the properties upon the death of Pranlachhi Kuer if they should survive Pranlachhi Kuer. If, on the other hand, Pranlachhi Kuer is in possession as the widow of Garib Sahi then it appears that her daughter and after her, her daughter's son would succeed to the properties on her death. It is necessary to mention that neither the daughter nor the daughter's son is a party to the suit.

The question at once arises whether the suit is maintainable under s. 42 of the Specific Relief Act. The learned Subordinate Judge thought that it was maintainable and he had made a declaration in favour of the plaintiffs. Section 42 of the Specific Relief Act provides as follows:—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court

may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief".

Now the plaintiffs admittedly have no interest in the estate of Garib Sahi or of Babunā Sahi either vested or contingent. It may be that upon the death of the widow they will be entitled to the properties in suit if they should survive the widow but that interest is a *spes successionis* and is not an interest which would be regarded either as vested or contingent. It follows, therefore, that the plaintiffs are not entitled to any legal character. Are they entitled to any right as to the properties in suit? In my opinion they have no right as to the properties either vested or contingent, and a suit under s. 42 of the Specific Relief Act is not maintainable by them.

The question was debated in the Calcutta High Court in the case of *Greeman Singh v. Wahari Lall Singh* (1). There the plaintiff claiming to be entitled in reversion to certain property on the death of his grandfather's widow, sued for a declaration that certain alienations made by the widow were void as against him. The Court gave the plaintiff a declaration of his reversionary right and Mr. Justice Mitter, delivering the judgment of the Court, set aside the order of the Court below by which it granted to the plaintiffs the declaration claimed by them in the suit. It will be useful to set out a portion of the judgment of Mr. Justice Mitter in the case:

"It is abundantly clear upon the authorities" said his Lordship "that a person who stands in the position of presumptive heir upon the death of a Hindu widow is not entitled to maintain a suit for a declaration of his so-called reversionary right. We may here cite only one case, which is exactly in point [*Dooli Chand v. Brij Bockun Lal Awasti* (2)]. Some of these cases were decided before the Specific Relief Act came into operation; but in our opinion the aforesaid Act has made no alteration in the law. Section 42 refers only to existing and vested rights, and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession of the property. That also appears from a consideration of

the difference in the language used by the Legislature in the illustrations (d) and (e) of s. 42. Illustration (c) contemplates a case like the present, and the illustration (d) applies to the case of a vested right of reversion. The appellants, therefore, have no sort of interest in the suit which was brought by the plaintiff, because, if the suit was dismissed, they could not have been affected by the result; and if it was decreed, they, after the death of the widow, if they were really persons entitled to succeed to the estate of Bal Gobind in preference to the plaintiff, would have been entitled to claim this property also."

The Judicial Committee in the case of *Janaki Ammal v. Narayanasami Aiyar* (3) has come exactly to the same conclusion. That was a suit by a plaintiff as the presumptive reversionary heir against a widow in possession of her husband's estate in order to protect the property; and the plaintiff made charges against the widow of waste, misappropriation, and other wrong dealing with the property. The High Court came to the conclusion that there were no acts of waste or misappropriation by the widow but gave the plaintiff a declaration as to his title as the presumptive reversionary heir. The Judicial Committee pointed out that suits by a reversionary heir in those cases where there were alienations by the widow stood entirely on a different footing. In dealing with that point the Judicial Committee said as follows:—

"But a reversionary heir thus appealing to the Court" namely to have the alienations made by the widow set aside "truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion." The decision of the Judicial Committee in the case to which I have referred entirely supports the argument advanced before us on behalf of the appellant.

It was contended, however, by Mr. Shorishi Charan Mitter that here also the suit is in a representative capacity. According to Mr. Shorishi Charan Mitter, the suit is on behalf of the whole body of reversioners who will be entitled to succeed to the estate, assuming the widow is not

(1) 8 C. 12; 9 C. L. R. 249; 6 Ind. Jur. 191; 4 Ind. Dec. (N. S.) 8.

(2) 6 C. L. R. 528.

(3) 37 Ind. Cas. 161; 39 M. 634.

holding possession as the heiress of her son, and he claims that he is entitled to have the question of heirship decided in this litigation. It may be pointed out at once that the decision will be wholly futile, for whatever the decision may be, it will bind no person after the death of *Musamat Pranalchhi Kuer*. In representative actions by the reversioner to prevent waste or alienation the alienees, if alienations have already taken place, are parties, and are concluded by the decisions arrived at in their presence and if alienations have not taken place, the injunction of the Court binds, the widow and preserves the property. But here neither the daughter nor the daughter's son is a party to the suit and the plaintiffs claim no relief against the widow in possession. The decision, therefore, will not bind those persons who may claim the estate, upon the death of the widow, as the reversionary heirs of her husband. That being so, it is perfectly useless for the Court to make a declaration in the plaintiffs' favour.

I would allow the appeal, set aside the judgment and decree of the Court below and dismiss the plaintiffs' suit with costs here and in the Court below.

Kulwant Sahay, J.—I agree.

A. N. A.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 176 OF 1923.

February 8, 1927.

Present :—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Devadoss.
ARCHAKA SUNDARA RAJU DIKSHATULU—PLAINTIFF—APPELLANT

versus

ARCHAK SESHADRI DIKSHATULU

AND OTHERS—DEFENDANTS—RESPONDENTS.

Inam—Service inam land—Lease for long term, whether void or voidable—Receipt of rent—Right to repudiate lease—Custom of alienability—Repeated illegal alienations, effect of—Construction of demise—Mortgage and lease, distinction between.

Alienations of temple service lands by sale, gift or mortgage are invalid. [p. 428, col. 1.]

Permanent leases or leases of such lands for so long a period as would practically amount to an alienation will be invalid as against the successor-in-office entitled to the rents and other emoluments arising out of the land which goes with the office. A test to find whether a lease for a long period amounts to an alienation for this purpose is whether the rent paid is sufficient to maintain the holder

of that office in such a way as not to interfere with the due performance of the duties attached to the office. [p. 429, col. 1.]

Venkatarao v. Papayya (3), *Ayancheri Kovilagath Rama Varma Tambaran v. Acholathil Varikoli Raman Nayar* (4), *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (5) and *Rama Reddi v. Ranga Dasan* (6), relied on.

Where a lease of such lands is not of this character it is not absolutely void but only voidable at the option of the succeeding office-holder who will be bound by the transaction if he does not repudiate the same but affirms it by receiving rent, after he assumes office. [*ibid.*]

The holder of the lands attached to an office has by the very nature of his tenure no power to lease the property so as to enure beyond his lifetime and the fact that the office is hereditary makes no difference. [*ibid.*]

A custom of alienability of service *inam* lands cannot be established by repeated illegal alienations. [p. 429, col. 2.]

Where the possession of certain lands was transferred to another under a document described as a *kanda bhogiam*, on receipt of a premium which was to be worked off by the enjoyment of the produce of the land for 30 years, a portion of the profits being reserved to be paid to the executant of the document, and there was no liability to account for the rent and profits nor was there any question of redemption on payment of any money:

Held, that the document was not a mortgage but only a lease. [p. 427, col. 2.]

Nidha Sah v. Murli Dhar (1), followed.

Appeal against a decree of the Court of the Subordinate Judge, Chittoor, dated the 30th September, 1922, in O. S. No. 20 of 1920.

Mr. C. V. Anantakrishna Iyer, for the Appellant.

Mr. T. V. Muthukrishna Iyer, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—The plaintiff is the appellant. He filed a suit for a declaration that the *khanda bhogiam* deed executed by his adoptive father in respect of the lands mentioned in the plaint which are *archaka* service *inam* lands is invalid and for possession of the properties. His case was that the lands are *archaka* service *inam* lands granted to his ancestors for the purpose of doing service in the Tirumalai Thirupathi Devasthanam, that on the death of his adoptive father the plaintiff succeeded to the hereditary office, that as *archaka* of the temple he is entitled to hold the lands free from any encumbrance and that his adoptive father purporting to act for himself and as guardian of the plaintiff executed the *khanda bhogiam* deed, dated the 21st of February, 1913, whereby the 1st defendant was put in possession of the properties for a term of 30 years in

consideration of a sum of Rs. 8,225 alleged to have been paid to the father. The plaintiff also states that there was no consideration for the deed, that the debts are not true and binding on him, that the deed is further invalid as having been taken from the plaintiff's father who was an old and orthodox person of weak mind, ignorant of worldly affairs and completely under the influence of the 1st defendant, that the property being service *inam* is not alienable and that the document even if supported by consideration will not be valid beyond the lifetime of the holder of the office. The defence was that the alienation was valid and supported by consideration, that the lands comprised in the deed are alienable and that the lease deed is valid and binding. It is also alleged that the plaintiff with full knowledge ratified the lease after the death of his father and that he is estopped from disputing its validity. The Subordinate Judge dismissed the plaintiff's suit. He held that the consideration mentioned in the document was paid, that there was no undue influence of fraud in the matter, that though the lands are *inam* lands, there was a custom of alienability, and that even apart from any such custom the lease of the lands is valid and binding and it is not an alienation prohibited by law. The plaintiff appeals.

It is not disputed that the lands in question are lands granted as *inam* to the person who holds the office of *archaka*. It is clear from Ex. B extract from the *Inam* Register, Exs. C and D as well as Ex. A that service was to be rendered. Exhibits C and D which are as far back as 1822 prohibit alienation even by lease but it is doubtful whether these orders would in law render leases invalid in the absence of anything in the grant and, as a matter of fact, it is not disputed that there have been several dealings with this property, by way of *ijar* or lease. Exhibit I is the *khandabhogiam* deed which is impeached. It is dated the 21st of February, 1913. Its genuineness is not disputed. It recites that the amount due by the plaintiff's father was Rs. 8,225 and that he was unable to pay the amount and has no other income except the income got from the village described in the schedule, possession was delivered of the *inam* village for a period of 30 years from *Fasli* 1323 to *Fasli* 1353. This document refers to a previous document of the 12th of April, 1910. As regards the enjoyment and payment of rent the deed runs as follows:—

"Therefore, you shall enjoy the said village from this time forwards and you yourself shall discharge the above mentioned debts. From this time forwards you yourself shall collect all the income that has been collected by us in the said village. We have nothing to do with the profit and loss occurring in the same. You shall have all the rights held by us in the said village for this *khanda bhogiam* period of 30 years for collecting arrears from the *ryots* in the said village. You shall pay the *cists* payable to the Sircar (Government) on the said village and obtain receipts. You should give the said receipts to us after the *khanda bhogiam* period that is when the said village was delivered possession to us. If you fail to pay the said *cists* according to instalments, you should pay the loss sustained by us thereby. For the said period of 30 years you shall pay to us at the rate of Rs. 120 (one hundred and twenty rupees) in cash and 24 (twenty-four) *putties* of paddy either *pat-teda sambadu* or *ganika sannam* worth about Rs. 144 every year and it should be given in two instalments on the 30th of *Karthika* month for *Karu* and on the 30th of *Chitrai Vaisaka* produce in every year. If you fail to pay in the said manner you should pay the same to us on demand with interest thereon at the rate of 1 per cent. per mensem from the date of default." It then goes on providing for the supply of straw, etc. It says that accounts should be maintained according to those maintained by the lessor which should be delivered after the *khanda bhogiam* period is over and that repairs should be executed to the channels by the lessee.

The first question is whether this document is a lease or mortgage. Having regard to the terms of the document, I think it is a lease. It satisfies all the requirements of a lease as defined in the Transfer of Property Act. A premium is taken which premium is to be worked off by the enjoyment of the produce for 30 years and a portion of the produce is to be given to the executants of the document. It is sometimes difficult to draw the line between a mortgage with possession and a lease where a premium is received by the lessor but considering the document as a whole I think it is a lease.

In *Nidha Sah v. Murli Dhar* (1) there was a document which was said to be a mortgage with possession for a period of

(1) 25 A. 115; 7 C. W. N. 289; 5 Bom. L. R. 111; 30 I. A. 54; 8 Sar. P. C. J. 435 (P. C.).

14 years under which it was provided that on the expiration of the term the mortgagor shall come into possession of the mortgaged properties without settlement of accounts and that on the expiration of the term the mortgagee shall have no power whatever in respect of the estates which after the expiration of the term of the mortgage deed shall be returned to the mortgagor without his paying the mortgaged money secured under the document. It was held by their Lordships of the Privy Council that it was merely a lease. Sir John Bonser who delivered the judgment of their Lordships observed: "This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption express or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances." These remarks apply to the present case. There is no liability to account for the rents and profits nor is there any question of redemption on payment of any money. All that the document requires is that an account should be kept as regards the payment of the *cist* and of the various expenses.

So far as consideration is concerned, there can be no doubt that the consideration as set out in the document was due and payable and as regards the plea of undue influence it has not been made out. It is not seriously disputed and argued before us in appeal that the document is invalid for any [other] reason but the inalienability of the land purported to be dealt with by the document. Ex. A as it was land granted for temple service. The only question, therefore, is whether this deed which is, in my opinion, a lease is invalid.

It has now been settled by this Court that alienations of temple service lands by sale, gift or mortgage, are invalid. I need only refer to the decision of the Full Bench in *Neti Anjaneyulu v. Venugopal Rice Mill Ltd.* (2) where it was held that lands held on

swasthivachakam service tenure are not subject to attachment in execution of a decree and that the sale of such lands is opposed to public policy. All the earlier decisions are referred to and discussed.

In *Venkata Rao v. Papayya* (3) it was held by Devadoss and Wallace, JJ., that the alienation of *swasthivachakam* *inam* lands is invalid and that the fact that the alienation was in favour of a member of the family does not validate the transfer.

It is argued by Mr. Muthukrishna Aiyar for the respondents that these decisions only apply to sales, gifts or mortgages and not to leases, and that consequently a lease could be made. In dealing with this question we have to see the nature of the transaction rather than the form. A lease for 99 years or for a long term in consideration of a premium paid down is as much an alienation as a sale or mortgage and I do not think that the mere use of the word 'lease' or the fact that a long term is fixed would, having regard to the mischief which is sought to be guarded against by holding that service *inam* lands are not alienable make the lease valid. The real question is whether the transaction in effect places the income from the lands, beyond the disposal of the holder of the office and prevents him from enjoying the emoluments which were intended to go to the holder of the office in order to enable him to discharge his duties properly.

In *Ayancheri Kōilagath Rama Varmā Tāmbaran v. Acholathil Vanikoli Ramān Nayar* (4) there was a *kanom* for 96 years and Innes and Muthuswami Aiyar, JJ., held that the *kanom* was invalid. The learned Judges observed: "There seems to be no real distinction between the mischief of such a transfer in perpetuity and a transfer for the long period of 96 years."

In *Pālaniappa Chetty v. Deivasikamony Pandara Sannadhi* (5) their Lordships of the Privy Council observed that there was no difference in principle in the grant of a lease in perpetuity of *debutter* lands at a fixed rent and an absolute alienation in perpetuity of the same kind of land in consideration of a premium and set aside a permanent lease at a fixed rent and on payment of a premium of temple lands.

(3) 98 Ind. Cas. 848; 24 L. W. 674.

(4) 5 M. 89; 2 Ind. Dec. (N. S.) 63.

(2) 70 Ind. Cas. 466; 45 M. 620; 15 L. W. 513; 42 M. L. J. 477; 30 M. L. T. 255, (1922) M. W. N. 307; A. R. 1922 Mad. 197 (F. B.)

(5) 39 Ind. Cas. 722; 40 M. 709; 21 O. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 O. L. J. 153; 6 L. W. 222; 44 I. A. 417 (P. O.).

In *Rama Reddy v. Ranga Dasan* (6) Devadoss, J., observed as follows:

"A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make 'a permanent' lease anytheless an alienation than a sale."

In *Madhavrao Waman v. Raghunath Venkatesh* (7) their Lordships of the Privy Council were of opinion that the grant of a permanent lease of service *watan* lands would, undoubtedly, be an alienation within the Bombay Regulation which prohibited *watandars* without the sanction of the Government to sell, mortgage or otherwise alienate or assign any *watan*.

It is thus clear that permanent leases or leases for so long a period as would practically amount to an alienation will be invalid as against the successor in office who will be entitled to the rents and other emoluments arising out of the land which goes with the office.

Where the lease in question is not of this character, I think that it is not absolutely void but only voidable at the instance of the successor-in-office. It cannot be said that the holder of the office is bound to cultivate the lands personally and very often leasing the lands is the usual and beneficial mode of enjoyment, nor will it be possible to fix any hard and fast rule in considering such leases. Where a premium is taken one test will be whether the rent paid is sufficient to maintain the holder of that office in such a way as not to interfere with the due performance of the duties attached to the office.

Having regard to the terms of the lease deed in question I think it is not absolutely void but that it is only voidable at the option of the plaintiff. The holder of the land attached to an office has by the very nature of his tenure no power to lease the property so as to enure beyond his lifetime and the fact that the office is hereditary makes no difference.

The lease, in my opinion, being voidable the next question is whether the plaintiff on succeeding to the office elected to avoid it. On this point there can be little doubt that the plaintiff after he attained majority not

only received rent but also filed a suit to recover the rent reserved. I agree with the Subordinate Judge in thinking that the plaintiff is bound by the lease as he did not repudiate it when he assumed office.

As regards the custom of alienation which the Sub-Judge thinks is made out it is difficult to see how there can be a custom which is opposed to the law or how illegal alienations if repeated can convert inalienable into alienable property. There is in this case no question of any *bona fide* purchaser or mortgagee. Nor are we concerned with the right of the trustees of the temple.

The appeal fails and is dismissed, but under the circumstances without costs.

Devadoss, J.—I agree and I have nothing to add.

V. N. V.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 251 OF 1925.

July 16, 1927.

Present:—Mr. Findley, J. C., and
Mr. Kotwal, A. J. C.

Musammat BARI BAHU—DEFENDANT.
versus

GANESH SINGH—PLAINTIFF.

*C. P. Land Revenue Act (II of 1917), s. 188 (2) (a).
(c)—Co-sharer holding sir in severalty—Sale of share—Lambardar's right to recover rent.*

A co-proprietor selling his share to a third party and by becoming an occupancy tenant of *sir* land held by him in severalty is the tenant of his vendee, and is, therefore, liable to pay rent to the vendee and not to the *lambardar*.

The Land Revenue Act makes the *lambardar* the landlord only in respect of such land, as the body of the proprietors, whom he represents, is the landlord of.

Appeal against the decree of the District Judge, Saugor, dated [the] 10th February, 1926, in Civil Appeal No. 103 of 1924. Messrs. K. B. J. K. R. Cama and P. C. Dutt, for the Appellant.

Mr. G. L. Subhedar, for the Respondent.

OPINION.—The question referred to the Bench is "Whether a co-proprietor of a village selling his share to a third party and becoming an occupancy tenant of his *sir* held in severalty becomes a tenant of the vendee or of the whole pro-

(6) 96 Ind. Cas. 371; 50 M. L. J. 539; 23 L. W. 657; 49 M. 543; A. I. R. 1926 Mad. 769.

(7) 74 Ind. Cas. 362; 47 B. 798; 25 Bom. L. R. 1005; (1923) M. W. N. 689; A. I. R. 1923 P. C. 205; 33 M. L. T. 389; 28 C. W. N. 857; 20 L. W. 248; 50 I. A. 255; 47 M. L. J. 248 (P. C.).

proprietary body, liable to pay rent to the vendee or to the *lambardar*?"

The material facts are as follows. *Musammam* Bari Bahu the defendant was an eight-anna co-sharer in *Mouza Gamharia Puranapani*. The other eight-anna share is owned by Ganesh Singh the plaintiff and two others. Ganesh Singh is the *lambardar*. In 1923 *Musammam* Bari Bahu sold her share to one Mohan Singh and became occupancy tenant of the *sir* held by her in severalty. Ganesh Singh sues to recover the rent of the holding from *Musammam* Bari Bahu. The latter pleads that Mohan Singh is her landlord and that she has paid the rent to him.

Looking to the definitions of "landlord" and "tenant" in the Tenancy Act, s. 2, cls. (7) and (11) it must be held that Mohan Singh is the landlord and Bari Bahu his tenant in respect of the land of which the rent is in dispute. It is Mohan Singh and not the proprietary body represented by Ganesh Singh as the *lambardar* of whom Bari Bahu holds the land.

Mohan Singh as the landlord has the right to claim the rent from Bari Bahu. It is contended that sub-cl. (a) and (c) of cl. (2) of s. 188, Land Revenue Act, 1917, make the *lambardar* the landlord within the meaning of the Central Provinces Tenancy Act, 1918, and give him the right to collect the rent from all tenants in the village. The Act makes the *lambardar* the landlord only in respect of such land as the body of proprietors whom he represents is the landlord of. The body of proprietors is not the landlord in respect of Bari Bahu's holding and the rent of the holding does not form part of the village profits of which an account is renderable to the body of proprietors. Ganesh Singh is, therefore, not entitled to claim the rent.

Our opinion is that the ex-proprietor becoming an occupancy tenant of *sir* held by him in severalty is the tenant of his vendee and that the vendee is entitled to claim the rent and not the *lambardar*.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 250 OF 1924.

May 18, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Kulwant Sahay.

GOSAIN DAS BAISHNAB—APPELLANT
versus

GOPAL SINGH AND OTHERS—

RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 139, 213, 214, 258—Suit to set aside decree and sale for fraud, whether maintainable.

The jurisdiction of a Civil Court to entertain a suit for setting aside an execution sale for fraud in publishing or conducting a sale is barred under s. 258 of the Chota Nagpur Tenancy Act. [p. 431, col. 2.]

Section 258 of the Chota Nagpur Tenancy Act contemplates that a decree passed under s. 139 can be questioned in a suit on the ground of fraud in obtaining the decree. [*ibid.*]

Appeal against an order of the Additional Subordinate Judge, Purulia, dated the 2nd September, 1924, setting aside that of the Munsif, Purulia, dated the 31st March, 1924.

Messrs. A. K. Roy and Sashi Sekhar Prasad Singh, for the Appellant.

Messrs. A. B. Mukherji and U. N. Banerji, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant No. 1 and arises out of a suit brought by the plaintiff for setting aside a decree for arrears of rent and a sale in execution of the decree on ground of fraud and collusion.

The facts as alleged in the plaint are shortly these:

Defendants Nos. 2 to 4 are the superior landlords of *Mauza Adaidah*; defendants Nos. 5 to 16 were *mokarraridars* under defendants Nos. 2 to 4 and the rental payable by them was Rs. 120 odd and Rs. 13-3 odd was the cess.

It appears that on the 9th May, 1920, the plaintiff purchased a 4 annas 6 *gandas* out of the 16 annas *mokarrari* interest from some of the *mokarraridar* defendants. There was some defect in the deed of sale and fresh deed was executed in favour of the plaintiff on the 19th July, 1921. The landlords, namely, defendants Nos. 2 to 4 brought a suit for arrears of cesses due for the years 1324-1325 B. S. against defendants Nos. 5 to 16 and they obtained a decree on the 2nd April, 1921. In execution of this decree the *mokarrari* interest was put up for sale and was purchased by defendant No. 1 on the 20th October, 1921. There was a formal delivery of possession to defendant No. 1.

in January, 1922. The plaintiff applied to the Deputy Collector to set aside the sale under the provisions of s. 213 of the Chota Nagpur Tenancy Act. This application was rejected and the order was confirmed on appeal by the Deputy Commissioner and the Commissioner. The plaintiff, therefore, brought the present suit for a declaration that the decree was obtained by fraud and that the sale in execution of the decree was also obtained by fraud. The learned Munsif framed various issues, but on the application of the parties he proceeded to try issues Nos. 4 and 5 only which were the issues in bar of the suit. Issue No. 4 ran thus:

"Has this Court jurisdiction to try this suit and is s. 258 of the Chota Nagpur Tenancy Act a bar to the maintainability of this suit" and issue No. 5 was. "Is the suit barred by the principle of *res judicata*?"

The learned Munsif held that the suit was barred under the provisions of s. 258 of the Act and further that the suit was also barred by *res judicata*. Without deciding the other issues raised in the case the learned Munsif, on his decision of these two issues, dismissed the suit. There was an appeal by the plaintiff which was heard by the Subordinate Judge of Purulia. He has set aside the decree of the Munsif on a finding that the suit was not barred under the provisions of s. 258 of the Chota Nagpur Tenancy Act and that it was not barred by the principle of *res judicata* either. Against this decree the defendant No. 1 has come up in second appeal.

As regards the bar under s. 258 of the Chota Nagpur Tenancy Act it is clear that in so far as the plaint asks for setting aside the sale in execution of the decree, the claim is barred by s. 258. Section 213 of the Act provides for setting aside a sale on ground of material irregularity or fraud in publishing or conducting the sale. The learned Munsif appears to be under a misapprehension when he says that fraud is not one of the grounds upon which a sale can be set aside under s. 213. By the Amending Act VI of 1920 B. & O. the words "or fraud" have been inserted in s. 213 so as to make the fraud in publishing and conducting the sale one of the grounds for setting aside a sale. The question of fraud was, therefore, properly raised in the application for setting aside the sale and was decided by the Revenue Officer.

Under s. 214 no suit or application can be entertained in any Court to either set aside or to modify the effect of any sale made under Chap. XVI of the Chota Nagpur Tenancy Act except on the ground of fraud or want of jurisdiction. The fraud or want of jurisdiction contemplated in s. 258 is fraud or want of jurisdiction in the order passed under s. 213 refusing to set aside the sale. In my opinion the learned Munsif was right in holding that the claim of the plaintiff, in so far as it asked for setting aside the sale, was barred by s. 258 of the Chota Nagpur Tenancy Act. The suit, however, proceeds further and asks for a declaration that the decree obtained in the suit was itself fraudulent and collusive. The suit for realisation of the cesses appears to have been brought under s. 139 of the Chota Nagpur Tenancy Act and there are clear allegations in the plaint of the present suit that the decree obtained under s. 139 was by fraud on the part of the plaintiffs in that suit. Section 258 of the Chota Nagpur Tenancy Act contemplates that a decree passed under s. 139 can be questioned in a suit on the ground of fraud in obtaining the decree. There are clear allegations in the plaint of fraud and those allegations have to be enquired into. In my opinion the view taken by the learned Subordinate Judge on this point is correct and the order of remand must stand and the suit will be tried on the issues as regards the fraud in obtaining the decree and other issues relating thereto.

The appeal is dismissed with costs.

Adami, J.—I agree.

A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 105 OF 1927.

June 6, 1927.

Present:—Mr. Justice Ashworth and
Mr. Justice Iqbal Ahmad.

KAMTA SINGH—DEFENDANT—APPLICANT
versus

BHAGWAN DAS AND ANOTHER—PLAINTIFFS
AND RAJA SINGH AND OTHERS—
DEFENDANTS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 115,
O. XXIII, r. 1—Permission to withdraw suit—No
reasons given—Material irregularity—Revision.*

For a Court to invoke O. XXIII, r. 1, Civil Procedure Code, without giving any reason amounts to a material irregularity in exercising jurisdiction and its order can be set aside in revision.

Civil revision from an order of the Munsif, Jaunpur.

Mr. *Shiva Prasad Sinha*, for the Applicant.

Mr. *Haribans Sahai*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order of the Munsif of Jaunpur allowing the non-applicant to withdraw his suit with liberty to bring a fresh suit. The order of the Munsif is impugned before us on the ground that the Munsif had no jurisdiction to permit the withdrawal of the suit with liberty to bring a fresh suit unless and until he had decided that there was a formal defect in the suit or some other sufficient ground. The order of the Munsif fails to mention the reason why he granted the plaintiff permission to withdraw the suit with liberty to bring a fresh suit. It is permissible, however, in this circumstance to refer to the application of the non-applicant. In that application two grounds were set out. One was that the success of the suit depended upon proof of a fact which could only be proved by production of a certain cash book, whereas the applicant had only produced a ledger. The second ground was that there were other persons who were necessary parties to the suit. It is unnecessary to decide whether either of these facts would give the lower Court jurisdiction. It is sufficient to say that, in our opinion, the permission, as a matter of discretion should not have been allowed on the grounds stated. We admit that if the lower Court has erred in the exercise of its discretion no application in revision would lie. But as the order of the lower Court does not set forth the reasons for giving the permission, it is possible that the lower Court considered that permission to withdraw with liberty to bring a fresh suit could be granted without any condition precedent rather than that it abused the discretion imposed on it by law. In any case we should hold that for a Court to invoke O. XXIII, r. 1 without giving any reason amounts to a material irregularity in exercising jurisdiction given to the Court by that rule. In the circumstances, we consider it necessary to set aside the order of the lower Court and to direct the lower Court to proceed with the case from the point where the plaintiff had put in the application now impugned. The lower Court must re-consider that application and

pass an order on it. If the Court is of the opinion that notwithstanding the opinion expressed above, the application should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of other sufficient cause. If the Court rejects the application, it will still be open to the Court to allow the plaintiff to add any necessary party and to produce any necessary evidence, provided, of course, that the Court gives reasons for allowing this and awards appropriate costs. This is not to be construed to mean that the Court must allow parties to be added or evidence to be produced. We are told that circumstances exist, such as the conclusion of the evidence, on both sides and the conclusion of arguments, which would make such an order improper. It will be for the lower Court to consider this aspect of the matter.

Various decisions of this Court have been cited to us in the course of the hearing. We do not consider it necessary to examine them in detail. They appear to us merely to be authority for the proposition that provided a Court finds that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit, then in revision the exercise of the discretion of the Court cannot be questioned. In a case like the present one, where the lower Court has given no reasons, it will always be difficult to decide whether the order of the Court is based on an assumption of jurisdiction not vested in it by law, namely, to allow the suit to be withdrawn without satisfying the conditions of O. XXIII, r. 1 or whether it is based on the discretion allowed by the rule. In such cases, then, the correct method seems to be to hold that the Court has exercised its jurisdiction irregularly in failing to record its reason for exercising that jurisdiction. At least this is the view which we take in the present case.

The order of the lower Court will, therefore, be set aside including the order requiring the plaintiff to pay the defendant full costs plus Rs. 15. Those costs, if paid, should be refunded to the plaintiff. The defendant-applicant will get the costs of this application.

N. H.

Order set aside.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 132 OF 1927.

November 8, 1927.

Present:—Mr. Justice Ross and

Mr. Justice Kulwant Sahay.

GAHBAR PANDE—ACQUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, 302—Murder and culpable homicide, distinction between—Act done with intent to cause bodily injury likely to cause death, whether murder.

Two girls were struggling for the possession of a handful of gram. The elder girl gave a blow with a thin *lathi* to the younger. The uncle of the latter came running to the place and gave a blow with a *lathi* on the head of the elder girl and after the girl had fallen gave two more blows on her thigh. The blow on the head caused fracture of the skull and the girl died. The uncle was convicted for murder. On appeal.

Held, that the accused could not be convicted for murder but was guilty only of culpable homicide not amounting to murder. [p. 435, col. 2; p. 436, col. 2.]

A blow on the head with a *lathi* is certainly likely to cause death and the person who inflicts a *lathi* blow on the head of another person must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a *lathi* blow on the head is always sufficient in the ordinary course of nature to cause death. [p. 435, col. 2.]

Per *Kulwant Sahay, J.*—The essence of the crime of murder under cl. (2) of s. 300 of the Penal Code is that there must be the intention of causing such bodily injury as the offender knows is likely to cause death, and in order to convict a person of the offence of murder under the said clause, it has to be found that he had the intention of causing the injury and also that he had the knowledge that such injury which he intended to inflict was likely to cause death. For a conviction of an offence under cl. (3) of s. 300 it must be shown that the injury which the person intended to cause was such as to be sufficient in the ordinary course of nature to cause death. [p. 436, col. 1.]

If a person causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under s. 299, and it is only if the intention was to cause bodily injury, which injury was sufficient in the ordinary course of nature to cause death, that the offence would come under s. 300, cl. (3). [*ibid.*]

Although a man is presumed to intend the natural and inevitable consequence of his own act, the presumption of intention must depend upon the facts of each particular case, and 'knowledge' as used in cl. (2) of the section is a word which imports a certainty and not merely a probability. [*ibid.*]

The difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue. [*ibid.*]

Criminal appeal from the decision of the Sessions Judge, Muzaffarpur, dated the 24th of June, 1927.

Messrs. S. P. Varma and Bindhyachal Prasad, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Kulwant Sahay, J.—(August 30, 1927).—The appellant Gahbar Pande was tried along with his brother Nathu Pande on a charge under s. 302/34 of the Indian Penal Code for the murder of a girl named Gujari aged about 15 years, the daughter of one Mewak Dusadh. Nathu Pande was acquitted, but the appellant Gahbar Pande was convicted under s. 302 of the Indian Penal Code and sentenced to transportation for life.

The prosecution case shortly stated is that Mewak Dusadh has a field which bears survey plot No. 813 in village Lauria in which gram was growing. On the 27th of March last about two *gharis* before sunset a little girl named Reshmi aged about 8 or 9 years, the daughter of Nathu Pande, pulled out some gram from the field. Gujari snatched it from Reshmi and there was a struggle between the two for the possession of the gram. Gujari is said to have hit Reshmi with a stick which was in her hand. Gahbar Pande, the uncle of the girl Reshmi, came running from the north with a *lathi* in his hand followed by his brother Nathu who had also a *lathi*, and being incited by Nathu to kill the girl for having the audacity to hit a Bhabni girl, Gahbar struck Gujari on the head with his *lathi* and she fell down. Then both Gahbar and Nathu struck her with a *lathi* and Gujari died instantaneously. Gajadhar, who is a nephew of Mewak, came running and then Vakil Pande and Babu Lal Pande assaulted him with *lathis* and he also fell. Mewak who was irrigating his onion field at a short distance from the gram field came running and found his daughter dead. He then went to his nephew Gajadhar, who was lying unconscious, and revived him. He then left the corpse of his daughter in charge of Gajadhar and himself went to the Police Station, where his first information was recorded at 7.30 P.M. The Junior Sub-Inspector who was in charge of the *Thana* and had recorded the first information, left for the place of occurrence and reached there at 8.30 P.M. He found the corpse not in the gram field but in another field, bearing survey No. 860 which belonged to one Dhani Pande at a distance of about 30 yards to the north-west of

the gram field. He held the inquest and examined certain witnesses and ultimately both Nathu Pande and Gahbar Pande were sent up for trial.

The defence of the accused was that they did not assault the girl Gujar and had committed no offence; that there was no quarrel at all in the gram field between Reshmi and Gujar, nor did Reshmi uproot gram from the field of Mewak; that Gujar Dusadhar, who was a young unmarried girl, aged more than 15 years, generally grazed buffaloes on the *chaur* and *parti* lands along with Gahbar Pande who is aged 19 or 20; that there was a suspicion of undue intimacy between the two and the castesmen of Mewak held a *Panchait* and Gujar was forbidden to graze buffaloes with Gahbar Pande; that on the day of occurrence Gahbar Pande was grazing buffaloes in the *chaur* along with Gujar and that Reshmi was also grazing her goat near about. Gajadhar Dusadh noticed Gahbar Pande and Gujar grazing the buffaloes together and chased Gahbar, whereupon Gahbar ran away. Reshmi abused Gajadhar for this, whereupon Gajadhar struck her with a stick. Gajadhar then took Gujar to her father Mewak who was irrigating his onion field near the field of Dhani Pande and told him about it, whereupon Mewak Dusadh became angry and struck his daughter Gujar with the wooden shovel with which he was irrigating his field on account of which Gujar died, and that in order to save his own life Mewak had brought the false case against the accused persons on wrong allegations.

It might at once be said that there is no evidence on the side of the defence to prove the defence story. Reshmi was examined as a Court witness and she to a certain extent supported the defence version of the occurrence. But having regard to all the circumstances and the evidence on the record, I agree with the learned Sessions Judge in holding that this defence version of the occurrence has not been established. No blood was found in the field where Mewak Dusadh is said to have struck the girl. The nature of the injuries on the girl makes it improbable that Mewak Dusadh inflicted all those injuries. Even if the blow on the head which fractured the skull be assumed to have been caused by the shovel with which

Mewak was irrigating his field, the other injuries on the person of the girl were not likely to be caused by the shovel, and it is hard to believe that Mewak went on striking the girl after she had fallen. The defence version does not account for the injuries on the person of Gajadhar. For the reasons given by the learned Sessions Judge, I must hold that the defence version has not been established.

The learned Sessions Judge has disbelieved the prosecution witnesses as regards the part alleged to have been taken by Nathu Pande, and having regard to the statement made by Mewak Dusadh to the Police Officers and to the deposition of Jotik Dusadh, the learned Sessions Judge was right in holding that Nathu came to the place of occurrence after the girl Gujar had been killed.

As regards Gahbar, it is to my mind clearly established that he struck Gujar the *lathi* blow on the head and after she fell, he gave her two more *lathi* blows on the right thigh. There are, no doubt, discrepancies in the evidence of the prosecution witnesses, and they have clearly given exaggerated accounts and in some respects false accounts as regards some of the particulars deposed to by them. All of them had stated that Nathu Pande incited Gahbar to kill the girl, because she had dared to strike a Bhabni girl. All of them also say that Nathu Pande struck her along with Gahbar Pande. There are certain discrepancies also as regards the place where Gujar fell. But there can be no doubt about the statement made by each of the witnesses that Gahbar Pande came running with a *lathi* either on seeing Reshmi assaulted by Gujar or by being told of it by Reshmi herself. There is no reason to doubt the evidence of Mewak, Uttim, Gajadhar and Jotik when they say that Gahbar struck her with a *lathi*. I, therefore, agree with the learned Sessions Judge in holding that Gahbar did strike Gujar with a *lathi* on the head and also on the thigh. The blow on the head caused a fracture of the skull and was the cause of the death.

The question is as to what offence Gahbar has committed. All the four assessors were of opinion that the offence did not amount to murder, but to culpable homicide not amounting to murder. The learned Sessions Judge was of opinion that

although the case did not fall under the first clause of s. 300, it came under the second clause of the section and also under the third clause, and was covered by the illustration (c) to s. 300. Now, cl. (2) of s. 300 makes culpable homicide, murder if the act by which death is caused is done with the *intention* of causing such bodily injury as the offender *knows* to be likely to cause the death of the person to whom the harm is caused; and under cl. (3) it is murder if the act is done with the *intention* of causing bodily injury to any person and the bodily injury *intended* to be inflicted is *sufficient in the ordinary course of nature to cause death*. Illustration (c) runs thus: "A intentionally gives Z a sword-cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death." This illustration evidently covers the third clause of s. 300. The question for consideration is whether the appellant Gahbar Pande in giving the blow with the *lathi* on the head had the intention of causing such bodily injury as he *knew* to be likely to cause the death of Gujari, or whether he gave the blow with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause her death. The essence of the crime of murder under cl. (2) of the section is that there must be the intention of causing such bodily injury as the offender knows is likely to cause death. In order to convict Gahbar Pande of the offence of murder under cl. (2) of the section, it has to be found that he had the intention of causing the fracture of the skull which was the injury inflicted upon the girl and also that he had the knowledge that such injury which he intended to inflict was likely to cause death. It is conceded that he had no intention of causing death. It is hard to suppose that he intended to cause the injury which was, as a matter of fact, caused by the blow on the head given by him. Two girls were struggling for the possession of a handful of gram; the elder girl had given a *lathi* blow (although with a thin *lathi*) to the younger girl; the uncle of the younger girl came running to the place where the two girls were struggling. Is it reasonable to suppose that on account of such a struggle the appellant

intended to cause such bodily injury to the elder girl as he knew was likely to cause death? The evidence and circumstances lead me to suppose that he could have no such intention or knowledge. The learned Sessions Judge has disbelieved the statement of the prosecution witnesses as regards Nathu Pande having incited Gahbar to kill the girl. The evidence shows that only one blow was struck on the head and the girl fell and thereafter two more *lathi* blows were given on the leg. The medical evidence shows two more bruises, one on the right temple 2" x 1" and the other on the left side of the skull 3" x 1", and the Civil Surgeon was of opinion that altogether five blows were struck. The evidence of the witnesses, however, goes to show that Gahbar Pande struck one blow on the head and after the girl had fallen he gave two more blows on the thigh. The first information makes mention of a *lathi* blow on the head. Before the Committing Magistrate the witnesses had also stated that Gahbar gave a blow with a *lathi* on the head and she fell. In the Sessions Court, also the evidence goes to show that Gahbar struck her only one blow on the head with the *lathi*. Now, if he had the intention of causing the fracture of the skull which was the injury caused and he knew that such fracture was likely to cause death, his intention was carried out by the first blow, and there was no reason why he should go on inflicting more blows thereafter. I am of opinion that he had not the intention of causing such bodily injury as he knew likely to cause death, but intended only to chastise her. The third clause of s. 300 also does not, in my opinion, apply. Here also it must be shown that the injury which Gahbar intended to cause was such as to be sufficient in the ordinary course of nature to cause death. A blow on the head with a *lathi* is certainly likely to cause death and the person who inflicts *lathi* blow on the head of another person must be presumed to have the intention of causing such bodily injury as is likely to cause death. But to my mind it does not necessarily follow that a *lathi* blow on the head is always sufficient in the ordinary course of nature to cause death, and I have already found that he had no intention of causing the bodily injury which was, as a matter of fact, caused, namely, the fracture of the skull which resulted in the death of the girl. Now, if a person

causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under s. 299, and it is only, if the intention was to cause bodily injury, which injury was sufficient in the ordinary course of nature to cause death, that the offence would come under s. 300, cl. (3). The difference between the two is, no doubt, fine, but there is certainly a difference and it is to my mind not clear upon the evidence that the offence comes under s. 300 of the Code. The difference between culpable homicide amounting to murder and culpable homicide not amounting to murder has been very ably brought out by Melvill, J., in *Reg. v. Govinda* (1). No doubt, a man is presumed to intend the natural and inevitable consequence of his own act; but the presumption of intention must depend upon the facts of each particular case, and 'knowledge' as used in cl. (2) of the section is a word which imports a certainty and not merely a probability. In the present case the evidence to my mind goes to show that the appellant had not the intention of causing such injury as he knew to be likely to cause death, or as was sufficient in the ordinary course of nature to cause death. The difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue.

Upon the evidence I am of opinion that the injury inflicted upon the girl was inflicted by the appellant with the knowledge that it was likely to cause death but without any intention to cause death, and the case falls under the second paragraph of s. 304 of the Indian Penal Code. I would, therefore, alter the conviction from one under s. 302 to one under the second paragraph of s. 304 of the Indian Penal Code and sentence the appellant to seven years' rigorous imprisonment.

Ross, J.—(November 8, 1927).—I agree with the opinion of Mr. Justice Kulwant Sahay that this case falls under the second paragraph of s. 304 of the Indian Penal Code, and that the conviction should be altered accordingly and that the sentence should be seven years' rigorous imprisonment. It is not necessary for me to discuss the case at length as I am in full agreement with his reasoning. The appellant who is a young man of 19 struck

a girl of 15 on the back of the scalp with a *lathi* and caused a compound fracture of the skull as the result of which she died. The evidence further is that after this blow he struck the girl two blows on the thigh. The cause of the assault was of a trivial character. The deceased who was a Dusadh had snatched away some gram from a Babni girl of 8 or 9 years, who had taken the gram from a Dusadh's field. Neither the circumstances of the assault nor the weapon used necessarily suggest an intention to kill or the only slightly different intentions defined in cls. (2) and (3) of s. 300. On the contrary the fact that two slight blows were given on the thigh after the blow on the head seems to indicate that there was no such intention present to the mind of the appellant when he struck the girl on the head. At the same time, by striking the girl on the head with a *lathi*, he undoubtedly intended to cause such bodily injury as was likely to cause death and he was, therefore, guilty of culpable homicide not amounting to murder. The facts of this case do not, in my opinion, warrant any stronger conclusion.

A. N. 4.

Conviction altered.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1235 of 1927.

October 7, 1927.

Present:—Mr. Justice Harrison.

FAIZ MOHAMMAD THROUGH
EMPEROR—COMPLAINANT—PETITIONER
versus

NABU AND ANOTHER—ACCUSED—
RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 256, 257—Re-call of prosecution witnesses for further cross-examination—Expense of witnesses—Order directing complainant to pay costs to accused, legality of.

Where an accused after the framing of the charge demands the re-call of prosecution witnesses for further cross-examination the complainant cannot be made to bear their expenses.

Where a complainant failed to produce his witnesses for cross-examination by the accused after the framing of the charge and the Magistrate ordered the complainant to deposit the process-fee and to pay the accused a certain sum of money as costs:

Held, that the order of the Magistrate directing the complainant to pay costs to the accused was illegal.

Case reported by the Sessions Judge, Karnal, with his No. 300-J of 15th July, 1927.

(1) 1 B. 342; 1 Ind. Jur. 378; 1 Ind. Dec. (N. S.) 228.

REPORT—FACTS.—This was a case under s. 323, Indian Penal Code. After the prosecution evidence in the case had been recorded the accused were charged under s. 323 on the 7th of June, 1927. On 8th June they stated that they will further cross-examine all the prosecution witnesses. The Magistrate ordered the complainant to produce his witnesses again on the 7th of June. On that date the complainant filed a petition that his witnesses who were related to the accused had been won over by the other side and so were not willing to come with him and that he will deposit their expenses and will have summons issued to them. On this the Magistrate (Chaudhry Ghasi Ram, Magistrate, Second Class, Thanesar) adjourned the case to 24th of June directing the complainant to pay process fee and costs of the witnesses and also ordered the complainant to pay Rs. 20 as costs to the accused. It is against this order that complainant has applied for revision.

GROUND.—The complainant had given a very plausible reason for the non-attendance of his witnesses. Without inquiring into the truth or falsehood of this allegation the Magistrate should not have ordered him to pay Rs. 20 as costs to the accused.

The complainant is a boy aged 13 or 14 years only. The Magistrate seems to have lost sight of this fact.

It is doubtful whether under the Criminal Procedure Code, it is the duty of the complainant to pay the expenses of his witnesses over again for further cross-examination. There seems to be no provision in the Criminal Procedure Code to justify this procedure.

There is a note to s. 257 in Rama Natha Aiyer's Criminal Procedure Code, Volume 2, page 1016, to the effect that there is nothing in the Code which enables the Magistrate to demand from a complainant the expenses to be incurred by his witnesses for cross-examination in a warrant case. In *Amin Chand v. King Emperor* (1) it was laid down that under s. 256 of the Criminal Procedure Code it is the duty of the Magistrate to re-call prosecution witnesses for cross-examination if the accused so demands after the charge is framed. The Sessions Judge who forwarded that case for revision to the High Court was of opinion that it was the duty of the Magistrate to re-call such

(1) 12 P. R. 1907 Cr.; 32 P. W. R. 1907 Cr.; 6 Cr. L. J. 339; 45 P. L. R. 1908.

witnesses presumably at the public expense. The language of s. 257 of the Criminal Procedure Code seems to imply that it is the accused who applied for re-calling of prosecution witnesses for cross-examination and it is he who should pay the expenses and not the complainant. It was not, therefore, for the complainant to pay expenses or to produce witnesses in this case. The Magistrate should have called the witnesses either at the expense of the Government or at the expense of the accused. His order, therefore, that complainant should pay Rs. 20 to the other side was not quite justified, the more so because the complainant in this case was willing to deposit the expenses of the witnesses. It is recommended, therefore, that the order of payment of costs Rs. 20 may be set aside.

ORDER.—For the reasons given by the learned Sessions Judge, I set aside the order directing the payment of Rs. 20 by the complainant to the accused.

R. L.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 464 of 1927.

June 2, 1927.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Lindsay.

EMPEROR—ПРОБОЕТОР

versus

MANGU—ACCUSED.

Penal Code (Act XLV of 1860), s. 215—Offence, nature of—Taking money to find stolen property—Screening offender—Desire to save oneself from vengeance of thieves.

The primary aim of s. 215, Penal Code, is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice. [p. 439, col. 2.]

It is not an offence to take money from another in order to help him to find stolen property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. The section is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence. [p. 440, col. 1.]

The fact that a person undertaking to recover

stolen horses says that he will take them, if recovered, either to the cattle-pound or leave them near some place, does not necessarily show that he knows the criminal and wishes to screen him. It may equally be that he intends to save himself from the vengeance of the people from whom he intends to take away the horses if he discovers their whereabouts. [*ibid.*]

Criminal appeal by the Local Government from an order of the Additional Sessions Judge, Bijnor.

The Government Advocate, for the Crown.
Mr. K. N. Malaviya, for the Accused.

JUDGMENT.—On the 1st of October, 1926, a mare belonging to one Bhagwant Singh of *Mauza Patti Tek Chand* disappeared and on the same night a mare belonging to one Budhu, *Jat*, also disappeared from an adjoining *mauza*, *Mauza Ohhajaura*. Although there is no evidence that these animals were stolen, we propose for the purposes of this case to assume that they were stolen.

The identity of the thief, or thieves, was not known, but one Mangu was suspected. He is the respondent to a Government appeal to-day, he having been charged, in the events which we shall set out in a few moments, with having committed an offence under s. 215 of the Indian Penal Code. He was tried for that offence by a Bench of First Class Magistrates of Bijnor and sentenced to one year's rigorous imprisonment. From that conviction he appealed, and the learned Additional Sessions Judge on the 18th of February, 1927, allowed the Jail appeal of Mangu and directed his acquittal.

The Local Government believing that acquittal to have been a miscarriage of justice, appealed and that is how the matter comes before us to-day on the Government appeal.

We can dispose of the judgment of the Additional Sessions Judge quite shortly by saying that he disbelieved the evidence given and pointed out one or two small discrepancies. He proceeded entirely on facts, and did not believe in the good faith of the prosecution. He thought it to be a manufactured case, because the prosecution believing Mangu to have been the thief but having no evidence against him, were endeavouring to secure his conviction by means of s. 215. We do not agree with the Sessions Judge in the way in which he approached the case, but that has become a matter of very little importance to-day, because from the early opening of this appeal the learned Government Advocate was asked to consider with us the some-

what intricate nature of that section, and to point to the evidence on the record which would satisfy all the requirements for a conviction under it. We have come to the conclusion that all the requirements for a conviction under s. 215 do not exist, and that, as a matter of law, Mangu is entitled to be acquitted. Section 215 is one which in practice very rarely comes before the Courts, and it is desirable first that we should set out what we believe to be the facts of this case as disclosed by the evidence, and then we should discuss s. 215 and show how the prosecution must, in our opinion, have failed from the outset.

Now, undoubtedly on the discovery of the loss of these horses Mangu was suspected. We think there can be no doubt about that, and we think that there being no evidence whatever against him, it was concluded that the best way to re gain possession of the missing animals was to offer Mangu Rs. 30 if he were able to recover them. We cannot, of course, attach any weight to the statement that Mangu was suspected, and we have got to deal with Mangu entirely upon the evidence as it appears on the record. Now the evidence is this. Bhagwant Singh told the Court how on the night of the 1st of October, 1926, his mare disappeared. He said that he had a suspicion of Mangu and other persons, and he being a *zemindar* of some importance in the neighbourhood, told the people of his own *mauza* and of the *mauza* from which the mare of Budhu had been taken, that they should trace out the animals, and that he was quite willing to defray the expenses. Now there was nothing improper in Bhagwant Singh making an offer to anybody that he would pay for the tracing out of the mares. That being the position, some 5 to 7 days after Mangu, the accused, came into the village. He is a seller of water-nuts. Chhajju Singh spoke to him, and the two phrases which he used show in themselves that he was endeavouring as politely as he could to suggest to Mangu that it might be possible for him (Mangu) to recover the mares without difficulty, really on the hypothesis that Mangu had been one of the offenders. The actual translation of the original is not as it appears at page 10, line 47 onwards in the text. The actual words which Chhajju Singh says that he used are as follows:—*"Teri suddh men kahin yah ghorian hon to pattah chala dei."* (If you happen to know where these horses are, then furnish a clue

to them). Mangu is said to have replied that a clue would, or might, be found but it would require money. Now there was no impropriety in either the request of Ohhajju Singh or in the answer of Mangu that it was possible that a clue might be found but that the tracing would be a matter of money. A few days later Bhagwant Singh provided Rs. 30, and at an interview at which many people were present, Mangu was given Rs. 4, and he was promised the balance of Rs. 26, on the return of the horses, and for the satisfaction of Mangu, the Rs. 26, was at his suggestion placed in the hands of Ohhajju Singh. Some 10 or 12 days after this Mangu returned and told Ohhajju Singh that he wanted some more money, saying that he had to go a long distance and that more money would be spent. That request was refused, and on or about the 1st of December, 1926, Mangu told Ohhajju Singh that he could not find the horses anywhere. Similarly Majid says that Mangu when asked why he had not found the horses said "this disease is beyond my power," meaning that the tracing of them was beyond his power. The Government Advocate relies upon two extracts from the evidence, page 12, line 25 onwards and page 12, line 53 and onwards. Page 12, line 25 and onwards runs as follows; Majid is giving evidence and he says as follows: "This accused said either 'I shall take it to the cattle-pound, or I shall bring it in here and leave it.' The other statement is similar, and is made by Dalu Singh. "Mangu was saying 'I will bring both the horses. Pay Rs. 4 at this time and deposit Rs. 26 with Ohhajju Singh. I will admit them in the cattle-pound or leave them near the village.'" Now the learned Government Advocate does not dissent from the possibility that all that has been read was or might well be taken to be prefaced by 'if I can get hold of the horses'; but he uses those phrases as an argument to show that Mangu's intention in taking them to the cattle-pound or leaving them near the village was a desire or intention to screen the thief. The answer to that seems to be that there is no evidence that Mangu ever knew who was the offender. He may have done so but there is nothing on the record to show that he knew who the thief was. There is nothing on the record to show that he did more than promise to attempt to trace out the horses, which we are willing to accept were stolen horses, and, if successful, to leave them in the

pound or in the village, nothing beyond that. Those being the essential circumstances the question is whether what Mangu agreed to do, and did, amounts to an offence under s. 215 of the Indian Penal Code. The section runs as follows: "Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both." Now that section has been the subject of two decisions in this Court, and it has also been considered by Mr. Mayne in the 4th Edition of his work on Criminal Law in India at page 271. In his commentary Mr. Mayne says: "The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice." Now we pause here for a minute to examine what Mr. Mayne puts forward as the essential ingredients. You must have a person knowing that property has been obtained by crime. In this particular case, as we are going to order the release of Mangu, we are willing to assume that the horses were in fact the subject of a theft on the night of October 1st, and that Mangu having been informed of that believed it to be the fact. We now come to this difficulty in the way of 'the screening' and 'knowing the criminal.' There is as we have said not the least evidence that Mangu knew the criminal; and if we have to take the record, Mangu is entitled to ask us to give weight to the two places in the evidence where the prosecution agrees that he said that he could not find the horses anywhere, and also that the finding of the horses was beyond his power. Therefore, if we take the evidence as it stands, Mangu was a man who had undertaken to endeavour to trace out and to restore the horses to their rightful owners if he was able to do so, and in the event of his being successful he was to be paid Rs. 30. But there is no suggestion in the bargain at any stage of the proceedings, that he intended to screen the offender, and that as will be seen is the third essential spoken

of by Mr. Mayne in his commentary. Mr. Mayne continues: "It is not an offence to take money from another in order to help him to find the property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. This section is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence." Now there again being in league with the thief, is a necessary act to be proved. The way in which the Government Advocate puts it is that the intention to leave the horses in the pound had its origin in the desire to screen the offender. It may, of course, bear that complexion but it equally supports this intention, namely, that Mangu, if he ascertained the whereabouts of these animals, was proposing himself to take them away from the unlawful possession in which they were in and quietly and secretly restore them to the owners, Bhagwant Singh and Budhu, by leaving them in the pound or near the village and that in doing this Mangu was not anxious that the part he had taken in the matter should be known and that he made these suggestions that he should put them in the cattle pound, or leave them in the village for his own protection, so that it should not be known by the thieves that his had been the hand that had restored them to the owners. It may have been his intention to screen the original thief, but it may equally have been that he intended to save himself from the vengeance of the people from whom he intended to take away the horses if he discovered their whereabouts.

We are, therefore, of opinion that this prosecution was not started with the necessary facts, which alone could support it, and that it fails because, strictly speaking, there is no evidence that the horses had been stolen, though for the purposes of this case we have been, in this particular instance, willing to accept that they were stolen, but there is certainly no evidence that Mangu knew the criminal, no evidence that he was making any attempt to screen that criminal from

justice, or that he failed to use all means in his power to cause the offender to be apprehended. On those grounds we affirm the order whereby the Additional Sessions Judge acquitted Mangu, though, as we have said, we differ from him in the reasons which he has given for such acquittal. Mangu is in Court and may leave the Court at once. The office will make the necessary arrangements to enable him to return to his village.

N. H.

Order affirmed.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 672 OF 1927.

October 21, 1927.

Present:—Mr. Justice Fforde.

MEHR SHAH—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, Part II, 325
—Dang blow on head causing death—Skull not fractured—Offence.

In most instances a man who strikes a person on the head with a heavy weapon such as *dang* must know that such a blow is likely to cause death. But this cannot be said about the case where the blow is not a very violent one and the injured person is able to walk about for a couple of days before he succumbs to the injury. In such a case the offence committed is one under s. 325, Penal Code. [p. 441, col. 2.]

Appeal from an order of the Magistrate, First Class, Multan, exercising enhanced powers under s. 30, Criminal Procedure Code, dated the 25th May, 1927.

Mr. Ganpat Rai, for the Appellant.

Mr. Des Raj Sawhney, for the Respondent.

JUDGMENT.—The appellant has been convicted under the provisions of s. 304, Part II, Indian Penal Code, of having caused the death of his wife by striking her a blow without intent to cause death but with a knowledge that the blow would be likely to cause her death. The evidence is of a highly unsatisfactory nature in many ways. In the First Information Report the informant Chiragh Shah stated that a number of persons were beating the deceased and that he could mention them by name and he named Sher Shah, Mehr Shah, Ghulam Shah and Tilla Shah. Of these persons he said that Mehr Shah, the woman's husband, dealt her a *dang* blow on her

head as a result of which she fell down. This witness corroborated his statement made in the First Information Report when he was examined in the box. He there said that on arriving at the scene he was told by the deceased that Sher Shah, Mehr Shah, Ghulam Shah and Tilla Shah were beating her with fists and legs. Then he added that meanwhile Mehr Shah gave her a *lathi* blow on the head.

Musammât Fateh Bibi, the mother of the deceased, stated that she was present at the time of occurrence, that she arrived at the scene as a result of hearing a noise and on arrival she found Mehr Shah striking her daughter *dang* blow. She added that Sher Shah, Ghulam Shah and Tilla Shah, were giving her blows with their fists and slapping her, and that Ghulam Shah was saying: "Do not strike her on the head". Mehr Ali (P. W. No. 4) who appears to be a disinterested witness, stated that on hearing a noise he came up to the scene and saw Mehr Shah strike a *dang* blow on the deceased's head and he added that Sher Shah, Mehr Shah, Tilla Shah and Ghulam Shah were present but he does not attribute any acts of assault to these other persons. Ahmada (P. W. No. 5) says that he saw the incident at a distance of about 3 or 4 *karams*, that he saw Mehr Shah strike the deceased a *dang* blow, that she thereupon fell down and became unconscious. He adds that Mehr Ali, Chiragh Shah, Sher Shah, Tilla Shah and Ghulam Shah were present. Three girls and some women also saw the scene. In addition to this evidence there is the statement of the deceased made to the Sub-Assistant Surgeon Ata Ullah Khan when he saw her at the hospital. According to this witness she stated to him that her husband gave her a *lathi* blow on her head. When he first examined the wound he did not think it was sufficient to cause death. According to this medical witness she remained conscious up to the moment of her death and she attended the hospital from the 28th of March, until the 30th as an outdoor patient and she was then admitted as an indoor patient. She died on the 6th of April.

On the 1st of April, the deceased made a dying declaration which was taken down by the Naib-Tahsildar Gurbachan Singh. In this statement she gives two inconsistent accounts of what occurred. She first says that only her husband, her little daughter Musammât Nizami who was in

her lap, her mother-in-law Musammât Rajan, and her husband's sister Musammât Imam Bibi, were present at the time when she received her injuries and that no body else was there. At the instigation of her mother who was present when this dying declaration was being made, she added that Zilla Shah, Gama Shah, and Sher Shah "also gave her kicks and cuffs along with her husband", and she stated in this dying declaration that her husband gave her two blows on her head and other blows on her legs.

The medical evidence is clear that the woman only received one injury and that was a blow on the head. That is consistent with the evidence of the persons who purport to be eye-witnesses, and is also consistent with the statement which she made on going to the hospital. It is, in my opinion, clearly established that this woman only received one blow, which ultimately caused her death. The learned trial Judge has stated in his judgment that "He selected the head of his wife for causing injury and did not remain content with one blow, but in order to be almost sure of dangerous result he gave another blow. He thus in inflicting two blows by a heavy *lathi* on the head of his wife knew that it will likely cause death or such bodily injury as will likely cause death."

This view is entirely opposed to the weight of evidence. In my opinion as far as I can gather from the whole of the evidence before me, the appellant did not intend to seriously injure his wife. But in a sudden quarrel he picked up a stick lying to hand and struck her with it on the head. There is no doubt that in most instances a man who strikes a person on the head with a heavy weapon such as *dang* must know that such a blow is likely to cause death; but the blow in the present case does not appear to have been a very violent one, inasmuch as skull was not fractured and the woman was able to attend the hospital and walk about for at least two days.

There is some difference of opinion between the medical men as to whether death was due to hæmorrhage from rupture of the blood vessels of brain or due to erysipelas. The Doctor who conducted the *post-mortem* examination is satisfied that death was due to hæmorrhage, but the Civil Surgeon (D. W. No. 1) has expressed

a decided opinion that it was due to erysipelas as in his judgment paralysis and unconsciousness would in some form precede death if the cause of death were compression of the brain. In the present case paralysis and unconsciousness did not precede death. It is hard to say in this conflict of medical testimony whether death was due to erysipelas or compression of the brain.

Upon the whole of the circumstances of this case I am not satisfied that the appellant knew when he gave the blow in question that it was likely to cause death; nor do I think that he intended to cause grievous hurt; but I am of opinion that when he struck the woman on the head he must have known that he was likely to cause grievous hurt, and in fact grievous hurt was caused. In these circumstances I think that he should have been convicted under the provisions of s. 325, Indian Penal Code, and I would accordingly alter the conviction to one under that section. Having regard to all the circumstances of the case I think the sentence of six years is too severe and I would reduce it to one of two years' rigorous imprisonment.

R. L.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 644 OF 1927.

September 7, 1927.

Present:—Mr. Justice Boys and Mr.

Justice Iqbal Ahmad.

KARAN SINGH AND OTHERS—ACCUSED

—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Duty of prosecution and trial Judge to see that all material evidence is adduced—Police diary, proper use of—Criminal Procedure Code (Act V of 1898), s. 162.

The Prosecuting Inspector, the Government Pleader in the trial Court and the trial Judge do not any of them discharge their duty, if they are merely content with getting recorded and recording such evidence as the Police may put before the Court. It is the duty of all of them to apply some intelligence, all the intelligence they can, to the problems that arise in the case and towards securing all possible evidence on material points. They must examine the motives and relations between the parties and insist upon their actions, where those actions are material, being disclosed. [p. 444, col. 2.]

A confession recorded in a Police diary cannot be used for anything other than to assist the presiding Judge in the enquiry or trial or for the purpose of

enabling the defence under certain circumstances to contradict the witnesses for the Crown. But it is the duty of the Judge to bring on record by evidence any material facts that may come to his knowledge and for this purpose a Judge can and should use the diary. [p. 445, col. 1.]

Criminal appeal from an order of the Sessions Judge, Shahjahanpur.

Messrs. P. N. Saprú and M. N. Raina, for the Appellants.

The Government Advocate, for the Respondent.

JUDGMENT.—Four men, Karan Singh, Bahadur, Mulaem Singh and Puran have been convicted under s. 302 for the murder of Gajraj. Karan Singh and Bahadur have been sentenced to death. Mulaem Singh and Puran have been sentenced to transportation for life on the ground that they did not take a principal part in committing the murder. In view of the opinion that we have formed about this case, it is unnecessary to say more in regard to the question of sentence than this, that we cannot find the smallest justification for the Sessions Judge sentencing Mulaem Singh and Puran only to transportation for life if there is in fact truth in the story for the prosecution which the learned Judge has believed. According to that story Mulaem and Puran held Gajraj while Bahadur and Karan forced the life out of him by placing their *lathis* on his neck. In view of this story, which the learned Judge accepted, it is inconceivable to us how he could justify a view that the two men did not take a principal part in the murder. The story for the prosecution is that Karan Singh hated Gajraj because Gajraj had been one of those responsible, though not tried, for kidnapping Karan Singh's wife about a year before the present murder. Gajraj is also said to have had enmity with one of the other appellants, Bahadur, on account of their both having an intrigue with the same woman Musammat Bitauli. On the night of the 30th March, Karan Singh is said to have persuaded Gajraj to accompany him with a view to beating Bahadur and to have taken Gajraj to his (Karan Singh's) house under this pretext, where the other three appellants were already concealed. Omitting some minor incidents which followed, the four appellants are then said to have murdered Gajraj by pressing a *lathi* on his neck, to have taken away the corpse and have hidden it in the jungle and to have subsequently, one, or the other of them largely destroyed the corpse by burning it.

Gajraj had four brothers, Munshi, Mahadeo, Nawab and Piare. Mahadeo lived with Gajraj in the village Barehla where also Karan Singh, Mulaem and Paran lived. The fourth appellant, Bahadur, lived in another village, but had been working in a *bel* in the village Barehla for several months. The other three brothers of Gajraj, Munshi, Nawab and Piare lived about two *kos* away from Barehla in the village Mundia Bais. Mahadeo is said to have been ill and, therefore, took no steps when he found that his brother did not return. How far this alleged illness is a real fact is at the least uncertain, because Mahadeo was himself well-enough a few days later to go to the place where the body was eventually found. However, Mahadeo says that he sent his son to fetch his brother Piare, who also had been named in the report of the kidnapping case above mentioned. Piare says that he searched for his brother Gajraj in certain villages where Karan Singh said Gajraj might be, but failed to find him and, failing to find him three days later again questioned Karan Singh and as a result of his suspicions got Karan Singh arrested by the *Mukhia* and others and took him to the Police Station. On the way to the Police station, they were told that the body of Gajraj had been found burnt in the jungle. The Sub-Inspector came to the village Barehla on the 3rd April, and as a result of his investigation sent up the present four appellants for trial. The case for the Crown really rests on the evidence of Ram Kali, the wife of Karan Singh, who was the woman alleged to have been kidnapped in the case that had occurred a year previously. She purports to give eye-witness testimony of the murder. The next fact of importance is that this woman is said not to have been present in the village when the Sub-Inspector came, and was found a long way off on the 7th April, in apparently some small jungle. The story for the Crown is that Karan Singh got her out of the way. The story for the defence is that she had never been in Karan Singh's house at all, since the kidnapping case, but had been under the protection of Piare and that the Police with the assistance of Piare pretended to have found her in the jungle. Further, there is the evidence of *Musammât* Bitauli, who is said to have met *Musammât* Ram Kali at a fair at Gola on the 3rd April and to have been told by *Musammât* Ram Kali that she (*Ram-Kali*) had seen the murder committed by

the four appellants. The remaining portion of the evidence consists of evidence by the Police and other witnesses that Karan Singh pointed out in the jungle where the shoes and *lathi* of the deceased were to be found, the heap of straw in which the body had first been concealed and the shop of the person from whom the kerosine oil had been purchased with which the body was later burned.

After very anxious consideration of the evidence for the Crown, two facts emerged. Firstly, there was no conceivable explanation on the record as it stood which would render it reasonable conduct on the part of Gajraj to allow himself to be taken away by the very man Karan Singh, whose wife he was alleged to have kidnapped on the pretext of beating Bahadur, his (Gajraj's) enemy. The Crown alleged that this man Bahadur, one of the present appellants, was the friend of Karan Singh and had been having his food in Karan Singh's house for a month past. This fact must have been perfectly well-known to Gajraj and two questions required an answer. What should make Gajraj unsuspecting of the motives of Karan Singh in assisting him at all? Why should Gajraj believe Karan Singh to be willing to assist Gajraj or any body else in beating a man who had been having his food in his (Karan Singh's) house for the past month and with whom he had, as far as the record shows, no enmity whatever? The record, however, discloses that practically all the persons concerned in this case, we do not of course mean without exception, but all the principal persons are bad character. That being so, it is highly improbable that we should find in the evidence a disclosure of the real feelings of the various persons towards each other, and it was just conceivable that Gajraj could be deceived into accompanying Karan Singh.

The second point that emerged was that there seemed no substantial reason to doubt that *Musammât* Ram Kali was at the time of the murder living with her husband Karan Singh and was, therefore, in a position to know something of the murder, if it took place as she said it did. That Karan Singh should endeavour to get her out of the way while having no real reason to suppose that she would give evidence against him, was not unnatural. It was also not unnatural

that the husbands of other women relative should refuse to have her in the house and that she might, therefore, have to leave as best she could; her being kept even in the open air was not in any way impossible in view of the season of the year. The third fact we may also mention about which there can be no dispute, and that is that evidence of the alleged production by Karan Singh of the shoes and *lathi* and evidence that he pointed out the shop where the oil had been bought and the place where the body had first been concealed, amounted in fact though not in words to giving evidence that Karan Singh had confessed. The Crown was entitled to lead such evidence, though they were not entitled to give evidence of a confession made to a Police Officer. But the conclusion to be drawn from such evidence was inevitable.

We feel it our duty here to note that nobody connected with the presentation of the case to the Court below, including the trial Judge, seems to have had the smallest conception of their duty to really examine the evidence and to secure that all available light on the case should be before the Court. The Prosecuting Inspector in the Court below, the Government Pleader in the Sessions Court and the trial Judge do not any of them discharge their duty, if they are merely content with getting recorded and recording such evidence as the Police may put before the Court. It is the duty of all of them to apply some intelligence, all the intelligence they can, to the problems that arise in the case and towards securing all possible evidence on material points. We find in this case no serious attention whatever directed to get on to the record any detailed evidence of the real relations between Karan Singh on the one hand and Gajraj and Mahadeo on the other. Nor do we find any attempt whatever to extract from *Musammam Ram Kali* any statement as to how she came to leave the house of her husband on or about the 3rd April. She alleges that she was taken away to a fair by her husband's brother but she tells us nothing and was asked nothing of what occurred during the three days subsequent to the murder and prior to her departure. If there is any truth whatever in her story, she must have had conversations with her husband and with Mulaem as to whether she was to stay in

the house or go, as to whether she was to hold her tongue about what she had seen and many other similar points. No attempt was made to extract from her any information as to her living in the jungle, who she was with whom she was content to stay there. It is no case of a simple ignorant woman unaccustomed to the world and to meeting and talking with men. She is avowedly a loose character and there is no suggestion of her being *pardah* to any body at all. Her evidence is limited to saying that she was concealed in order to keep her away from the Sub-Inspector. She was not asked whether this was with her consent or against her will. If it was with her consent, she was not asked how it came about that she so readily disclosed the whole transaction to *Musammam Bitauli*, the mistress of Gajraj the murdered man. If it was against her will, she was not asked why she did not disclose it to numbers of other people or why she was willing to live, so far as the evidence goes, unguarded in some jungle. It is not the duty of either the Government Pleader or the trial Judge to assume without giving any thought to it, that the stories told by the prosecution witnesses are necessarily true. It is their duty to apply some intelligence to examination of motives and relations between the parties and to insist upon their actions, where those actions are material, being disclosed.

We were inclined, however, to think that the evidence of *Musammam Ram Kali* was possibly true in the main.

On the other hand, there was still the unsolved problem of how Karan Singh could have induced Gajraj to go away with him for the purpose alleged.

Thirdly, there was the fact staring us in the face on the record that the Crown really intended the Court to believe that Karan Singh had confessed.

In view of the unsatisfactory way in which the case has been tried, we considered it desirable to look into the diary. It is unnecessary to state again, one of us has frequently stated, the principles which must guide a Court in using the diary. Looking into the diary then we find that Karan Singh is recorded as having made a confession to the Sub-Inspector of Police on the 4th April after the Superintendent of Police had left, while Karan Singh was still refusing to

disclose anything. In many particulars that confession details the same story as that which is put before us now for the prosecution, but in one very grave particular it is wholly discrepant. Karan Singh says in that confession that the murder was committed under his supervision, but with the aid of four men, Bahadur and Puran, two of the present appellants, and with the assistance of Bachu and Bhajnu, and does not mention Mulaem. Now it is conceivable that in confessing to the Police Karan Singh might have excluded the name of his brother Mulaem. But there is no possible explanation which occurs to our minds of why he should have put in two other men Bachu and Bhajnu falsely.

The serious question raised by the discovery of this confession is, apart from the legal aspects of it, which of the two statements contains the truth? Supposing that either of them does, Karan Singh's statement or *Musammam* Ram Kali's, it is manifest that the two are hopelessly contradictory as to the actual murder, and yet both statements are made by persons who were eye-witnesses. If Karan Singh's confession represents the truth, then *Musammam* Ram Kali's evidence, that of the principal witness for the prosecution, is wholly false.

Now we have referred above to the legal aspects of this confession. It is manifest that it cannot be used against Karan Singh or any of the appellants. It was a confession made to the Police. How then should it have been used in the Court below? The diary cannot be used for anything other than to assist the presiding Judge in the enquiry or trial or for the purpose of enabling the defence under certain circumstances to contradict the witnesses for the Crown. It is the duty of the Judge to bring on record by evidence any material facts that may come to his knowledge and it is for that purpose that he can and should use the diary. Here it is clear that his suspicions ought to have been aroused by the evidence given in Court as to the production of shoes, etc., by Karan Singh that Karan Singh might be supposed to have confessed. If he had looked at the diary to see whether there was anything which would indicate the absence of material facts, he would have come across, as we did, that confession; he would have seen that Karan Singh had told a story there which, if it was true, would shatter the

evidence of *Musammam* Ram Kali. He could not use that confession against the accused, but what he could have done and should have done would have been to question the Investigating Inspector some what as follows. Did you in fact have two persons mentioned to you by Karan Singh as having taken part in the murder, who are not mentioned in any way at all by *Musammam* Ram Kali who purports to have seen the murder? The Sub-Inspector would have had to admit that he had. The defence could then have used this evidence to rebut the testimony of *Musammam* Ram Kali and it would further have thrown doubts on the evidence that Karan Singh produced the shoes, etc. A Court is not allowed to use the confession of a person to the Police against the accused, but there is no reason whatever why it should not get on the record facts in connection with that confession of which, if the defence were aware of them, the accused would be entitled to the benefit.

It would be useless for us now to call the Sub-Inspector to give formal evidence to these discrepant statements in the alleged confession. It is manifest that once those facts have come to light it is impossible to place reliance on the evidence of *Musammam* Ram Kali. It may be true, it may be false, but it is clear that somehow or other the name of Mulaem has become substituted for the names of two other men who were originally the objects of suspicion and rightly so. We do not mean of course by the words "rightly so" that Bachu and Bhajnu were guilty or that there is the smallest reason for believing them to be guilty, but suspicion must have been strongly directed against them at the outset, unless there was something improper in the way this confession was obtained from Karan Singh. No explanation whatever is offered as to how it now comes about that such an important part of Karan Singh's statement is alleged by the Crown to be false and how a new figure Mulaem is inserted in the list of guilty persons. We are of course unable to say whether the case is or is not in fact a true one, but in view of the facts that we have set forth above, it is manifest that no reliance whatever can be placed on the main evidence for the Crown, including the alleged production by Karan Singh of articles belonging to the deceased and other things he is said to have

disclosed. A brutal murder has undoubtedly been committed and it is, in our view, owing to the manner in which the case was investigated and tried that the guilty persons have escaped, whether they be the present appellants or others. We have no alternative but to set aside the convictions and sentences and direct the appellants to be released.

A. N. A.

Convictions set aside.

MADRAS HIGH COURT.

CRIMINAL REVISIONS CASES NOS. 100 AND 101 OF 1927.

(CRIMINAL REVISION PETITIONS NOS. 90, 91 OF 1927).

September 23, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Ourganven.

LOCAL FUND OVERSEER,
MAYAVARAM—COMPLAINANT—PETITIONER
versus

PAKKIRISAMI THEVAN—ACCUSED

—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 166, 207 (a), Sch. VIII—“Plying for hire”, meaning of—Mere use of hired vehicle, whether amounts to plying for hire—Soliciting for custom, necessity of.

A vehicle cannot be said ‘to ply for hire’ on a public road simply because it is made use of as a hired vehicle on that road. Plying for hire means the act of waiting for soliciting custom and the act of plying for hire can only be done at the place and time that the hiring is effected. [p. 447, col. 1; p. 448, col. 1.]

Clarke v. Stanford (1), *Sales v. Lake* (2) and *Leonard v. Western Services, Ltd.* (3), followed.

A person who lets out his car for hire in a Municipality is not bound to take a license from the District Board for taking the car beyond the Municipal limits and traversing any of the District Board roads, inasmuch as there is no hiring and, therefore, no “plying for hire” in any of the District Board roads. [p. 447, col. 1.]

Petitions under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Stationary Second Class Magistrate, Mayavaram, in C. C. Nos. 200 and 179 of 1926 respectively.

Sir K. V. Reddi and P. V. Rangaram, for the Petitioners.

Mr. K. S. Lakshmi Narasimha Ayyar, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—These two revision petitions have been filed on behalf of the District Board of Tanjore against the judgments of the Stationary Sub-Magistrate of Mayavaram acquitting the accused in each case of an offence punishable under s. 207 (a) and

Sch. VIII of the Local Boards Act. Under s. 166 (1) of that Act “No person shall, on any public road in a district, ply any motor-vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board.” Under the further provisions mentioned above failure to obtain a license is punishable. In C. C. No. 179 to which Cr. R. C. No. 101 relates, the complaint against the accused was that he “committed the offence of plying a motor-car. Tan. 234, for hire in the District Board Road No. 7-A, two trips, from Mayavaram to Tranquebar, without obtaining the license from the President, District Board, Tanjore.” The terms of the complaint in the other case, C. C. No. 200 of 1926, were similar. In the former case the prosecution adduced the evidence of a Local Fund Maistry stationed at Porayur, which we understand is adjacent to Tranquebar, to the effect that the accused’s car used to come and stand in the hired car-stand there and obtain passengers. The Sub-Magistrate, we gather, has not accepted this evidence, but it is unnecessary for us to consider whether he should be supported in this finding because the evidence appears to be clearly inconsistent not only with the terms of the complaint but also with those of the question put to the accused. The case was tried as a summons case and he was asked to show cause why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tanquebar on the 27th, 28th and 29th March 1925 without obtaining a license. Although however the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to Vakils, *Mirasidars* and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (C. C. No. 200), the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases only the first portion of s. 166 (1) would apply because admittedly there is no proof that the vehicles were used for carrying

passengers or goods at separate fares or rates. Accordingly the question we have to decide is whether a person, who lets out his car for hire in Mayavaram, which is a Municipality, must obtain a license from the Tanjore District Board if the car travels beyond the Municipal limits and traverses any of the District Board Roads. The argument of Sir K. V. Reddi for the District Board is that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not a necessary condition that the actual hiring should take place upon that road. The alternative view is that the plying of a motor vehicle for hire means the act of waiting for soliciting custom, and that, therefore, so soon as any person has hired it the act of plying for hire is complete. If this be so, that act was committed, if at all, within the Municipality of Mayavaram, and not within the District Board area, so that no license would be required from the District Board and these cases would fail.

We have no doubt that the latter is the correct view. The phrase 'to ply for hire' is used in the English as well as in the Indian enactments relating to hackney and stage carriages, and we have been shown no reason why the same significance should not be attached to it in India as in England. Our attention has been drawn to three English cases. In the earliest of these, *Clarke v. Stanford* (1), the question which arose was whether a carriage which stood on the premises of a Railway Company to await the arrival of trains, with the object of conveying any passenger who chose to hire it, was plying for hire within the meaning of the Metropolitan Public Carriage Act of 1869. The case turned upon whether the Railway premises, not being a public place were a place in which a vehicle could be said to ply for hire, and although that question does not arise here, it is clear from the judgments that 'plying for hire' was taken to mean the act of soliciting custom. This is made clear too in *Sales v. Lake* (2). Certain persons arranged to run a charabanc from London to Brighton, all seats being booked and tickets paid for

beforehand and no other passengers being accepted. The charabanc started from Grosvenor Gardens, where it was joined by passengers with their tickets, and the question was whether it was a stage carriage plying for hire at that place. This question was answered in the negative, Lord Trevethin, C. J., expressing the view that a carriage could not accurately be said to ply for hire unless two conditions were satisfied "(1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers." Mr. Justice Avory delivered himself to the same effect. This case is, therefore, authority not only for the view that 'plying for hire' is an act which results in the vehicle being hired and not an act consequential upon the hiring but also for a distinction between plying for hire, that is obtaining passengers on the spot and without any previous arrangement, and merely letting out a car for hire by previous arrangement. The third English case, *Leonard v. Western Services Ltd.* (3), affords a fairly close parallel with the circumstances now in question. A lady purchased a return ticket by motor omnibus from Newport in Wales to Risca, travelling to Risca by one of the omnibuses of the Company and returning by another. The omnibuses were licensed to ply for hire in Newport but were not so licensed in Risca. The question was whether the return omnibus, in accepting the lady as a passenger on the strength of her return ticket, was plying for hire in Risca. This point was found against, Lord Hewart, C. J., observing "There is no occasion for soliciting passengers within the district (Risca). It is not open to the omnibus driver by diligence or by skill to attract to his employers the customers of other employers. There is, therefore, no plying for hire in the District, the hiring having already been done." And Salter, J., said. "Without attempting any exhaustive definition of the expression, I think that in order to constitute 'plying for hire' within the meaning of the Acts there must be a general invitation by the person in charge of the vehicle to the mem-

(1) (1871) 6 Q. B. 357; 40 L. J. M. C. 151; 24 L. T. 389; 19 W. R. 846.

(2) (1922) 1 K. B. 553; 91 L. J. K. B. 563; 126 L. T. 636; 86 J. P. 80; 20 L. G. R. 259; 66 S. J. 453; 38 T. L. R. 336.

(3) (1927) 1 K. B. 702; 96 L. J. K. B. 213.

bers of the public to make contracts with him for carriage in the vehicle."

It is quite clear from these decisions that the act of plying for hire can only be done at the place and time that the hiring is effected, in the present instances at Mayavaram—and that is a sufficient finding to dispose of these cases. We do not need to enter into the question as to what precisely the act consists in; but it is clear that not every case of hiring out a vehicle will fall within its meaning. We dismiss the criminal revision cases.

V. N. V.

Petition dismissed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1035 OF 1927.

November 4, 1927.

*Present:—*Mr. Justice Dalip Singh.

ALLAH DIN *alias* DINA—CONVICT—

APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 75—Previous conviction very old—Enhanced sentence.

An enhanced sentence under s. 75, Penal Code, should not be passed where the previous conviction took place as much as 12 years before the subsequent one and there is only one previous offence.

Criminal appeal from an order of the Sessions Judge, Lyallpur, dated the 12th August, 1927.

Mr. *Jalal-ud-Din*, for the Appellant.

Diwan *Ram Lal*, Assistant Legal. Remembrancer, for the Respondent.

JUDGMENT.—The appellant Dina has been convicted by the learned Sessions Judge under s. 420 of the Indian Penal Code and also under s. 468 of the same Code and, because of a previous conviction under s. 395 more than twelve years before this case, s. 75 of the Indian Penal Code has been applied. He has been sentenced to eight years' rigorous imprisonment and four years' rigorous imprisonment respectively on the two charges, the sentences to run concurrently.

As regards the question of forgery, the story for the prosecution is that Dina, accompanied by one Mahen, persuaded Fateh Ali to part with Rs. 300 on the ground that the niece of Mahen would get a divorce from her husband Chiragh and marry the son of Fateh Ali. Later a forged deed was produced by Dina appellant and handed over to Fateh Ali and

the latter was made to part with a further sum of Rs. 250 by way of payment to Mahen with whom the niece was at that time residing. As nothing happened after this Fateh Ali went to the village of Mahen and demanded the woman in marriage. Mahen thereupon denied that Chiragh had divorced the woman and repudiated the divorce deed. After inquiry it appeared that Chiragh had not divorced the woman and Fateh Ali lodged a complaint against Mahen and Dina for cheating and forgery, Mahen has been acquitted. Fateh Ali complainant is undoubtedly an unreliable witness. He first of all made a complaint against Mahen and his wife alone alleging a somewhat different story. But his story does not stand alone and I see no reason, and the learned Sessions Judge saw none, for disbelieving the evidence of Hussain Bakhsh (P. W. No. 7) as to the part played by Dina in the forgery. That the deed is forged is proved beyond all doubt as the thumb-mark purporting to be that of the husband of the woman has been proved to be that of one Fazal Shah and similarly the thumb-mark purporting to be that of Nura has been proved to be that of one Roshan since deceased. Moreover there is nothing to show why Dina should have been implicated if he had no hand in this matter at all. There is no enmity alleged or proved between Fateh Ali complainant and Dina. The fact that Mahen was acquitted, has nothing to do with the question of the guilt of Dina. I, therefore, consider that Dina has been rightly convicted both under s. 468 and under s. 420 of the Indian Penal Code. I must, however, again repeat, as I have frequently had occasion to, that I deprecate the use of s. 75 of the Indian Penal Code when the previous offence took place as much as twelve years before the present one and there is only one previous offence. I, therefore, consider that s. 75 should not have been used at all in the case, though technically no doubt it could be used. Counsel for the appellant did not argue the point of sentence at all, but I accept the appeal to this extent that I reduce the sentence passed on Dina to one of four years' rigorous imprisonment under s. 420. The sentence under s. 468 of four years' rigorous imprisonment will stand and the sentences will run concurrently.

B. L.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 720 OF 1927.

October 26, 1927.

Present:—Mr. Justice Agha Haidar.**KARAM ILAHI—ACCUSED—APPELLANT***versus***EMPEROR—RESPONDENT.***Penal Code (Act XLV of 1860); s 304—Murder—Single blow—Sudden quarrel—Sentence.*

In a quarrel between the accused's wife and his brother's wife, the latter abused the accused's daughters, whereupon the accused hit her a single violent blow with a stick which he picked up there and then. The woman died of her injury the following day. There was no feeling of enmity between the accused and the deceased:

Held, that the quarrel being unpremeditated and the blow having been struck in the heat of passion, a severe sentence was not called for, and that a sentence of three years' rigorous imprisonment would meet the ends of justice. [p 450, col. 1]

Criminal appeal from an order of the Magistrate, First Class, with enhanced powers under s. 30 of the Criminal Procedure Code, Multan, dated the 4th June, 1927.

Mr. N. C. Mehra, for the Appellant.

Mr. B. H. Bevan Petman, for the Government Advocate, for the Respondent.

JUDGMENT.—Karam Ilahi has been convicted under s. 304, Part II of the Indian Penal Code and sentenced to seven years' rigorous imprisonment with four months' solitary confinement. He has come up in appeal to this Court.

The story for the prosecution is very simple. There are two brothers, the appellant and Ali Muhammad. They have got houses in the same enclosure. In that enclosure there is an oven which is used by the village people for baking their bread. There was quarrel over the baking of bread between the wife of the accused, Musammat Begam and Musammat Natho, the deceased woman. In the course of that quarrel there was the inevitable exchange of abuse between these two women. Karam Ilahi happened to be present. He lost his temper when he heard Musammat Natho abusing his daughters and in a fit of passion hit her with a stick which he picked up there and then. The blow unfortunately fell on the woman's head with the result that her skull was fractured and she succumbed to her injuries the following day. This was at about 10 or 11 A.M., on the 4th of May, 1927.

On the following day Ali Muhammad, the husband of the deceased woman, made the First Information Report at the *thana*.

In that report he narrated the facts stated above and asked the Police to make an investigation. It appears, however, that after the First Information Report had been lodged, the members of the family and their friends put their heads together and tried their best to screen Karam Ilahi. The witnesses for the prosecution tried to save the accused and put forward quite a different story saying that Musammat Natho fell down from the roof of her house while she was plastering it and thus met her death as a result of the injuries caused by the fall.

A number of defence witnesses also have come forward. They say that they saw the woman falling down from the roof of the house. One of them Rahim Bahksh makes an awkward blunder so far as the defence is concerned and puts the occurrence at sometime near the evening which is not the case either for the prosecution or for the defence. One witness, however Musammat Begam the wife of the accused has throughout been consistent and her story is perfectly clear and cogent. She mentions the quarrel and further says that her husband Karam Ilahi, in a fit of ungovernable passion hit a blow on the head of Musammat Natho. Ali Muhammad, the brother of the accused appellant, who appears as a witness for the prosecution, has admitted that there had been some quarrel now and again between Musammat Begam and her husband Karam Ilahi, but this was only after the charge had been framed and then he was recalled for the purpose of cross-examination. It is significant that, in the evidence which he gave earlier, on the 10th of May, 1927, he does not make any mention of any such quarrels between Musammat Begam and her husband, the appellant. Several of the defence witnesses refer to these domestic quarrels between Musammat Begum and the appellant. But, considering the social position of these people and their rough and tumble domestic life, I am not prepared to attach much importance to these bickerings. Certainly I am not prepared to believe that as a result of these quarrels the wife would deliberately perjure herself to get her own husband convicted of a serious offence. The fact of the matter, as already stated is that this woman did not like to perjure herself in order to screen her husband and has given a consistent version of the affair throughout, while

the witnesses for the prosecution as well as for the defence have been trying their best to save the appellant. In my opinion the guilt of the accused is proved beyond all reasonable doubt.

The question of sentence is not an easy one to decide. Ali Muhammad, the brother of the appellant and husband of the deceased woman, says that there was no enmity between Karam Ilahi and Musammat Begam, that they had all been living amicably together in the same enclosure and that the appellant had no feelings of enmity towards Musammat Natho. It appears that, as a result of the exchange of abuse between the womanfolk, Karam Ilahi hit the deceased woman with a stick while he was in such a fit of temper that he could not control himself. There was only one blow struck, but it must have been struck with considerable violence according to the medical evidence, seeing that it practically smashed the skull of the deceased woman. There is not the slightest suggestion anywhere that any previous ill-feeling existed between the appellant and the deceased woman. The quarrel certainly was not premeditated and the unfortunate incident happened in the heat of passion.

Without in any way minimizing the seriousness of the offence and having regard to all the circumstances of the case, I think a sentence of three years' rigorous imprisonment would meet the ends of justice. With this modification I dismiss the appeal.

N. H.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1268 OF 1927.

October 7, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice.

BABU MAL—COMPLAINANT—PETITIONER
versus

GHASI AND OTHERS—ACCUSED—
RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 233, 239—Revision—Acquittal, interference in—Practice—Offences of mischief and riot—Joint trial—Misjoinder of charges.

The Court of Revision will not ordinarily interfere with an order of acquittal.

A joint trial for offences of mischief and riot where they do not form part of the same transaction and the persons accused are not the same is bad for misjoinder of charges.

Case reported by the District Magistrate, Gurgaon, with his No. 1150 of 25th July, 1927.

REPORT.—FACTS.—The accused were challaned by the Sub-Inspector of Police under ss. 429, 147 and 325, Indian Penal Code. The facts are that a cow owned by the complainant trespassed into his field of *jowar*. Accused No. 1, Ghasi killed her by giving her several blows. Net Ram shepherd informed the complainant of it who accompanied by his brother Lachi Ram and his father Tika Ram repaired to the place of occurrence and found the cow dead. Later on they were beaten by the accused very mercilessly when they complained to the accused about the killing of the cow.

GROUND.—The questions are whether there is sufficient cause to report the case under s. 438, Criminal Procedure Code, or to move Government to appeal against the acquittal of Ghasi, accused No. 1, on the charge of mischief for killing the cow, and whether application should be made for enhancement of sentence for the beating of Babu Mal and Lachhi Ram. The facts are clear and fully proved.

Ghasi in a fit of rage killed a cow which trespassed into his field. The owners, Babu Mal and Lachhi Ram, apparently set about Ghasi and Tundlla and inflicted some slight injuries. Ghasi's party then fell upon Babu Mal and Lachhi Ram and Babu Ram received 5 injuries and Lachhi Ram 11 (two head injuries and one neck injury). The lower Court finds that the brutal killing of a cow is not mischief because it is done by a Hindu who cannot intend the death of a cow. This is most mischievous nonsense. Intention is no part of the ingredients of mischief and the idea that all Hindus are perfect followers of their faith is an absurd contention. As for the subsequent assault the owners of the cow fell upon the brutal perpetrator of this gratuitous act of cruelty and this the lower Court finds only the natural thing for them to do. They did not beat the accused much and it is obvious that no right of self-defence arose that could justify the subsequent trouncing which the five convicted persons gave to the owners of the cow. As a matter of fact the two men who were beaten by the owners of the cow have been acquitted and only their friends have been convicted so that the question of self-defence does not arise. They came up afterwards to avenge the injuries of their kinsmen. The lower

Court, after convicting five persons under s. 147/323 released them under s. 562, Criminal Procedure Code.

The net result is, therefore, that the man who beat a cow to death goes scot-free and his friends who gave a sound beating to the owners of the cow are bound down under s. 562, Criminal Procedure Code. This sort of thing will only encourage crime and cruelty.

The file of the case is, therefore, forwarded to the High Court with the request that the order of the lower Court be set aside and a re-trial of the case be ordered.

Mr. Ram Lal, for the Petitioner.

Mr. B. A. Cooper, for the Respondent.

ORDER.—The reasons given by the District Magistrate for recommending a re-trial of the case are not sound and cannot be accepted. If an accused has been wrongly acquitted the order of acquittal can be set aside on an appeal by the Local Government under s. 417 of the Criminal Procedure Code. The Court of Revision does not ordinarily interfere with an order of acquittal.]

There is, however, a legal defect in the trial of the case which has not been noticed by the District Magistrate. It appears that the offence of mischief was quite a separate transaction from that of riot, and, as the same persons were not accused in both the transactions, the trial was bad for misjoinder of charges.

I accordingly quash the proceedings and direct that the two offences shall be tried separately.

R. L.

Proceedings quashed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 520 OF 1927.

August 29, 1927.

Present:—Mr. Justice Kulwant Sahay
and Mr. Justice Allanson.

EMPEROR—PETITIONER

versus

RADHIA alias GOPIA BHOI alias KANDI

—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 397—Minimum sentence—Seven years' rigorous imprisonment.

A person convicted under s. 397 of the Penal Code cannot be sentenced for a period of imprisonment less than seven years.

Criminal revision from an order of the Sessions Judge, Cuttack, dated the 26th May, 1927.

Mr. A. B. Mukerjee, Government Pleader, for the Crown.

JUDGMENT.—Radhia alias Gopia Bhoi alias Kandi has been convicted by the learned Sessions Judge under s. 397 of the Indian Penal Code and sentenced to four years' rigorous imprisonment. This is an application on behalf of the Crown for enhancement of the sentence on the ground that the minimum sentence provided for by s. 397 is seven years' rigorous imprisonment. Having regard to the provisions of s. 397 the sentence must be enhanced from four years to seven years' rigorous imprisonment.

A. N. A.

Sentence enhanced.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1205 OF 1926.

April 8, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Agha Haidar.

NIHAL SINGH AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 300, 302, 325—Unlawful assembly—Fatal assault by some members—Common intention—Sudden quarrel—Sentence.

The deceased, a village goldsmith, who was obstructing the view of a proprietor in the village at a wrestling match was abused by the latter and returned the abuse. On this the proprietor asked his relations to kill (*mar do*) "these goldsmith dogs". On this four of his relations stood up, two out of whom belaboured the goldsmith with *dangs* causing fatal injuries in the heads of which the goldsmith died the next morning. The other two beat a person who tried to stop the assault. The proprietor continued shouting to his relations but did not strike any blow himself.

Held, (1) that when at the behest of the proprietor, the four relations arose for the assault, they intended at least to inflict grievous hurt on the goldsmith, and being five in number including the proprietor, they all were guilty under ss. 325/149, Penal Code; [p. 453, col. 1.]

(2) that the two relations who struck *dangs* on the head of the goldsmith were in addition guilty of murder in that their attack on the goldsmith was made either with the intention of causing death or such bodily injury as they knew to be likely to cause death, but that as the elements of preparation and premeditation were absent, the ends of justice would be met by a sentence of transportation for life. [p. 453, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge, Lahore, dated the 11th November, 1926.

Dr. Nand Lal, Messrs. Saunders and Brij Lal, for the Appellants.

Mr. Des Raj Sawhney, Public Prosecutor, for the Respondent.

JUDGMENT.

Agha Haidar, J.—The five appellants before us are Nihal Singh and his two sons, Teja Singh and Banta Singh, and two other persons, namely, Ram Singh and Banta Singh son of Hira Singh. They have all been convicted under ss. 302/149, Indian Penal Code. Teja Singh and Banta Singh, sons of Nihal Singh, have been sentenced to death and Nihal Singh and Banta Singh sons of Hira Singh have been transported for life under ss. 302/149, Indian Penal Code. Under ss. 325/149, Indian Penal Code, all the five appellants are also sentenced to three years' rigorous imprisonment.

The record is also before us for the confirmation of the death sentences passed upon Teja Singh and Banta Singh under the provisions of s. 374 of the Code of Criminal Procedure.

Briefly stated the story for the prosecution is that on the 8th of August, 1926, at about 7 P. M. there was a wrestling match going on between some boys of the village. The match was being watched by a number of people estimated to be between 50 and 60. The deceased Bishan Singh son of Chanda Singh was a *Sunar* by occupation and, therefore, a *kamin*. All the appellants are *Jats* of the village. It happened that Bishan Singh while watching the wrestling match obstructed the view of Nihal Singh who is stated to be an old man of about 80 and who happened to be watching the match. On this Nihal Singh abused Bishan Singh and ordered him to get out of the way. Bishan Singh also retorted and used some abusive language. On this Nihal Singh considering himself insulted and humiliated by a *kamin* lad stood up and called out to his sons and others to kill (*mar do*) "these goldsmith dogs." At this Teja Singh and Banta Singh sons of Nihal Singh, Banta Singh son of Hira Singh and Ram Singh stood up and began the assault. Nihal Singh continued shouting to his young followers but did not strike any blow himself. Banta Singh son of Nihal Singh inflicted the first blow on the head of the deceased and was followed by

Teja Singh his brother who gave another blow on the left temple of the deceased. Chanda Singh, the father of the lad Bishan Singh, deceased, intervened and tried to keep off the assailants, but finding it of no avail threw himself upon the prostrate body of his son in order to protect him. The assailants, Banta Singh and Teja Singh son of Nihal Singh, according to the evidence, continued striking blows upon the bodies of the father and son as they lay upon the ground. It does not appear, however, that Banta Singh son of Hira Singh and Ram Singh struck any blows either to Bishan Singh deceased or to his father Chanda Singh. At this stage Maghar Singh one of the *Jats* who was present at the wrestling match, came forward with a view to separate the assailants from Bishan Singh and his father, but Ram Singh and Banta Singh son of Hira Singh belaboured him also with *dangs*.

The result of this savage assault was that the deceased Bishan Singh received three serious injuries; one of the injuries left a contusion mark in front of the head measuring 4" x 3", as a result of which the skull had a fracture of right side of frontal bone extending into right temporal bone. According to the evidence of the Civil Surgeon death was due to fracture of the skull. Chanda Singh also received no less than eight injuries, and, according to the medical evidence; two of these injuries, that is to say Nos. 1 and 2, were dangerous to life and grievous. Maghar Singh's injuries were also very serious, as according to the medical evidence among other injuries he received a contusion mark 3" x 1" with much swelling on the left forearm, the radius bone under this contusion being broken. The medical evidence is, therefore, clear that Chanda Singh and Maghar Singh received grievous hurts.

After this fight Bishan Singh's friends and relations took him and his father Chanda Singh to their house in the village. Bishan Singh lingered on during the night and expired on the following day at about 8 A. M. It was a wet night and it had been raining also in the morning so that the First Information Report was made at 2 P. M. on the 9th of August, 1926, at the Police Station of Barki which is at a distance of six miles from the village Thehpura, the scene of the occurrence. It is stated on behalf of the appellants that the First Inform

ation Report was unduly delayed. Having regard to the atmospheric condition it cannot be said that it was belated and that the friends and relations of Bishan Singh were free to go to the Police Station, leaving him in this critical condition during the night. We have also the evidence of Tara Singh, an uncle of Bishan Singh, deceased, who states that they tried to take Bishan Singh to the Hospital, or to go out at night to lodge the First Information Report, but the accused threatened them with their *dangs* and would not let them leave the village.

These facts have been established by the evidence of the eye-witnesses, Tara Singh, Maghar Singh and Chanda Singh. There is another witness also named Deva Singh who professes to be an eye-witness to the occurrence, but having regard to the fact that his statement was recorded somewhat late and he has failed to account satisfactorily for the delay of five or six days which occurred before his statement was recorded by the Police, it would not be safe to place any reliance upon his evidence. Chanda Singh and Maghar Singh received injuries and there can be no manner of doubt that they were present on the spot. Tara Singh also was present on the spot although he was fortunate in not receiving any injuries.

The evidence of these eye-witnesses is sufficient to prove the story as put forward by the prosecution. It may be mentioned here that the evidence of *alibi* is worthless. Now, the question before the Court is as to what offence or offences the appellants have committed. The appellants are all *Jats* and, as stated above, Bishan Singh and his father are goldsmiths and, therefore, *kamins* of the village. Bishan Singh was a lad of 18 only and it is not at all difficult to believe that the fact of his using abusive language towards an old *Jat* of 80 in the presence of a large assembly must have caused very considerable resentment and annoyance to Nihal Singh and his adherents who are all *Jats*. When, at the behest of Nihal Singh the appellants rose and made ready for the assault there cannot be any doubt that they all intended at least to inflict grievous hurt upon Bishan Singh deceased and being five in number including Nihal Singh the case comes under ss. 325/149, Indian Penal Code.

But the case of the two sons of Nihal Singh, i. e., Banta Singh and Teja Singh,

stands upon a different footing. They struck blows with *lathis* on the head of a defenceless youth of 18. Even when he fell down they continued hitting him. How reckless and violent was the attack can be judged from the fact that when the father of Bishan Singh fell upon him, in order to protect him they continued their assault and inflicted very savage injuries both upon Bishan Singh as well as on his father Chanda Singh. Their case clearly comes under s. 300, Indian Penal Code in that the attack upon Bishan Singh which resulted in his death was committed either with the intention of causing death or such bodily injury as they knew to be likely to cause death. No exception under s. 300 applies to the facts of the case, so far as Teja Singh and Banta Singh sons of Nihal Singh are concerned.

The quarrel which ended so fatally was begun by Nihal Singh who used abusive language and ordered his sons and others to kill the deceased. There is no evidence whatsoever on the record to show that either Bishan Singh or any one of his party had even an ordinary stick in his hand. The appellants did not receive any injury whatsoever. Thus it appears from the record that the fight was throughout a one-sided affair. The appellants were the aggressors and Bishan Singh and his father and afterwards Maghar Singh were the victims of the appellants' attack.

The question now is what punishment should be awarded to the five appellants. Teja Singh and Banta Singh who struck *dangs* on the head of the deceased which resulted in his death are undoubtedly guilty of murder under s. 302, but, having regard to the fact that the elements of preparation and premeditation are absent, the ends of justice would be met if the sentence of death is altered to that of transportation for life. Nihal Singh who was at the root of the whole trouble and ordered the fatal assault, deserves no sympathy. He is an old man of 80 and ought to have known better. He let loose his sons and friends upon an unarmed lad of 18 and must, therefore, take the consequence. I, therefore, maintain his conviction and sentence him to seven years' rigorous imprisonment under ss. 325/149 of the Indian Penal Code, as he must have at least contemplated an offence under s. 325 when he gave his word of command.

The appeal of Banta Singh son of Hira

Singh and Ram Singh is allowed to this extent that the sentence of transportation for life passed upon them is set aside and in place thereof they are convicted and sentenced to seven years' rigorous imprisonment under ss. 325/149 of the Indian Penal Code, along with Nihal Singh.

Teja Singh and Banta Singh sons of Nihal Singh are also guilty under ss. 325/149 of the Indian Penal Code. They also deserve punishment under that section. I, therefore, convict them under ss. 325/149 and sentence them to seven years' rigorous imprisonment. This sentence, however, would run concurrently with the sentence of transportation for life.

The result is that Nihal Singh's appeal is allowed to this extent that the sentence of transportation for life passed upon him by the learned Sessions Judge under ss. 302/149, Indian Penal Code is set aside and his conviction under ss. 325/149, Indian Penal Code, is maintained and he is hereby ordered to suffer seven years' rigorous imprisonment under those sections. Teja Singh and Banta Singh, sons of Nihal Singh's appeal is allowed to this extent that instead of the sentence of death passed upon them under s. 302, Indian Penal Code, by the learned Sessions Judge, they are sentenced to transportation for life. Under ss. 325/149, Indian Penal Code they are also guilty and are sentenced hereby to seven years' rigorous imprisonment. This sentence is to run concurrently with the sentence of transportation for life. Banta Singh son of Hira Singh and Ram Singh's appeal is allowed to this extent that the sentence of transportation for life passed upon them by the learned Sessions Judge is set aside and they are hereby convicted under ss. 325/149, Indian Penal Code, and sentenced to seven years' rigorous imprisonment.

Broadway, J.—I concur in the above order.

N. H.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1493 OF 1927.

November 11, 1927.

Present :—Sir Shadi Lal, Kt., Chief Justice.

MOHAMMAD ZAMAN AND OTHERS—ACCUSED
—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 250,

562—Accused released under s. 562—Order of compensation, legality of.

A person released under s. 562, Criminal Procedure Code, cannot be ordered to pay compensation to the complainant.

Case reported by the District Magistrate, Attock District, Campbellpur, with his No. 3919-G of 1927.

REPORT.—FACTS.—Abbas Khan complainant was taking away the animals of the accused for the purpose of impounding them because they had trespassed into his lands. The accused interfered, in the way, beat Abbas Khan and rescued the animals. One of the injuries inflicted was of a grievous nature. The complainant remained in the Hospital for 20 days. The accused was challaned under s. 325, Indian Penal Code. Rahim Ali was acquitted and two others convicted and ordered to execute bonds with sureties under s. 562, Criminal Procedure Code, and also to pay Rs. 25 as compensation to the complainant.

GROUND.—The order of the Magistrate is obviously illegal as regards the accused who were convicted. It appears that the compensation awarded to complainant must have been intended as a fine to be recovered from the accused. If that is so then it would appear that the accused were punished by fine in addition to being bound down under s. 562, Criminal Procedure Code. This is illegal as that section of the Criminal Procedure Code can only be applied when no punishment is inflicted.

Inasmuch as the order of the Magistrate is not legal the file is, therefore, submitted to High Court with a view to the said order being set aside by the Hon'ble Judges in so far as it relates to the paying of compensation.

Mr. Farrukh Hussain, for the Complainant-Respondent.

ORDER.—The convicts, who were released by the trial Magistrate under s. 562, Criminal Procedure Code, could not be directed to pay compensation to the complainant. The order is obviously illegal and must be set aside.

It appears that the complainant made an application to the District Magistrate praying that the order under s. 562, Criminal Procedure Code, be set aside and that suitable sentences be awarded to the convicts. But the District Magistrate has not dealt with that application. My order

shall not preclude him from adjudicating upon that application.

R.L.

Order set aside.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 868
OF 1927.

November 14, 1927.

Present :—Mr. Justice Broadway.

MOTI LAL AND OTHERS—ACCUSED—

PETITIONERS

versus

EMPEROR THROUGH BISHEN CHAND

AND ANOTHER—COMPLAINANTS—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Preliminary enquiry—Calling on accused to show cause against issuing process, legality of—Discharge of accused—Further enquiry, when to be ordered.

It is incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under s. 202, Criminal Procedure Code, are in contemplation. [p. 455, col. 2.]

Chandi Charan Mitra v. Manindra Chandra Roy (2), followed.

In re Tukaram Udaram (1), distinguished.

Further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. [p. 456, col. 1.]

Emperor v. Kiru (4), followed.

Peary Lal v. Sagar Mal (3), distinguished.

Petition for revision against an order of the Additional Sessions Judge, Delhi, dated the 29th April, 1927, reversing that of the Magistrate, First Class, Delhi, dated the 3rd March, 1927.

Dr. Nand Lal, for the Petitioners.

Lala Moti Sagar, R. S., and Mr. Nawal Kishore, for the Complainants.

JUDGMENT.—A complaint under ss. 392, 347/348 and 477, Indian Penal Code, was instituted by certain persons against the petitioners. The Magistrate decided to make an enquiry before issuing process and took action under s. 202, Criminal Procedure Code. At the same time notice was issued to the petitioners to be present although it does not appear that they were allowed to do more than act as spectators of the proceedings. After examining the witnesses produced by the complainants the Magistrate recorded a detailed and reasonable order holding that no *prima facie* case had been made out against the petitioners and dismissed the complaint. The complainant then moved the Sessions Court

on the revision side, and the Additional Sessions Judge ordered a further enquiry, as after a review of the evidence he came to a conclusion different from that arrived at by the learned Magistrate.

Against this order the petitioners have come up to this Court under s. 439, Criminal Procedure Code, and on their behalf I have heard Counsel at length while the complainants' Advocate have addressed me in support of the order for further enquiry.

Most of the authorities cited afford no assistance and need not be discussed. It has been strongly urged that the Magistrate acted against law in issuing notice to the petitioners and allowing them to be present at the enquiry. This procedure is certainly unusual. *In re Tukaram Udaram* (1) the Bombay High Court held it was not illegal to call on the person complained against to show cause. The Calcutta High Court has, however, taken a different view in *Chandi Charan Mitra v. Manindra Chandra Roy* (2) a view that found favour with Fford, J., in *Joginder Singh v. Agha Safdar Ali Khan* (Cr. R. No. 1563 of 1926), and it appears to me a little incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under s. 202, Criminal Procedure Code, are in contemplation. At the same time this alone would not induce me to interfere on revision unless there was reason to believe that it had occasioned a miscarriage of justice.

In the present case I am unable to see that the mere presence of the petitioners could have affected the evidence led by the complainants. The Magistrate recorded a detailed order showing that he had considered and weighed all the evidence recorded by him and giving reasons for his being unable to accept it as correct or true.

The learned Additional Sessions Judge has also examined the evidence and as he thought the evidence worthy of credence, ordered a further enquiry. It has been argued that the Additional Sessions Judge acted legally and reliance was placed on *Pearey Lal v. Sagar Mal* (3) which no

(1) 6 Bom. L. R. 91; 1 Cr. L. J. 102.

(2) 72 Ind. Cas. 173; A. I. R. 1923 Cal. 198; 36 C. L. J. 414; 27 C. W. N. 196; 24 Cr. L. J. 333.

(3) 97 Ind. Cas. 650; 49 A. 230; L. R. 7 A. 178; 27 Cr. L. J. 1130; 25 A. L. J. 42; A. I. R. 1927 All. 38.

doubt is to the point. At the same time it was laid down in *Emperor v. Kiru* (4) by a Full Bench of the Chief Court that "generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete."

This has been followed consistently by this Court, see for instance *Dani v. Emperor* (5), *Nabi Bakhsh v. Emperor* (6) and *Karam Chand v. Mathra Das* (7) and I am unable to see any reason for refusing to accept that as laying down the rule to be followed by this Court. The order of the Magistrate is not, and has not been called, perverse or foolish and it was not suggested that the record of the evidence was incomplete. The mere fact that the Additional Sessions Judge was prepared to place a different value on the testimony of the witnesses would not warrant the order passed by him. I, therefore, accept this petition and setting aside the order of the Additional Sessions Judge restore that of the Magistrate, dismissing the complaint.

R. L.

Order set aside.

(4) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911.

(5) 60 Ind. Cas. 55; 22 Cr. L. J. 199; 3 U. P. L. R. (L.) 11; 3 Lah. L. J. 97.

(6) 56 Ind. Cas. 777; 1 Lah. 216; 21 Cr. L. J. 521; 109 P. L. R. 1920; 8 P. W. R. 1920 Cr.

(7) 72 Ind. Cas. 369; A. I. R. 1923 Lah. 329; 24 Cr. L. J. 369; 7 P. W. R. 1923 Cr.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 212
OF 1927.

November 18, 1927.

Present:—Mr. Justice Agha Haidar.

GOPAL SINGH—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 476, 526—Prosecution of witness for perjury—Transfer of case—Reasonable apprehension—Impartiality of Magistrate.

The proper time for taking action against a witness under s. 476, Criminal Procedure Code, is the time of delivering the judgment in the case.

Ordering prosecution of a defence witness under s. 476, Criminal Procedure Code, for an offence under s. 193, Penal Code, at the time his evidence is recorded is bound to strike terror in the heart of defence witnesses and is, therefore, a sufficient ground for transfer of the case.

Where the action of the Magistrate is such as to create a reasonable apprehension in the mind of the accused that the Magistrate has made up his mind against him, the case would be transferred even though the Magistrate may have acted with perfect impartiality.

Petition, under s. 526 of the Criminal Procedure Code, for transfer of the case from the Court of the District Magistrate, Lyallpur, to some other Court of competent jurisdiction in some other District.

Mr. Mukand Lal Puri, for the Petitioner

ORDER.—This is an application for the transfer of a case. A lengthy affidavit has been filed on behalf of the applicant and it contains a lot of verbiage. There are number of other allegations too, which have been met by the learned Magistrate who has submitted his explanation. There is one matter however on which, I am afraid, I cannot agree with the view of the learned District Magistrate. A certain witness named Ganesh Das was being examined and at the conclusion of the evidence of this witness, the learned District Magistrate ordered his prosecution under s. 193, Indian Penal Code. The Magistrate further ordered that the witness may be detained in Court until the end of the hearing to show cause why he should not be prosecuted. As a matter of fact at the conclusion of the hearing of the case on that date he did formally order his prosecution, acting apparently under the provisions of s. 476, Criminal Procedure Code. The Magistrate in his explanation submits as follows:—

"The whole attitude and expression of the witness showed so obviously that he was telling a lie that the dignity of a Court of Law required that immediate notice should be taken of the matter and I accordingly recorded the note referred to".

The 'Note' here refers to the Magistrate's decision ordering action being taken under s. 193, Indian Penal Code. In my opinion, this action of the learned Magistrate, however well-intended it may be, was to say the least of it precipitate, the proper time, if he was inclined to take action against any witness under s. 476, Criminal Procedure Code, would have been at the time of delivering judgment in the main case. My own view is that such a step as the Magistrate took in the present case is bound to strike terror into the heart of the defence witnesses and under the circumstances they would be most unwilling to give evidence. This would be very prejudicial to the defence in the case. In a

sense the step taken by the learned Magistrate is tantamount to condemning the testimony of one witness at least as false, before the trial of the case had concluded. This alone is sufficient to justify the transfer applied for [*Golam Bari Gazi v. Yar Ali Khan* (1)].

Having regard to all the circumstances of the case, in my opinion, it would be better if the case were to be transferred to the neighbouring District of Sheikhupura. I feel certain, in my mind, that the learned Magistrate would have decided the case with perfect impartiality and according to his own lights, but the action taken by him against this particular witness was such as to create a reasonable apprehension in the mind of the accused person that the Magistrate had made up his mind against him. The case may be transferred to the neighbouring District of Sheikhupura but it is distinctly understood that the evidence so far as it has been recorded in the case would stand good and only fresh evidence would be produced on behalf of the defence if the accused persons so wish. The case has been dragged on for a long time, which is regrettable, and I trust that the Magistrate before whom the case now goes, would see to it that there are no adjournments and the case is disposed of as soon as possible.

B. L.

Case transferred.

(1) 86 Ind. Cas. 708; A. I. R. 1925 Cal. 480; 29 C. W. N. 316; 26 Cr. L. J. 832.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 771 OF 1927.

November 7, 1927.

Present:—Sir Shadi Lal, Kt.,

Chief Justice, and Mr Justice Jai Jal.

KHANDU SON OF KARIM BAKHSH—

ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Provocation—Sentence.

A person who was trusted and treated with hospitality by another seduced the latter's wife and persisted in remaining in his house after having been requested to leave. The injured man killed the seducer. There was no evidence to indicate the circumstances which led to the commission of the murder:

Held, that the conduct of the deceased was certainly provoking, and, in the absence of evidence to indicate the circumstances of the crime, it was

not a case for the infliction of the extreme penalty of the law, but for a sentence of transportation for life. [p. 458, col. 2.]

Criminal appeal from an order of the Additional Session Judge, Multan at Dera Ghazi Khan, dated the 26th May, 1927.

Mr. Bihari Lal, for the Appellant.

Mr. Des Raj Sawhny, Public Prosecutor, for the Respondent.

JUDGMENT.—Khandu appellant has been convicted by the Additional Sessions Judge of Multan under s. 302, Indian Penal Code, for having caused the death of Yar Muhammad and has been sentenced to death. He has appealed against his conviction and the case is also before us for confirmation of the capital sentence.

It seems that the deceased met the accused in a fair about six months before his death and both became friendly. In consequence, Yar Muhammad continued to visit Khandu at his house in village Ganga in the District of Muzaffargarh, and finally he began to reside in the house of the appellant. It also appears that shortly before his death the deceased made advance to *Musammât Aisha*, the wife of the prisoner and after some perseverance succeeded in seducing her. The appellant was informed of this by Ahmad Yar, his servant and, therefore, asked the deceased to leave his house but the latter persisted in staying on for a few days more.

The case for the prosecution is that owing to the conduct of the deceased, the prisoner with the help of one Ali strangled him to death on the night between the 11th and 12th of January, 1927 and after having separated the head from the trunk threw the body in a *nalâh* near the village and buried the head in the *nalâh* at a place where there was no water. Ali, it may be mentioned, was sent up for trial but has been acquitted by the Sessions Judge for want of sufficient evidence against him.

On the 12th of January, a headless body was seen floating in the *nalâh* by Sadda (P. W. No. 2) who informed Ghulam *chaukidar* (P. W. No. 3). The latter went and reported the discovery at the *thana*. Muhammad Arif, Head Constable, took charge of the body and sent it for *post mortem* examination at Muzaffargarh and Sultan Khan, Sub-Inspector on arrival took up the investigation and learnt that Yar Muhammad, who used to live with Khandu appellant had been missing from the village. He also learnt that Khandu suddenly dis-

appeared from the village when the body was discovered by Sadda. Khandu was consequently fetched from the house of his brother-in-law in another village. His house was searched and three reels of silk thread, one of gold thread and the handle of an awl were recovered therefrom. It may be mentioned that Yar Muhammad deceased was a cobbler and these articles pertained to his profession. The same evening as a result of information given by Khandu the head of the deceased was recovered from the place where it had been buried in the *nalah*, and the next morning he pointed out the place in the roof of his house from where a blood-stained knife was recovered. It is alleged that this knife was used for the purpose of severing the head of the deceased from the trunk. There is ample evidence on the record to prove that the head recovered, was that of Yar Muhammad, and the medical evidence shows that the head and the trunk were of the same person. There is, therefore, no doubt that Yar Muhammad was done to death.

The appellant was produced before a Magistrate of the First Class on the 18th of January, who recorded his statement under s. 164, Criminal Procedure Code. In that statement the accused confessed that he had killed the deceased but we are not prepared to place any reliance on this confession. In the first instance, the facts stated therein are contradicted by the medical evidence in some details and secondly in the course of this statement the appellant disclosed the fact that "the Police took him in custody and told him that he would be set off on a promise of pardon." This presumably means that he was told that, if he confessed, he would be pardoned. This confession must, therefore, be excluded from consideration in determining the guilt of the appellant. The following circumstances have, however, been proved against the accused.

(a) The deceased lived in his house and suddenly disappeared and was next found murdered. Before the discovery of the body the accused stated to Karim Bakhsh (P. W. No. 19), the brother of the deceased, in the presence of Wasaya (P. W. No. 14) that the deceased had left his house and gone back to his own village. This information was obviously false, because the deceased had not gone to his house, and he could not have left the appellant's house, with the intention of

returning to his home because his goods were found in the house of the appellant.

(b) He confessed to Khuda Bakhsh (P. W. No. 7) that he had killed Yar Muhammad when the former fetched him from the house of his brother-in-law Musa to his own village after the arrival of the Sub-Inspector.

(c) The head of the deceased was recovered in pursuance of the information supplied by the prisoner.

(d) The recovery of the blood-stained knife was also made in consequence of the information supplied by him.

(e) The tracks of two men were noticed in the *nalah* where the body was seen floating and on comparison one set of the tracks was found by Ramzan (P. W. No. 8) to correspond with the footprints of the appellant.

(f) Immediately after the recovery of the corpse the appellant disappeared from the village.

The circumstances stated above taken with the motive for the crime, which has been established by the testimony of Wasaya (P. W. No. 14) and Ahmad Yar (P. W. No. 16) leave no doubt that it was the appellant who killed Yar Muhammad. We hold, therefore, that he has been rightly convicted of the murder of Yar Muhammad.

We have next to consider the question of sentence. It is apparent that the deceased who was trusted and treated with hospitality by the appellant seduced his wife and persisted in remaining in the appellant's house after he had been requested to leave. His conduct was certainly provoking and, there is no evidence to indicate the circumstances which led the appellant to commit the crime. We consider that this is not a case in which the extreme penalty of the law should be inflicted on the convict. We are of opinion that a sentence of transportation or life will meet the ends of justice. While maintaining the conviction we accept the appeal so far as to reduce the sentence to one of transportation for life.

N. H.

Sentence reduced.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 224 OF 1927.

September 28, 1927.

*Present:—Mr. Justice Jackson and Mr.**Justice Madhavan Nair.**On difference of opinion**Present:—Mr. Justice Wallace.***THE PUBLIC PROSECUTOR—APPELLANT**
*versus***V. N. RATNAVELU MUDALI—ACCUSED.***Petroleum Act (VIII of 1899), ss. 5, 11, 15 (a)—
License to transport petroleum, whether includes per-
mission to possess or keep for process of and during
transport.**Per Wallace and Madhavan Nair, J.J. (Jackson, J.
contra.)—A license for the transport of petrol under
the Petroleum Act of 1899 includes permission to be
in possession of petrol for the purpose of and during
the process of transportation, so as to cover a halt
over-night, and the possession of petrol during such
halt is not 'keeping' of petrol within the meaning
of s. 5 (1) of the Act. [p. 462, col. 2; p. 463, col. 1.]**Per Madhavan Nair, J.—The keeping of petroleum
received under a transport license, for a short period
which is incidental to, and necessary for, the dis-
tribution of it cannot amount to 'keeping' or 'possession'
within the meaning of ss. 5, 11 and 15 (a) of the
Petroleum Act. The question whether the period of
time is short enough to be considered reasonable or
too long to be considered reasonable will have to be
decided with reference to the particular facts of each
case. [p. 462, col. 1.]**Appeal under s. 417 of the Code of
Criminal Procedure, 1898, against the
acquittal of the aforesaid accused by the
Joint Magistrate, Tiruppattur, in C. C. No. 48
of 1926 on his file.**Mr. K. N. Ganapathi, for the Public Pro-
secutor.**Mr. V. L. Ethiraj, for the Accused.***JUDGMENT.****Jackson, J.**—Appeal by Government
against the acquittal of accused in C. C.
No. 48 of 1926 Joint Magistrate, Tiruppattur.

Accused holds a license to possess 500
gallons of petrol at Katpadi. On the even-
ing of 28th November, 1926, he took delivery
of 1000 gallons at Katpadi Railway Station.
At 10 a. m. on 29th November, 1926, his pre-
mises were visited by the Police and he
was found to be in possession of 900
gallons. His brother who was examined on
his behalf (D. W. No. 1) explained that
500 gallons were to be retained at
Katpadi, and 400 gallons were for despatch
to Vellore and Madanapalli.

The learned Magistrate acquitted the
accused on the ground that "the quantity in
excess of the amount allowed by his license,
400 gallons were really intended for dis-
tribution and not for possession, and was,

therefore, covered by his transport license.
His temporary possession of the excess
quantity for a few hours was inevitable in
the circumstances and does not amount to
the possession contemplated in s. 15 (a),
Act VIII of 1899.

If a licensee is found to be keeping
quantity of petrol upon his premises in
excess of the licensed amount he infringes
s. 5 (1) of the Act.

"No quantity of dangerous petroleum
exceeding 40 gallons shall be...kept by
any one person or on the same premises
except under...a license etc." It is no
excuse in such circumstances to plead that
the petrol thus kept is "for distribution".
Petrol is always kept for distribution, and
if it were held that s. 5 does not cover
petrol kept for distribution, no one need
ever take out a license.

When he says that the possession is,
therefore, covered by the transport license,
the learned Magistrate does not appear to
be referring to any specific document.
Nothing of the sort was exhibited by the
accused and though this Court adjourned
the case for this purpose nothing is forth-
coming. He seems to mean that the
accused had power to license the trans-
port of the petrol from Katpadi to Vellore
and to Madanapalli. Strictly speaking, the
accused should have issued a transport
license to remove the 1000 gallons from
Katpadi Railway Station to his Katpadi
Depôt, and then he should have issued a
license for 200 gallons to be removed north
to Madanapalli and for 200 gallons to be
removed south to Vellore. As the Police
intervened before these supplies were des-
patched to either place probably no licenses
were actually issued.

The reference to the license, or rather
the power to license, is all part of the
Magistrate's argument that possession with
the intention to distribute is not posses-
sion under s. 5 of the Act. The accused
in his opinion intended to license consign-
ments to Vellore and to Madanapalli,
and had the power to do so; and from the
time that he took delivery at the Railway
Station until he removed the petrol res-
pectively to Vellore and to Madanapalli
there was merely the act of transport and
not the act of possession. In answer to
this contention it is only necessary to re-
peat that if taking from the Railway
Station, keeping at the depot and remov-
ing to the market, are all mere incidents

in the act of transport, there would be no need for any one to take out a license for keeping.

But the Magistrate may intend his theory only to apply to "the temporary possession of the excess quantity for a few hours." He may mean, that is to say, that the 'intention to distribute' by itself is not enough to excuse the keeping of an excess quantity, it must be intention to distribute coupled with the fact that the period of keeping is short. If the argument proceeds upon these lines, it is difficult to determine what periods may be said to be short enough or too long. If a man may keep petrol in excess for 16 hours, may he for 32, or for 64, it may be said that a mere halt in the process of transport cannot be counted as keeping, but whatever force that idea may have at any rate it has no applicability to the present case.

A period from sun-down till 10 o'clock next morning is not the ordinary halt of a Bandyman. The true solution of the difficulty is to hold that under the Statute a man who possesses petrol and is not removing it, is keeping it.

But in certain circumstances as for example way-side halts, the infringement would be so entirely technical as to be nugatory and no authority would think of directing a prosecution. But there is obviously a very great difference between a way-side halt, and keeping petrol in a depôt for sixteen hours. In the latter case the heinousness of the offence may be arguable, but that the offence has been committed seems to admit of no doubt.

As a further plea the Magistrate holds that the possession besides being only for a few hours, was inevitable in the circumstances. There is nothing in the terms of the license to excuse "inevitable" breaches. Nor as to what exactly the circumstances were is there any finding and without a finding the term inevitable is meaningless. A firm which has a depôt licensed only to contain 500 gallons can avoid keeping an excess quantity in that depot by confining its consignments to 500 gallons, provided that the depôt is empty. And an agent who takes delivery of more gallons than it may lawfully keep in his depôt can avoid the infringement of his license by despatching the petrol direct to the outlying markets from the Railway Station. In the present case no more

than 500 gallons need have been consigned and as 1000 were consigned the accused might have despatched 500 straight to Vellore and Madanapalli. The infringement so far from being inevitable was eminently avoidable. I should not consider that we were bound by this finding of inevitability because, on the evidence, it is perverse, nor do I consider that it has any force in law.

To sum up. If a person licensed to keep 500 gallons keeps 900 gallons of petrol in his depôt he commits an offence under ss. 5 and 15, Act VIII of 1899.

He may plead that he had not kept the excess quantity very long, and had not intended to keep it much longer, but this is only a plea of extenuation which cannot be regarded as a plea of acquittal.

The case on which the learned Magistrate relies, *In re Swaminatha Iyer* (1), does not traverse this view. In that case a person who had no depôt dumped the petrol upon the Railway platform and there and then sold it to customers. It was held that the accused would be guilty of unlawful keeping, if he had kept the petrol on the Railway premises for a length of time which would not be required in the ordinary course of business for the purposes of distribution. But apparently in that case the accused dealt out the cans to the various purchasers so promptly that the whole transaction was entirely one of removal. I do not think that this ruling would cover circumstances in which a longer period was occupied.

Suppose, for instance, a man set up a sort of petrol shop on the platform, and spent 16 hours distributing petrol to customers, he would be held, I think, to be keeping petrol within the mischief of the Act.

I would allow the appeal. The Public Prosecutor is only concerned with the interpretation of the law and does not press for a penalty. I would, therefore, inflict a nominal sentence of a fine one rupee. But since the case will have to go before a third Judge, this is a mere expression of opinion.

Madhavan Nair, J.—I have had the advantage of reading the judgment prepared by my learned brother. I regret I cannot agree with his view.

(1) 39 Ind. Cas. 995; (1917) M. W. N. 720; 13 Cr. L. J. 627.

The facts in the case are admitted; and the learned Public Prosecutor has argued the question of law on the findings of fact arrived at by the learned Joint Magistrate.

The accused was found on the 29th November, 1926, to be in possession of 900 gallons of petrol of which he was admittedly entitled to keep 500 gallons as per license. The remaining 400 gallons contained in 200 cans were received by him as sub-agent of the B. O. C. under a transport license for despatching them to Vellore and Madanapalli. It is not denied that this transport license entitled him to receive the petrol sent to him by the Burma Oil Company and to despatch it to various places. The 200 cans which were received on the evening of the 28th November were ready for despatch and were kept loaded in bandies for the purpose at 10 A. M. on the 29th, when the Police made their surprise visit. It had been found that this excess quantity was really intended for distribution and its possession for few hours was inevitable in the circumstances. The correctness of the latter finding has not been questioned before us. Nothing has been suggested against the *bona fide* of the accused in this case. What is suggested in argument is that if, for purposes of legitimately transporting petrol covered by a transport license, it is inevitable that the agent should keep petrol with him temporarily for a few hours, then, unless he protects himself by a special license for such purpose, he will be guilty of possessing petrol in contravention of the Indian Petroleum Act and will be liable for prosecution under s. 15 (a). Neither the Act nor the Rules provide for any temporary storage license.

The question for consideration is whether temporary possession of petroleum, which is inevitable in the circumstances and which is covered by a transport license, amounts to 'possession' in contravention of the Indian Petroleum Act VIII of 1899, within the meaning of s. 15 (a). That section says, "Whoever in contravention of this Act or of any of the rules thereunder, imports, possesses or transports any petroleum" shall be liable to certain penalties. Section 5 (1) of the Act which refers to dangerous petroleum says "No quantity of dangerous petroleum exceeding forty gallons shall be imported or transported or kept by any one person or on the same premises, except under, and in accordance

with the conditions (if any) of, a license from the Local Government." Section 11 which refers to the possession or transport of petroleum which is not dangerous states that "No quantity of petroleum exceeding 500 gallons shall be kept by any one person or on the same premises, or shall be transported, except under, and in accordance with the conditions of, a license granted under this Act." In *In re Swaminatha Iyer* (1), in circumstances very similar to the present, it was held by Abdur Rahim and Napier, JJ, that for a prosecution under s. 15 (a) for "possession" of petroleum in contravention of the Act the possession of the same must be such as to amount to 'keeping' within the meaning of s. 11, and that a person cannot be said to 'keep' petroleum if he distributed the same within a reasonable time of taking delivery by him. Thus laying down the law, the learned Judge stated that "It has to be found whether upon the evidence as produced at the trial, there was 'possession' or 'keeping,' within the meaning of ss. 11 and 15 (a) on the part of the accused, of more than 500 gallons of petroleum" and for this purpose they remitted the appeal to the Sessions Judge. In the same case the learned Judges also point out that, if the agent had induced the Railway Authorities to allow him to keep the consignment exceeding 500 gallons on the premises for a length of time which would not be required, in the ordinary course of business, for the purposes of distribution, it would be 'keeping' or 'possession' within the meaning of ss. 11 and 15 of the Act. These observations clearly show that the question whether there was possession in contravention of the Act of the excess petroleum within the meaning of s. 15 (a) is really one of fact and has to be decided with reference to the facts of each particular case. As I have said, it has been found here that the possession of the excess petroleum was inevitable in the circumstances of the case and this finding has not in any way been attacked. We should not attempt to minimise its effect by suggesting that the accused could have transported the petrol in a shorter time or more satisfactorily by following any other method or by finding now that in the present case there was no compelling circumstance. I am not dealing with the case on the assumption that the 'delay' in this case was avoidable

because that plea has not been put forward by the Public Prosecutor. I think the finding amounts to this, that the accused was about to remove the excess petrol for purposes of distribution within a reasonable time after its receipt when the Police made a surprise visit. I think the keeping of petroleum received under a transport license, for a short period which is incidental to, and necessary for, the distribution of it cannot amount to 'keeping' or 'possession' within the meaning of ss. 5, 11 and 15 (a). The question whether the period of time is short enough to be considered reasonable or too long to be considered reasonable will have to be decided with reference to the particular facts of each case and this is precisely what it laid down in *In re Swaminatha Iyer* (1). If this is not the correct view, I think transportation of petrol from one place to another for distribution to customers, which is perfectly legal under the Act, will become well-nigh impossible and the distributing agent unless he is always on the move will be liable to prosecution. Sections 5 and 11 of the Act should not be construed as if they stood alone in the Act. We must give a reasonable interpretation to the provisions of the Act.

In my view, this case is governed by the principle of the decision in *In re Swaminatha Iyer* (1). I would, therefore, uphold the order of acquittal passed by the learned Joint Magistrate and dismiss the appeal by the Government.

By the Court.—Owing to the difference of opinion between us, the case will be posted before the Chief Justice for passing orders under s. 429, Criminal Procedure Code.

JUDGMENT.

Wallace, J.—This appeal has been posted before me owing to a difference of opinion between Jackson, J., and Madhavan Nair, J. It is an appeal by Government against the acquittal of the accused by the Joint Magistrate of Tiruppattur. The charge against him was illegal possession of petrol in excess of the quantity covered by his license to 'keep' petrol.

The facts not disputed are that the accused holds a license for storage of 500 gallons of petrol and has a store for that quantity at Katpadi. He is the agent of the Burma Oil Company and as their agent also holds a transport license for transport of petrol without limit of quan-

tity. On 28th November, 1926, evening he took delivery at the Katpadi Railway Station of 1000 gallons. He carried these to his premises, put 500 in store, disposed of another 100 before dark, and kept the remaining 400 in bandies on his premises over-night with a view to transporting them in the morning to Vellore and Madanapalli for which places he had booked orders. At 10 A. M. on the 29th morning the Police visited the premises and found the 400 gallons in excess. The case was argued before me, and I think also before the learned Judges of the Bench, on the footing that these 400 gallons were really intended for transport and would have been transported on that morning if the Police had not paid their visit. The question, therefore, resolves itself into this: Does a transport license covers a halt over-night, say from sun-down till 10 A. M. next morning, so that the possession of petrol during that halt is not the 'keeping' of petrol within the meaning of s. 5 (1) of the Act?

Now a license for the transport of petrol must obviously include permission to be in possession of the petrol for the purpose of and during the process of transportation. It would be absurd to hold that in addition to the license to transport, the transporter, e.g., the Bandyman, must be in possession of a license to keep petrol on his 'premises' or that every place at which he halts on his way must also possess a license to 'keep' petrol. A license to 'keep' petrol lays down stringent conditions as to the nature of the building etc. and these cannot by any stretch of imagination be held applicable to a country cart or a motor lorry or a Railway waggon. Also so long as Government does not lay down rules regarding the issue of temporary licenses to cover such temporary possession if they consider such possession illegal without a license of that nature or regarding the provision of licensed halting places which transporters must use, it is unreasonable to hold that the transporter cannot except on peril of prosecution halt his consignment for a few hours over-night in places which are not formally licensed to keep petrol. The transport of petrol during the night time obviously has its own dangers. Therefore, it must be taken to be the law, and also is common sense, that a license to transport includes permission to possess or keep for the process of and during the transport.

Now if the transporter, the accused in the case, had halted at any other place on his journey from the Railway Station to his destination from sun down to 10 A. M. with his consignment of petrol, I would not hold that this was such an unreasonable halt that it cannot be said to have been in the process of transport or can be said to constitute the possession of petrol during that halt a keeping of it within the meaning of s. 5 (1) of the Act. If then such a halt would not be an offence in regard to any other place, it cannot be an offence because the place at which the bandies were kept was the accused's own premises. The fact that he has a store for petrol there makes no difference. If a halt just outside his premises is no offence, it does not become an offence if the halt is within the premises. The halt was during and in the process of transportation and the possession of petrol during that period is, therefore, not an offence.

I, therefore, agree with Madhavan Nair, J., and hold that no offence has been committed and I, therefore, dismiss this appeal.

V. N. V.

Appeal dismissed.

A. N. A.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1466 OF 1927.

November 11, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice.

PHUMAN SINGH—ACCUSED—PETITIONER
versus

EMPEROR THROUGH ATTAR SINGH—
COMPLAINANT—RESPONDENT.

Practice—Stay of criminal proceedings during pendency of civil suit.

When the subject-matter for adjudication before a Civil Court is the same as before a Magistrate, the Magistrate would be exercising a wise discretion in staying criminal proceedings pending the decision of the Civil Court even though the civil suit is filed during the pendency of the criminal proceedings. [P. 464, col. 1.]

Emperor v. Bishen Das (1), followed.

Case reported by the District Magistrate, Lyallpur under s. 438 of the Criminal Procedure Code.

REPORT.—FACTS.—Attar Singh respondent is a *lamardar* through whom Phuman Singh the applicant was to pay his revenue. Phuman Singh presented an application to the *Tehsildar* that he had paid Rs. 200 to Attar Singh asking him to pay out of it the revenue due from him (Phuman Singh) and from his brother and to pay back the balance. This application was apparently

filed in connection with proceedings being taken by the *Tehsildar* to recover revenue from Phuman Singh and the *lamardar* Attar Singh having reported him as not having paid. On this application the *Tehsildar* remarked that Phuman Singh must take action through the Civil Courts to establish that he had paid Attar Singh, and proceeded to recover the revenue due from Phuman Singh by revenue process. Attar Singh *lamardar* then came forward and stated that the application which Phuman Singh had presented to the *Tehsildar* amounted to an accusation of fraud, and was, therefore, defamatory and he put in a complaint of defamation under s. 500 accordingly. That complaint is proceeding in the Court of Sardar Bahadur Sardar Dilbagh Singh, Honorary Magistrate. Phuman Singh has now apparently sued Attar Singh for the Rs. 200 and asks that as the Civil Court will now be called upon to adjudicate on the question of the payment of Rs. 200 the criminal proceedings should be stayed because if the Civil Court finds that Phuman Singh did in fact pay the money to Attar Singh and that, therefore, the application to the *Tehsildar* was true no case of defamation could lie.

My attention has been drawn to *Emperor v. Bishen Das* (1) where the circumstances seem very similar.

GROUND.—I have heard Counsel for both parties to-day. On behalf of the respondent it is argued that this case is very different to the one referred to as *Emperor v. Bishen Das* (1) inasmuch as in that case a Civil Court had reached a decision prior to the institution of the criminal case. In the present case at the time the complainant presented his complaint in Court the matter was not pending before a Civil Court nor was it one which the complainant could take to a Civil Court. Since the institution of the criminal case, however, applicant has taken the case into a Civil Court, which has now been called upon to adjudicate definitely on the question as to whether or not Phuman Singh paid Rs. 200 to Attar Singh. The allegation in the criminal case is that Phuman Singh had falsely stated that he had paid Rs. 200 to Attar Singh and that this false statement amounted to defamation. It is obvious that if the Civil Court holds that Rs. 200 were in fact paid, the whole defamation

(1) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50.

case must fall to the ground. The Chief Court, in the order in the criminal judgment referred to, laid down that the Magistrate in that case would have exercised a wise discretion if he had of his own motion stayed the proceedings in his Court pending the decision of the Civil Court. Those words appear to apply equally forcibly to the present case now that the dispute has definitely been taken into a Civil Court. Accordingly, under s. 438, Criminal Procedure Code, I forward the proceedings to the High Court of Judicature at Lahore, with the recommendation that in the present case the Magistrate be directed to stay proceedings in the defamation case pending the decision of the Civil Court.

Mr. Lakhpat Rai, for the Respondent.

ORDER.—For the reasons recorded by the learned District Magistrate I stay proceedings in the criminal case pending the decision of the civil suit.

R. L.

Proceedings stayed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 343 OF 1927.

(CRIMINAL REVISION PETITION No. 300 OF 1927.)

October 7, 1927.

Present:—Mr. Justice Devadoss.

H. J. E. MACCARTHY—COMPLAINANT—
PETITIONER

versus

SHANNON—ACCUSED—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 262—
Complaint—Magistrate calling for counter-evidence—
Dismissal of complaint without giving complainant
opportunity to meet such evidence, legality of.*

Where a Magistrate holding an inquiry under s. 202, Criminal Procedure Code, has before him evidence opposed to the complainant's allegations, he should give opportunity to the complainant to explain or meet such evidence.

It is not open to a Magistrate to reject a complaint holding that the accused acted under a *bona fide* claim of right and that, therefore, no offence was committed by him, merely on a perusal of records sent for by him from the Police or a private individual.

Petition, under ss. 435 and 439 of the Code of the Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of Coimbatore Division, in Criminal Revision Petition No. 41 of 1926, presented to revise the order of the Court of the District Magistrate, Nilgiris, dated the 22nd September, 1926, and passed in C. C. No. 3 of 1926.

Mr. V. L. Ethiraj, for the Petitioner.

The Public Prosecutor, for the Crown.

Mr. Sidney Smith instructed by Messrs. Moresby & Co., for the Respondent.

ORDER.—This is an application by the complainant to revise the order of the District Magistrate of the Nilgiris dismissing his complaint of robbery. The contention of the complainant is that he was the owner of a car and he was in possession of it for over two years and that the counter-petitioner forcibly took the car from his possession and thereby committed robbery. The learned District Magistrate after examining the complainant on oath sent for some records from the Police and some records from a private individual, perused them and came to the conclusion that the counter-petitioner acted under a *bona fide* claim of right and, therefore, no offence was committed by him. It does not appear from the records nor is it suggested by Mr. Smith who appears for the counter-petitioner, that the complainant was given an opportunity to meet the evidence that was available before the Magistrate to disprove the statements made in the complaint. It is open to a Magistrate to hold a preliminary enquiry under s. 202, Criminal Procedure Code, but in holding such enquiry if evidence which is opposed to the complainant's allegations is brought before him he should give opportunity to the complainant to explain or to meet such evidence. In this case such a procedure was not adopted. The District Magistrate satisfied himself by looking at certain records that the counter-petitioner acted *bona fide*. At this stage of the case, I decline to discuss the question of law whether an act which is done under colour of right would or would not come within the purview of s. 379, Indian Penal Code, for that depends on fact and as any observation of mine on facts might prejudice one side or other I carefully refrain from doing so. The District Magistrate not having disbelieved the complainant's version and the sworn statement he should have given him an opportunity to prove his case. This he has not done. On this sole ground I think the order of the District Magistrate should be set aside. I, therefore, set aside the order of the District Magistrate and direct that the case be enquired into by a Magistrate outside the Nilgiris. The District Magistrate of Coimbatore to whose file it is transferred will enquire into and dispose of it according to law.

V. N. V.

A. N. A.

Order set aside.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 291 OF 1926.

August 17, 1927.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

G. I. P. RAILWAY—DEFENDANT.

—APPELLANT

versus

KASHINATH CHIMNAJI—PLAINTIFF—
RESPONDENT.*Workmen's Compensation Act (VIII of 1923), ss. 3, 10—Accident to workmen—Employer, liability of—Notice to employer.*

To bring a case under the Workmen's Compensation Act, two conditions must be satisfied; the accident must be one arising out of the employment, and it must also be in the course of the employment, [p. 465, col. 2.]

A Railway coolie was returning by an electric train from some place where he had been sent to do some work. He was standing near a carriage door which was left open by the Company. The train while going up a bridge received a jerk and the coolie fell out of the train and died. In a suit for compensation under the Workmen's Compensation Act:

Held, that if the carriage with the open door was a dangerous place, it was a dangerous place provided by the masters of the coolie, the Railway Company, and they were liable to pay compensation as the accident was in the course of and arose out of the employment of the coolie. [p. 468, col. 1.]

A notice given by the family of a deceased workman after six days of the accident cannot be said not to have been given as soon as practicable after the accident. [p. 466, col. 1.]

First appeal from the decision of the Commissioner for Workmen's Compensation.

Mr. Kanga, Advocate-General, for the Appellant.

Mr. S. R. Bakhale for Mr. P. S. Bakhale, for the Respondent.

JUDGMENT.—We understand that this is the first case to be brought before the High Court under the new Workmen's Compensation Act, 1923. I only hope that it is not going to be the forerunner of a large number of other cases, for, as we know, the English Workmen's Compensation Act has given rise to more litigation and more differences of opinion between various Judges than any legislation of modern times; and with our present over-crowded list we are not in a position to stand any substantial increase of litigation.

The present case is an appeal by the G. I. P. Railway Company under s. 30 of the Act, against an award of a sum of Rs. 750 by the Commissioner as lump compensation to the father and other relatives of the deceased. The question before us

is whether the accident arose out of and in the course of the workman's employment within the meaning of s. 3 of the Act. As has been clearly laid down in the English cases dealing with the same words, both those conditions must be satisfied, viz., the accident must be one arising out of the employment. It must also be in the course of the employment. And unless both those conditions are satisfied, the workman cannot bring his case within the Act.

Now in the present case the Company admits before us that the accident arose in the course of the workman's employment. But it is denied by them that it arose out of his employment. It is further contended by the Company that the workman acted in wilful disobedience of a rule expressly framed for the purpose of securing the safety of workmen within proviso (b) (ii) to s. 3. It was also originally contended that he had no right to travel in the particular manner he did, and also that notice was not given as soon as practicable after the happening of the event as required by the Act.

The short facts are these. The workman was in the employ of the Company on Rs. 25 a month, and was employed at Kalyan. He was sent on a message by one of the Company's Officers from Kalyan to Bombay. In Bombay he was directed by another of the Company's Officers to return to Kalyan. On his way back he was travelling in an electric train as far as Kurla. While so travelling he, to follow the language of the plaint, being "a coolie under the engineering department, on January 16, 1926, received personal injury by accident arising out of and in the course of his employment at the Sandhurst Road new bridge. The cause of injury is that while he was standing (at about 12-52 P.M. on the day mentioned at the entrance of the carriage of a train on the Harbour branch supporting himself on the vertical iron bar, the train while going up the bridge received a jerk, and as a result of that Ganpat fell down on the lines and died consequently." In their written statement the Company do not deny the facts as stated in the claim, except that they do deny that the accident arose out of and in the course of his employment.

Now taking the points one by one, first of all, as regards notice under s. 10, the accident occurred on January 16, 1926, and

notice was given on January 22, 1926. It was contended that this was not given as soon as practicable after the happening of the accident. But in my judgment, that suggestion is entirely unfounded, when one considers the condition the man's family would be in after an accident such as this. Moreover, to give a notice under the Act, the family would, no doubt, have to consult some lawyer, for a layman cannot be expected to be familiar with his precise rights under this particular Act. I need not, however, pursue this point.

Then as regards the proviso to s. 3 of the Act, that arises in this way. The Company have apparently issued certain warning notices in connection with these electric trains, which state, amongst other things, "Do not stand near the door." It is contended that this is a rule expressly framed for the purpose of securing the safety of workmen within s. 3. In our opinion that is not a fair construction of s. 3. The notice in question, if it is a rule at all, is one expressly framed for the purpose of securing the safety of passengers in general, and not for that of workmen. No doubt, what s. 3 primarily contemplates are certain rules or regulations in a factory for preventing, for instance, workmen coming within particular dangerous area in the factory. And there are many other instances one can think of. Accordingly, we do not think that the Company are protected by this proviso in the present case.

Then I may get rid of another argument they urged in the Court below. They said they had got another rule which prevented workmen going by the electric trains at all. It seems somewhat inconsistent with the point I have just dealt with, but at any rate it is a point which they made in the Court below, and which they have abandoned before us. There is, therefore, nothing in that point because they conceded that the workman was entitled to travel on the return journey by this particular electric train.

We, therefore, come to the question, which is really the crux of the case, as to whether in acting as he did, the workman's accident arose out of his employment. Now in the first place, one has to see exactly what is the admitted evidence in the case. It was at first suggested to us—so I understood—that the learned Commissioner had acted without taking any evidence, and

that this was an irregular procedure. But when one comes to look at the plaint and the written statement, it is clear that on those two documents—at any rate if one treats them as pleadings—there was no dispute as to how the accident arose. I have already read out what may be described as the plaint. I have already referred to what is called the written statement. So we may take it that the cause of injury was that while the workman was standing at the entrance of the carriage of this train supporting himself on the vertical iron bar, the train, while going up the bridge, received a jerk, and as a result of that Ganpat fell down on the lines and died consequently.

Why then did he fall out of the train in this way? The answer is that the door was open. In reply to certain questions put to him by the Bench, the learned Advocate-General produced a rough sketch of the carriages used on these electric trains, which show that there were six doors in all, three on each side, and that in the middle of each door there was a place called "vertical iron stanchion." The learned Advocate General stated (this of course is not in evidence) that the stanchion is not used for the purpose of shutting the doors or holding them in any way when they are shut, but that the stanchion comes inside the carriage when the doors are shut. He further stated that in practice these trains all run with the doors open, because it is not practicable for the Railway Company to find porters to shut the doors. It was at first further suggested that this was in accordance with the regulations of the Railway Board or other proper authorities. But when we asked for the regulation to be produced, it was subsequently admitted that this procedure could not be justified under the regulations. Indeed I rather gather that in ordinary trains to travel deliberately with open doors is a matter which is prohibited under the regulations.

But later on in the case the learned Advocate-General said that though he had made these statements, they were not in evidence and accordingly we must go by the evidence in the case. But taking the evidence as it stands, it is a reasonable inference that the door was open. That being so, I do not think we ought to infer that the workman opened that door. Still less ought we to do so after what we

were told by Counsel, who has made statements quite frankly to assist the Court, which cannot be entirely ignored.

Now that being so, was there evidence before the Commissioner on which he could find that this accident arose out of the employment of the workman? We have here a case where the Company in effect invite passengers to use these carriages on the electric line. This particular carriage was left with the door in question, if not other doors, open. Presumably the passengers were entitled to consider that that was a safe mode in which to travel, if it was done deliberately by the Railway Company. There was a jerk in the train, and the traveller was thrown out. What added risk then did he expose himself to beyond what would be so in the case of an ordinary traveller. This class of case is naturally near the line. But on the facts of the present case, I think there was evidence before the learned Commissioner on which he could properly find that the traveller in question, *viz.*, the workman, did not take any greater risk than an ordinary traveller would do while travelling at the present time on one of these electric trains. I lay some stress on the fact that that door was left open. I think this has a material bearing on the circumstances of the present case.

We were referred to certain English authorities which have been naturally of great value to us in arriving at our conclusion, because they clearly bring out what is described as an added peril. For instance, in *Lancashire and Yorkshire Ry. v. Highley* (1), there the workman in the course of his employment crossed the Railway by an unauthorised way, and exposed himself to an added peril by going under the trucks of a standing goods train. The train moved and he was killed. It was held that although it was proper for him to cross the line at a particular place, he was exposing himself to an added peril by attempting to pass under the trucks in the way he did. But that was not entirely an accident arising out of his employment and was not an ordinary risk of his employment, and consequently the Act did not apply.

Then in *Pomfret v. Lancashire Ry., Co.*

(2) the workman while travelling in a train (1) (1917) A. C. 352; 86 L. J. K. B. 715; (1917) W. O. & I. Rep. 179; 116 L. T. 767; 61 S. J. 397; 33 T. L. R. 286.

(2) (1903) 2 K. B. 718; 72 L. J. K. B. 729; 52 W. R. 66; 89 L. T. 176; 19 T. L. R. 649.

in the course of his employment fell out of the train. The question arose as to whether the mere fact of his falling out of the train was sufficient to prove that it had arisen out of his employment. In other words, was he merely doing what an ordinary passenger might do? At the first hearing before the Court of Appeal their Lordships differed; Lord Justice Mathew took the view that the learned County Court Judge had (page 723*) drawn the inference that the deceased did no more than an ordinary passenger in the train might do. But on the evidence in that particular case the other two Judges, *viz.*, Collins, M. R., and Lord Justice Stirling were not prepared to go as far as that on the then evidence, and accordingly the whole Court agreed in sending the case back to the County Court Judge. On remand—certain further evidence was taken of the passengers in the train, and the County Court Judge said he could draw no other inference than that the accident occurred when the deceased was acting as an ordinary passenger would do. On that further finding the Court of Appeal came to the conclusion that there was evidence on which he could so find, and accordingly they refused to disturb the finding of the County Court Judge. But even then the accident itself was left in a condition of some doubt, for the Court only arrived at this rather tentative conclusion (page 726*):

"The evidence rather suggests that while the deceased was still standing up and was putting his basket in the rack the train began to move, and as it travelled rather unsteadily at starting the deceased lost his balance and fell against the window in the upper part of the door, and so fell out of the train."

Of course we have not got here, I take it, a door or a window like an ordinary English railway carriage. We have here a carriage with large openings and sliding doors such as are found in many electric trains in England.

Then another case cited was *Jibb v. Chadwick* (3). There the workman tried to enter the train whilst in motion, and it was held that "the risk attaching to the attempt to enter a train in motion was not a risk reasonably incidental to the deceased's employment. He had exposed himself to

(3) (1915) 2 K. B. 94; 84 L. J. K. B. 1241; (1915) W. O. & I. Rep. 342; 112 L. T. 878; 31 T. L. R. 185.

*Pages of (1903) 2 K. B. [Ed.]

an added risk by doing an unauthorised and illegal act, and the accident did not, therefore, arise out of the employment within s. 1, sub-s. 1, of the Act." In that action it was pointed out by Lord Justice Swinfen Eady in his judgment, quoting also a Scottish case to the same effect, that (page 99*) "the risk of entering a train in motion, which is prohibited by Act of Parliament, cannot be included or regarded as one of the risks of Railway travelling."

Then *Brice v. Lloyd* (4) was a case where a workman employed at certain works climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank and was scalded to death. The workmen were not allowed on the tank. There Lord Justice Kennedy said (page 810†):

"But where, as here, a man chooses to go to a dangerous place where he has no business to go, incurring a danger of his own choosing and one altogether outside any reasonable exercise of his employment, in my opinion, if he meets with an accident, it cannot be said that the accident arose out of his employment."

Here, if the carriage was a dangerous place, it was a dangerous place provided by his masters the Railway Company, viz., an electric coach on which the door in question, if not the other doors, were not properly shut. The fact that the man leaned against the stanchion for protection did not necessarily involve that he was negligent. He may have thought that that stanchion was put there expressly for the protection of passengers, and that he was safer in holding on to it than if he stood on some other part of the carriage without having anything to hold on to at all.

As regards the point whether the carriage at the time was crowded or not, as may often be the case, we have no evidence. But as it was in the middle of the day probably it was not.

Taking however the facts as we find them, we think there was evidence on which the Commissioner could arrive at the finding, which he did, viz., in effect that the applicants had discharged the onus of proof which lay upon them. It was contended that the learned Commissioner had

(4) (1909) 2 K. B. 804; 79 L. J. K. B. 37; 101 L. T. 472; 53 S. J. 744; 25 T. L. R. 759.

*Page of (1915) 2 K. B.—[Ed.]

†Page of (1909) 2 K. B.—[Ed.]

misapprehended the onus of proof, and really put the onus on the Railway Company to show that they were not liable. With all respect I do not think that that suggestion is justified by the judgment of the learned Commissioner. It is quite clear from the cases to which allusion has already been made, and which only state the ordinary well-accepted procedure under this type of legislation, that the onus of proof is on the applicants to allege that they are entitled to the benefit of the Act.

Under these circumstances the appeal will be dismissed with costs.

N. H.

Appeal dismissed.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 657

OF 1926.

July 4, 1927.

Present :—Mr. Justice Brown.

AH CHOON—DEFENDANTS—APPELLANT
versus

T. S. FIRM—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 72—"Coercion," meaning of—Satisfaction of decree to save interference with business—Suit to recover, whether lies.

The word "coercion" in s. 72, Contract Act, is used in its general sense, and if a third person is coerced into paying the money in satisfaction of a decree against another, and is not himself liable for the money, a suit does lie to recover that money. [p. 469, col. 1.]

Kanhaya Lal v. National Bank of India, Ltd. (1), followed.

A payment to save a serious interference with one's business is a payment under coercion. [p. 469 col. 2.]

Mr. Janab Ali, for the Appellant.

Mr. Ekambaram, for the Respondents.

JUDGMENT.—The respondent T. S. Firm in Civil Regular No. 122 of 1924 of the Township Court, Pyapon, filed a suit against two persons, Maung Sit Pin and Ah Kwin, whom they called in the plaint managing partners of the Firm of Ho Ho Company, Pyapon, for money due on a promissory note. The defendants admitted the execution of the promissory note and a decree was passed against them. Nothing was said in the decree as to their being partners of the Ho Ho Firm. The decree was passed on the 20th May, 1924. On the 4th June the Chettyar firm applied for warrant of attachment of property in execution of the decree and the property attached was the property in the possession of the present appellant, Ah Choon, who

was carrying on the business in the shop. The Deputy Bailiff claimed to effect the warrant of attachment. Ah Choon, in order to prevent all the goods in his shop being seized, paid the decretal amount Rs. 894 to the Deputy Bailiff. The next day he made an application in the Court to the effect that the goods were his and were not liable to attachment and asked for the removal of the attachment. But this application was unsuccessful and the money was paid to the decree-holder. Ah Choon then brought a suit out of which this appeal has arisen for recovery of the money which he alleges was paid by him under coercion to the Deputy Bailiff. The trial Court held that the money was paid under coercion and gave Ah Choon a decree. The District Court in appeal set aside this decree on the ground that whatever the motive of the payment it was clear that the Deputy Bailiff had no power to accept security for the decretal amount; that the money must have been held to have been paid in satisfaction of the decree and that Ah Choon's remedy, if any, was against the judgment-debtors. It is against this decree of the District Court that the present appeal has been filed, and I think that the view of the law taken by the learned Judge of the District Court was wrong.

It was held by their Lordships of the Privy Council in the case of *Kanhaya Lal v. National Bank of India, Limited* (1) that the word "coercion" in s. 72 of the Indian Contract Act is used in its general sense and that if a third party was coerced into paying the money in satisfaction of a decree against a judgment-debtor and was not himself liable for the money, the money was paid by him under coercion within the meaning of s. 72 of the Contract Act, and a suit did lie to recover that money.

The question then for consideration is whether the appellant was acting under coercion when he paid the money and whether he was liable to pay.

It is quite clear that when the Deputy Bailiff went to execute the warrant of attachment there was no decree at all against the appellant under which he could be held liable. It is contended that this is simply due to a mistake which was rectified later. But,

even if this were so, it seems to me clear that the attachment was illegal.

The Chettyar's case is that Ah Choon, Sit Pin and Ah Kwin were the three partners in the Firm of Ho Ho & Co.; that it was the Firm of Ho Ho & Co. who borrowed the money and that it was against that firm that they got the decree. Admittedly no personal decree has been passed against Ah Choon. The property of the partnership, therefore, can only be attached under the provisions of r. 50 of O. XXI if the decree were against the partnership; and if the property in the shop were the partnership property, then the attachment was perfectly legal. But it is clear that the property said to be attached was not the property of the partnership of these three men, as it has been abundantly proved that this partnership was dissolved long before the decree was executed; and if the decree-holder wished to proceed against Ah Choon personally it was incumbent on him to take action under sub-r. 2 of r. 50. This he clearly did not do. The attachment was, therefore, an illegal attachment. The respondent Chettyar alleges however that even if the attachment were illegal Ah Choon paid up the money perfectly willingly.

Karapaya Pillay in his evidence says that when the Deputy Bailiff was going to attach the property Ah Choon said he was liable and paid the money. He is supported in this by Muthu Raman Servai. But I think that the trial Judge was perfectly correct in holding that these witnesses were not speaking the truth.

Ah Choon's witnesses state that it was only after considerable persuasion and in order to prevent his business being closed that he consented to pay the money. And the Deputy Bailiff who was called as a witness by the Chettyar says that plaintiff, that is, Ah Choon, said that he did not know the decretal amount and that he was never sued before, and then he (the Bailiff) directed the plaintiff to go to Court. He further says that he was first of all asked to take security and finally that it was only after about an hour of speaking that the money was paid. His evidence alone makes it fairly clear that the payment was not freely and willingly made; and Ah Choon's action in going to the Court the very next day and complaining about the matter confirms his story that he paid only under compulsion and in order to prevent a very serious interference with his business.

(1) 18 Ind. Cas. 949; 40 I. A. 56; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 478; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.).

In such a case he can justly claim that he was induced by coercion to pay the money, and, on the authority of *Seth Kan-haya Lall's case* (1) he is entitled to recover that money unless he himself is liable for the debt. I do not consider that the Chettyar has satisfactorily proved his liability. The Chettyar claims that the money was advanced to the partnership. That is entirely denied by Ah Choon himself and also by one of the executants of the note, Sit Pin. Sit Pin says that the money was borrowed by him and Ah Kwin personally and that the money was used by Ah Kwin on his own personal account. The note itself reads "We, Maung Sit Pin and Ah Kwin, of Ho Ho & Co., 1st Street, Pyapon, promise to re-pay the Rs. 650." It does mention Ho Ho & Co. but the persons who promised to pay are Maung Sit Pin and Ah Kwin, and I do not think it is possible, on the face of the note, to say definitely that the money was borrowed on behalf of the partnership or that the promise was made to re-pay on behalf of the partnership. It is true that there is the seal of the partnership on the document, but, Sit Pin denies that this was put on at the time and denies that the seal was the one ordinarily used on such promissory notes taken out for the partnership. And Suit No. 122 was not really filed against the partnership at all. It was filed against Maung Sit Pin and Ah Kwin as managing partners of the firm. It was not filed against the firm by their managing partners and there is no mention at all in the proceedings of Ah Choon.

At the time this suit was filed it would appear that the partnership had been dissolved and that the assets and liabilities of the partnership had been made over to Ah Choon. In these circumstances it is very curious that Ah Choon's name should have been left entirely out of the plaint if the plaintiff did really mean to sue the partnership. Ah Choon has shown that at the time of the dissolution a number of debts owed by the partnership were shown including a debt to the T. S. Firm, but the debt now in dispute was not included. Of course an agreement of this kind between the partners would not be binding on the Chettyar, but it does lend corroboration to the story of Maung Sit Pin and Ah Kwin that this money was never borrowed for or on behalf of the firm at all.

In these circumstances I am not satisfied

that it has been shown that Ah Choon was liable for this debt and, as in my opinion, the attachment was clearly illegal he is entitled to recover the sum paid by him.

I accordingly set aside the decree of the District Court and restore that of the trial Court for payment by the T. S. Firm of the sum of Rs. 894 to the plaintiff Ah Choon. The Chettyar respondent will pay the costs of the appellant throughout.

N. H.

Appeal accepted.

BOMBAY HIGH COURT.

CIVIL REVISIONAL APPLICATION No. 310
OF 1926.

August 15, 1927.

Present:—Sir Amberson Marten, Kt, Chief Justice, and Mr. Justice Blackwell.
THE BOMBAY STEAM NAVIGATION
Co. LTD.—DEFENDANT—APPLICANT

versus

VASUDEV BABURAO KAMAT—
APPELLANT—OPPONENT.

Bill of Lading Act (IX of 1856), s. 1—Contract Act (IX of 1872), ss. 151, 152—Bill of Lading—Protection clause—Consignee, whether bound—Bombay Regulation II of 1927—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), ss. 106, 130—Revision.

A consignee claiming goods under a Bill of Lading is bound by the terms in the Bill protecting the Shipping Company from loss in respect to those goods. It is not necessary that he should have expressly authorised the consignor to accept the terms in the Bill of Lading. [p. 471, col. 2.]

The Contract Act does not apply to carriage by sea, excluding inland navigation. [p. 472, col. 2.]

It is competent to a shipowner to protect himself by express contract from liability for the negligence of himself or his servants. [ibid.]

Sheik Mahamad Ravuther v. British India Steam Navigation Co. Ltd. (1), followed.

The very wide powers of revision of the Bombay High Court under Bombay Regulation II of 1827 have been saved in spite of the repeal of the Regulation, by ss. 106 and 130 of the Government of India Act. But they should be exercised only in special cases. [p. 473, col. 2.]

Civil revisional application against the decision of the District Judge, Karwar, in Appeal No. 68 of 1925, reversing that of the Subordinate Judge at Honawar, in Small Cause Court Suit No. 139 of 1924.

Mr. Kemp, (with him Messrs. Little & Co.) for the Applicant.

Mr. Nilkant Atmaram, for the Opponent.

JUDGMENT.

Marten, C. J.—This is one of those cases which, though petty in amount, involve

legal points of importance and some difficulty. The subject-matter of the dispute is a humble cask of iron nails. The plaintiff who is a merchant at Honawar had a *dalal* at Bombay. The latter sent this case of nails together with other cases and some other goods by the ss. *Indravati* of the defendant Company for being delivered to the plaintiff at Honawar harbour. The Company's Bill of Lading was sent by the plaintiff's *dalal* to the plaintiff. The plaintiff presented it to the Company at Honawar, and got delivery of all the goods except the suit cask of nails. The plaintiff then called on the Company to deliver the suit cask. The answer was: "it was lost overboard in unloading through an accident due to the ship rolling, and we are not liable under the terms of our contract contained in the Bill of Lading."

The plaintiff nevertheless brought his suit. The trial Court held that the loss was due rather to an incident of the sea than to an accident of the sea, and that accordingly one particular clause in the Bill of Lading did not protect the defendants. But it was held that another clause applied which protected the Company from the negligence of its stevedores and servants, and that in fact the accident was caused by such negligence, and that consequently the suit failed and must be dismissed.

The plaintiff, however, was not content. He appealed, and a somewhat surprising result happened. The view the learned District Judge took was that it was not proved that the plaintiff in any way by himself or by his broker accepted the conditions in the Bill of Lading. Therefore it was not binding on him, and the shipping Company were liable. The shipping company now apply in revision.

At the outset we must bear in mind that in the plaint itself the plaintiff had pleaded that on October 3 the plaintiff's *dalal* at Bombay had sent some goods to be delivered to the plaintiff at Honawar harbour, and para. 3 stated that the defendant Company was to give delivery of the suit cask of iron nails to the plaintiff at Honawar harbour. The plaintiff had also stated in his evidence that he had received an invoice from his Commission Agent from Bombay. In cross-examination he said:—

"I get my goods from Kagal Lakshman Anant. He sends me Bill of Lading for the goods sent. I see the Bill of Lading which

was received by me and given to the Agent. It is Ex. 19."

Now, as I understand the judgment of the learned trial Judge, he held as a matter of law that even although goods are shipped under a Bill of Lading and the consignee claims the goods under that Bill of Lading, yet unless the shipowners can show that the consignee expressly authorised his shipping agent to accept the terms in the Bill of Lading, the consignee is not bound. In other words, the consignee may accept the carriage of the goods, but he is not bound by the special conditions of carriage unless his broker has been authorised to assent to them, and has in fact assented to them, and the consignee has assented to them.

Now that view is in the teeth not only of mercantile custom, but also of the Statute which has been in force ever since 1856. I refer to the Bills of Lading Act, 1856. There s. 1 provides:—

"Every consignee of goods named in a Bill of Lading...shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the Bill of Lading had been made with himself." The learned Judge is clearly bound by that Act. He had no jurisdiction to ignore it. I say nothing about mercantile custom, for it is obvious to any one having any familiarity with shipping business, that if the learned Judge's view was correct, the shipping industry would be paralysed, so far as the carriage of cargo is concerned.

Under these circumstances I say nothing as to the blunder, which was apparently made in the trial Court, in not putting in evidence the forwarding note which is referred to as No. 2 of the defendant's list of documents. There is an affidavit of July 6, 1926, by the Agent of the Steamship Company as to that, and he says that the trial Court disallowed it in evidence. That appears to have been the view also taken in the lower Appellate Court. As to this I would only refer to the evidence of Pandurang Narayan, the Agent of the Company, who in his examination-in-chief said:—

"I see the goods forwarding note given by the shipper Lakshman Anant Pai, it is produced to the Company and accordingly the Bill of Lading is written." I should have thought that that document being produced from the proper custody, viz., that of the shipowners' Agent, it would lie upon the plaintiff to prove that it was not authorized or that

the signature was a forgery, and nonetheless so because apparently there was no cross-examination. But we decide the case irrespective of that, and solely on the evidence that was actually before the Court. Similarly, we say nothing as to whether the lower Courts were correct in thinking that this was an incident of the sea, and not an accident of the sea, and also in holding that there was any negligence whatever by the Shipping Company in what happened in the present case. Their findings of fact on this point we must, of course, and we do accept.

I must too guard myself against any suggestion that a Shipping Company has only to produce a duplicate of the Bill of Lading to a consignee, and the latter is then bound to accept the Bill of Lading and accept the goods, whether or no he has ever authorised the goods to be sent, or has anything whatever to do with them. That of course is not the case here. Admittedly, the plaintiff authorised the goods to be sent by his Commission Agent and he is in fact claiming the goods under the very Bill of Lading which his Agent sent.

Further, my brother Blackwell reminds me that in his letter before suit the plaintiff writes:—

"I hereby inform you that my goods covered by Bill of Lading No. 26479 dated October 20, 1923, consigned by my Agent, Mr. K. L. Anant Pai at Bombay port to me at Honawar are short of one cask of iron nails."

On the facts then of this particular case we are of opinion that the learned Judge gave his decision in disregard of statutory authority which was binding on him, and that by reason of such disregard of statutory authority he arrived at exactly the contrary result to that which in law he ought to have arrived at.

There is a further point as to whether in any event conditions of the nature relied on in this Bill of Lading are legal having regard to s. 151 of the Indian Contract Act. The plaintiff's argument is that the shipowner is a bailee under the bailment sections of the Indian Contract Act, viz., 148 *et seq.*; and that under s. 151 he is bound to take as much care of the goods bailed as a man of ordinary prudence would of his own goods; and that there is no clause which permits him to contract himself out of that minimum liability. In this respect there is a marked contrast under s. 152.

But there it is expressly provided that in the absence of any special contract the bailee is not liable for the loss if he has taken the amount of care described in s. 151. As far as the Indian Carriers Act is concerned, that does not, I think, apply to carriage by sea. I exclude of course inland navigation. There is some difference of opinion in certain High Courts as to whether the bailment sections of the Indian Contract Act apply to carriage by sea. But in *Sheik Mahamad Ravuther v. British India Steam Navigation Co Ltd.*, (1) the point now raised was considered, and Sir Arnold White and Mr. Justice Wallis, as he then was, held, that "In England it is competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India". Mr. Justice Sankaran Nair took the contrary view, holding that it was inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions.

But we see no adequate reason here to adopt the view of the learned dissenting Judge. Accordingly we do not think that this latter point affords an effective answer to the present revisional application.

If then the conditions of the Bill of Lading are binding on the consignee, then having regard to the findings in both Courts below the Shipping Company is protected. I should have explained that the learned District Judge took the correct course in recording a finding on all points. We have, therefore, the benefit of his judgment on the alternative issues, supposing his decision as to the Bill of Lading being not binding on the consignee is incorrect. Incidentally the learned Judge has adopted the same course with reference to *Sheik Mahamad Ravuther v. British India Steam Navigation Co. Ltd.* (1) which, as I have indicated, we propose to adopt.

This brings me next to what as regards certain aspects seems to me a difficult question. If the appellant can only rely on s. 115 of the Civil Procedure Code, then, having regard to certain decisions of the Privy Council on the point and to various other decisions, many of which are difficult to reconcile either with the Privy Council decision or as between themselves, it might well be desirable to refer the point to a

(1) 1 Ind. Cas. 977; 32 M. 95; 4 M. L. T. 110; 18 M. L. J. 497.

Full Bench notwithstanding the small amount of money that is involved here. I need only refer to the notes to s. 115 in Mulla's Civil Procedure Code to illustrate what I mean. But in Bombay there are decisions which are binding on this Division Bench to the effect that in the old Bombay Regulation II of 1827, Ch. I, s. 5, sub-s. (2), we have certain supplemental powers which we are entitled to exercise. That sub-section runs: "It shall also be competent to the said Court, to call for the proceedings of any Subordinate Civil Court, and to issue such orders thereon as the case may require." This Regulation was repealed by Act XII of 1873, but there is an express section which provides that it was not, amongst other things, to affect any established jurisdiction; etc.

In *Bai Atrani v. Deepsing Baria* (2) Mr. Justice Batchelor and Mr. Justice Hayward considered this Regulation and stated the paragraph I have just referred to in the Repealing Act, *viz.*, (page 94*):

"It shall not affect any established jurisdiction, form or procedure or existing usage, custom or privilege notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived, by, in, or from any enactment hereby repealed."

Then the judgment goes on to say (page 94*):—

"It follows, I think, that the jurisdiction established in the Suddur Dewanny Adawlat in 1827 and in the High Court in 1861 was not affected by the repeal of the Regulation in 1873."

So, too, in *Secretary of State for India v. Narsibhai Dadabhai* (3), which was a decision of Sir Lallubhai Shah and Mr. Justice Coyajee, both the learned Judges arrived at a similar conclusion. Mr. Justice Coyajee at page 55† says:—

"In any event, our powers derived from s. 5 of Bombay Regulation II of 1827 are very wide. The powers thereby conferred on the Suddur Dewanny Adawlat were transferred to this Court by s. 9 of the High Courts Act, 1861, and they continue still in force by virtue of s. 106 of the Government of India Act."

Mr. Justice Shah says (page 59*):—

"Even assuming that the case is not covered by s. 115, I think it would clearly be covered by the words of the second clause of s. 5 of Bombay Regulation II of 1827. Though the Regulation on this point is repealed, this Court still retains the power under the Statutes, which the Suddur Dewanny Adawlat had under the said repealed clause."

Then as regards the Government of India Act, 1915, in addition to s. 106 which Mr. Justice Coyajee referred to, I may mention s. 130 which provides that the repeal was not to affect "the validity of any law, charter, letters patent, rule... order, regulation... under any enactment hereby repealed and in force at the commencement of this Act." That Act repeals, for instance, the Indian High Courts Act, 1861, and the Indian High Courts Act, 1865.

We think, therefore, it is open to us to act under Regulation II of 1827, whether or no s. 115 of the Civil Procedure Code applies. Consequently it is competent for us to issue such orders as the case may require. But I wish it to be clearly understood that it is only in a very exceptional case that I would be prepared to exercise such a power as this, more especially as normally we should act, if at all, under s. 115. I regard, however, this particular case as a very exceptional one and as a very important one to the shipping world, and that consequently it is eminently one where we ought to interfere irrespective of the small amount involved, because to allow the contrary decision to remain might well result in much confusion.

I would, therefore, act under the Regulation, *viz.*, II of 1827, and make the Rule absolute, and discharge the order of the learned District Judge, and restore the decree of the Subordinate Judge, and direct the plaintiff to pay the costs throughout.

Blackwell, J.—I agree.

N. H.

Rule made absolute.

*Page of 48 B.—[Ed.]

(2) 33 Ind. Cas. 358; 40 B. 86; 17 Bom. L. R. 1097.

(3) 77 Ind. Cas. 241; 48 B. 43; 25 Bom. L. R. 992; A. I. R. 1924 Bom. 65.

*Pages of 40 B.—[Ed.]

†Page of 48 B.—[Ed.]

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 802 OF 1922.

March 14, 1927.

*Present:—*Mr. Justice Fforde and
Mr. Justice Tek Chand.**SHERA AND OTHERS—PLAINTIFFS—
APPELLANTS***versus***GAHNA AND OTHERS—DEFENDANTS—
RESPONDENTS.***Pleadings—Estoppel—New ground.*

A plea of estoppel cannot be upheld on a ground not pleaded in the written statement, and inconsistent with what was stated therein, and with regard to which no issue had been framed. [p. 475, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Sheikhpura, dated the 4th January, 1922.

Mr. Shambu Lal Puri for Mr. Mukand Lal Puri, for the Appellants.

Messrs. Muhammad Amin and Anant Ram Khosla for Mr. Khurshid Zaman, for the Respondents.

JUDGMENT.

Tek Chand, J.—On the 22nd of February, 1921, the plaintiffs, nine in number, representing themselves to be collaterals in the third degree of one Azmat, instituted a suit for possession of the land measuring 376 *kanals* and 11 *marlas* on the allegation that the land was ancestral of the plaintiffs and the alienor, that it had been sold by Azmat to the ancestor of the defendants in 1893 without consideration and necessity, and that though Azmat alienor had died in 1899 he had left a widow *Musammât* Muradân, who died in 1920 and, therefore, the suit was within time.

The defendants pleaded that the suit was time-barred, that "the plaintiffs' ancestors had brought a declaratory suit before 1893 in respect of this very land and the alienation made by Azmat; but that they relinquished their rights as against the defendants" and, therefore, the plaintiffs were estopped from maintaining the suit and that the sale had been effected for consideration and valid necessity. The defendant, Murad, was examined in Court on the 30th of June, 1921, and stated that before the alienation now sought to be impeached, there had been another sale of the same land to the defendants for Rs. 400, that Kadim and Ismail and other reversioners of Azmat had sued to contest that sale, but ultimately withdrew the suit on a compromise, under which Rs. 200 more was paid to the vendor and a fresh sale-deed for Rs. 600 executed. It was stated that it is this subsequent sale

for Rs. 600 which is the subject of the present suit.

On these pleadings the Court framed the following three issues:—

(1) Is the suit barred by time?

(2) Was the sale for consideration and valid necessity?

(3) Was this sale the result of a compromise between the plaintiffs' predecessors and the vendees and are plaintiffs estopped from suing?

It seems that on the 24th of August, 1921, the defendants were permitted to file a better statement of their defence. This better statement, however, has not been printed in the paper-book and is not before us. The learned Judge Mr. Din Muhammad passed an order on that date in the following terms:

"A better statement has been permitted to be filed. The following fresh issues arise. The parties to be examined."

Murad, defendant, and Ziada, plaintiff were accordingly examined the same day and it was noted that it was necessary to send for records of suits decided in 1893 and 1895 before any fresh issues could be framed and an order was passed that the defendants should furnish particulars of these records. The case was again adjourned to the 15th of October, 1921. On that date it was discovered that the records could not be sent for as the requisite particulars had not been furnished by the defendants. They were ordered to do so within a week and the case was adjourned to the 27th of October, 1921. On that date one of the records required was received in the Court but not the other as the particulars filed by the defendants were incorrect. The case had again to be adjourned, but on the next hearing (18th of November, 1921) it was reported that the required record was missing. An enquiry was ordered in this matter and the case adjourned once again to the 14th of December, 1921. In the meantime Mr. Din Muhammad was transferred and Mr. Asad Jan succeeded him. On the 14th of December, 1921, the record which was supposed to have been missing, was received from the record-room. No fresh issues were framed by Mr. Asad Jan and though the defendants' Counsel urged that in order to determine the question of limitation it was necessary to find whether Azmat had left a "legal widow" or not, the learned Judge refused to grant this request, remarking that he did not

see its importance. The case was adjourned for arguments to the 19th of December and on the 4th January, 1922, judgment was pronounced dismissing the suit on the ground that the plaintiffs were estopped from maintaining the present suit, "because Khadim and Umar had instituted a suit to contest the sale of 1893 which ended in a compromise effected on the 12th of May, 1893". The learned Judge in support of his finding that the plaintiffs were estopped from suing also referred to another suit between Sakhar and Sakhu as plaintiffs and Azmat and Nawab as defendants, which had been dismissed on the 15th of July, 1895.

Against this judgment and decree a first appeal has been preferred by the plaintiffs and it has been contended on their behalf that the learned Judge was not justified in upholding the plea of estoppel on the ground that Khadim and Umar had instituted a suit to contest the sale in question in 1893 which had resulted in a compromise. It is clear from the written statement of the defendants as well as from the oral statement of Murad defendant and the form in which issue No. 3 was put that the defendants had originally based their plea of estoppel upon a compromise which they alleged had been arrived at between the ancestors of the plaintiffs and Azmat vendor in a suit relating to a sale prior to 1893. Mr. Anant Ram for the defendant-respondents, however, now concedes that as a matter of fact, no such prior sale had been effected nor any suit filed, which was adjusted by a compromise resulting in the sale now in question. He states that the plea of estoppel as raised in the pleadings on which issue No. 3 had been framed was really put forward by his clients in complete ignorance of the real facts. Mr. Anant Ram, however, seeks to support the lower Court's finding on the issue of estoppel on the ground that Khadim and Ismail had filed a suit to contest the sale in question, which suit they had subsequently withdrawn. He states that these facts were pleaded in the better statement with regard to which Mr. Din Muhammad had intended to frame fresh issues. But no such issues were actually framed by Mr. Din Muhammad or by his successor and the plaintiffs had no opportunity of meeting the defendants' case as put in the better statement. Moreover, the compromise dated the 12th of May, 1893, on which

the learned Judge has largely relied, had not been incorporated in any judgment and was not proved or exhibited in this case. It is also a question for consideration whether the compromise arrived at in a suit which, according to the defendants' own showing, was instituted by Khadim and Ismail, whose descendants are plaintiffs Nos. 4 to 8, is binding on Shah Muhammad, plaintiff No. 1, Taja, plaintiff No. 2, Allah Ditta, plaintiff No. 3 and Shahbali, plaintiff No. 9, who or whose direct lineal ancestors were not parties to it. The learned Subordinate Judge has not addressed himself to this aspect of the case, nor have all the relevant materials been placed on the record, on which this Court could come to a definite finding.

For the appellants it is, further, urged that the litigation of 1895 can have no bearing on the present suit as the plaintiffs in that suit were Sakhar and Sakhu, who are not mentioned in the pedigree-table printed at page 4 as being related to Azmat, but who were probably collaterals of a very remote degree. It is contended that the plaintiffs did not derive their title through Sakhar and Sakhu and are in no way bound by the dismissal of their suit in 1895.

I do not, however, think it necessary to give a finding on this point, as I am of opinion that this appeal must succeed on the short ground that the learned Judge ought not to have upheld the plea of estoppel on the grounds which were not pleaded in the written statement, but which were inconsistent with what was stated therein and with regard to which no issue had been framed. Issue No. 3 had been struck with reference to allegations which the defendants had abandoned and issues Nos. 1 and 2 have not been decided. Under these circumstances there has been no proper trial of the suit in the lower Court and it is unfortunate that the case has to be remanded for re-trial and fresh decision, after proper issues have been framed and parties given an opportunity to prove their respective contentions.

In order to avoid another possible remand it seems necessary to point out that the question whether *Musammât Muradan* was or was not the widow of Azmat alienor is of vital importance in this case for the decision of the issues as to limitation, and the learned Subordinate Judge was wholly

wrong in supposing that this question was of no importance. If *Musammāt* Muradan was not the married wife of Azmat, the present suit is obviously time-barred. If, however, *Musammāt* Muradan did succeed him as his widow, it is a matter for consideration whether time could run against the reversioners during her lifetime.

The attention of the Court below is also drawn to the necessity of having any documents on which the parties wish to rely formerly proved and exhibited and the provisions of O. XIII, r. 4, Civil Procedure Code, complied with.

For the foregoing reasons, I would accept this appeal and setting aside the judgment and decree of the learned Subordinate Judge remand the case under O. XLI, r. 23, Civil Procedure Code, for disposal in accordance with law. Court-fee on appeal will be refunded and costs will be costs in the cause.

Fforde, J.—I agree.

N. H.

Appeal accepted.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 210 OF 1926.

June 30, 1927.

Present :—Mr. Justice Pratt.

MA SAW—APPELLANT

versus

MAUNG BA—RESPONDENT.

Evidence Act (I of 1872), s. 91—Stamp Act (I of 1879)—Stamp Act (II of 1899), s. 2—Unstamped mortgage-deed—"Execution", what is—Secondary evidence.

Under s. 2 of the Stamp Act, 1899, "execution" means signature, and an instrument which becomes chargeable with stamp duty only on being executed is not liable to stamp duty until it is signed. [p. 476, col. 2.]

"Execution" under the old Stamp Act of 1879 ordinarily connoted signature, though there may have been special instances where a document was executed other than by signature. [p. 477, col. 1.]

Mi Ta v. Nga Sein (3), dissented from.

Secondary evidence of the contents of a formal unstamped mortgage-deed is admissible if it was not signed by the mortgagor. If the deed was executed by signing, then secondary evidence is inadmissible for lack of stamping. [*ibid.*]

In re the application of Chet Po (4), followed.

Mr. *Sanyal*, for the Appellant.

Mr. *Mukerjee*, for the Respondent.

JUDGMENT.—Plaintiff sued for redemption of certain lands. He asserted that at the time of the mortgage which was in 1891 or 1892, some record had been

made on a palm leaf of the original mortgage and subsequent advances. He called upon the 1st defendant in whose custody he alleged it to be to produce the document, but the latter declined to do so and denied its existence.

He produced a copy or precis, it was not clear which, made by him of the original record and subsequent memoranda and asked to be allowed to give secondary evidence of the contents of the document.

Both Courts have held that secondary evidence of an unstamped document is inadmissible and the suit has been dismissed.

In the Upper Burma cases of *Ma Ein U v. Maung Aung Hmwe* (1) and *Maung Net v. Maung Hmo Zan* (2), Thirkell White, J. C., undoubtedly held that secondary evidence of a document not produced, which ought to have been stamped, but was not, is inadmissible.

In the later case of *Mi Ta v. Nga Sein* (3) Shaw, C. J., went further and held that a *parabaik* mortgage, dated 1894-95, though not signed, was executed within the meaning of the Stamp Act of 1879 then in force, and that secondary evidence of the unstamped *parabaik* document which defendant was alleged to be withholding was not admissible.

The correctness of this view was not accepted by a Bench on which I sat in Rangoon last year. (*Vide, Ma Hla U v. Ma Hta*, Letters Patent Appeal No. 131 of 1926).

In *In re the application of Chet Po* (4) it was held by a Full Bench of the Chief Court that as under s. 2 of the Indian Stamp Act, 1899, 'Execution' means signature, an instrument which becomes chargeable with stamp duty only on being executed is not liable to stamp duty until it is signed.

It was further pointed out that in accordance with universal custom formal documents on palm leaf and *parabaik* have hitherto been treated by Upper Burma Courts as completed documents and admitted as evidence as such though not signed. The judgment concludes "Our decision that these unsigned documents are not liable to stamp duty does not neces-

(1) U. B. R. (1897-01), II, 365.

(2) U. B. R. (1897-01), II, 367.

(3) U. B. R. (1907-09) Execution Signing, 5.

(4) 22 Ind. Cas. 75; 7 L. B. R. 77; 7 Bur. L. T. 48.

sarily imply that they must henceforward be regarded as incomplete. The effect of the present decision is only that the Courts cannot refuse to admit any such document in evidence merely on the ground that it is unstamped."

With this ruling I wholly agree.

At the time of the palm leaf document now in question the Stamp Act of 1879 was in force.

That Act contains no definition of execution, and I am unable to agree with the view taken in *Mi Ta's case* (3) by the learned Judicial Commissioner that an unsigned *parabaik* document was liable to stamp duty under the law in force prior to the introduction of the Stamp Act of 1899.

I have no doubt that 'execution' under the old Stamp Act ordinarily connoted signature; though there may have been special instances where a document was executed other than by signature.

From the extract or copy taken from the palm leaf document in the suit under appeal, however, it does not appear to have been an instrument of mortgage at all, but merely a note that a mortgage had taken place.

Unless the extract is extremely meagre, it seems clear that the mortgage transaction has not been reduced to the form of a document within the meaning of s. 91 of the Evidence Act.

If that is so, then secondary evidence of the note and oral evidence of the transaction of mortgage, which was itself oral, is admissible.

It will, therefore, be necessary to take evidence for plaintiff as to the actual form of the so-called mortgage document and whether it amounts to an instrument of mortgage.

If there is evidence that a formal deed of mortgage was drawn up on a palm leaf, then secondary evidence of its contents will be admissible, unless it was signed by the mortgagor, which is not alleged.

If it should transpire that a formal deed was drawn up and executed by signing, then secondary evidence will be inadmissible for lack of stamping.

I set aside the finding of the lower Courts on the preliminary issue of law and remand the suit for disposal on its merits in view of these considerations.

Costs to follow final disposal.

Appellant is entitled to a refund of the Court-fees in this and the lower Appellate Court.

N. H.

Case remanded.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 1673 OF 1925.

February 25, 1927.

Present:—Mr. Justice Page.

DEBENDRA LAL KHAN—PLAINTIFF
versus

F. M. A. COHEN—DEFENDANT.

Landlord and tenant—Forfeiture of lease—Covenant to repair—Non-payment of rent—Relief against forfeiture—Transfer of Property Act (IV of 1882), s. 114.

The general rule of law with respect to the construction of covenants to repair is that, where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses", unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections. [p. 479, col. 2; p. 480, col. 1.]

Doe v. Rowlands (3), *Cornish v. Cleife* (4) and *Smith v. Mills* (5), relied on.

Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration. [p. 480, col. 1.]

The test as to whether any particular renovation amounts to repair or not is whether the act to be done is one which in substance is the renewal or re-placement of defective parts, or the renewal or re-placement of substantially the whole. [p. 480, col. 2.]

Lauratt v. Wakeley (6) and *Calthorpe v. McOscar* (7), relied on.

Under s. 114 of the Transfer of Property Act, the Court is invested with a discretionary power to grant relief against forfeiture for non-payment of rent which it may or may not exercise in favour of the tenant. [p. 478, col. 2.]

The Courts in India in exercising the discretion entrusted to them under s. 114 of the Transfer of Property Act, in the absence of any special circumstances, should adopt the rule that prevailed in the old Courts of Chancery, and; subject to any equities that may have arisen between the date of the forfeiture and the application for relief, e.g., where the landlord during that period has re-let the premises to other persons, or otherwise has dealt with them, or where the conduct of the tenant *qua* tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, the Court, provided the tenant complies with the conditions laid down in s. 114, ought to exercise its discretion in the tenant's favour, and grant him relief. [p. 479, cols. 1 & 2.]

Messrs. A. N. Chaudhuri and Sudhis Ray, for the Plaintiff.

Messrs. A. K. Ray and B. C. Ghose, for the Defendant.

JUDGMENT.—This is a suit brought to recover possession of a block of buildings lying at the corner of Wellington Street and Dhurumtolla Street in Calcutta. I shall refer to the buildings generally as No. 149-1, Dhurumtolla Street, the parcels being set out in the lease in suit.

On the 3rd August, 1906, the predecessor of the plaintiff let the said premises to one Sassoon Ezra Cohen (through whom the defendant claims title) for a term of 50 years. The rent reserved was Rs. 416-10-8, payable on the 25th day of each month succeeding the month for which it became due. The lessee covenanted *inter alia* that he "will at all times during the said term keep the said premises in good and substantial repair, and the same in good and substantial repair deliver up to the lessor his heirs or assigns at the expiration or sooner determination of the said term". The lessee further covenanted that he would repair the said premises within two months after a notice in writing of the necessary repairs was served upon him by the landlord. No such notice was given, but it was conceded by the defendant that the covenant to carry out specific repairs after notice was an independent covenant, and did not restrict or affect the defendant's liability under the general covenant to repair. It was further provided that

"If the said monthly rent, Rs. 416-10-8 or any part thereof, shall be in arrear for the space of three months next after any of the days whenever the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance by the said lessee, his executors, administrators, or assigns, of any of the covenants hereinbefore on his or their part contained, or the lessee becoming insolvent, then, and in any of the said cases, it shall be lawful for the said lessor, his heirs or assigns, at any time thereafter, into or upon the said demised premises or any part thereof, in the name of the whole to re-enter and the same to have, re-possess and enjoy as in his or their former estate, and to hold the same free and discharged from the covenants and agreements herein contained and to hold the said lessee liable for all loss and damages that may be sustained

by the said lessor for such breach of covenant on the part of the said lessee".

The plaintiff based his cause of action in ejectment upon a breach of (i) the covenant to pay rent, (ii) the general covenant to repair.

It was conceded by the defendant that before action was brought he had committed a breach of the covenant to pay rent, and that, although on the 16th June, 1925, the Official Receiver of the High Court (who was then in possession of the premises pursuant to a decree which had been obtained in a mortgage suit against the defendant) sent to the Solicitor of the plaintiff a cheque for Rs. 2,500 in payment of arrears of rent from August, 1924, to January, 1925, the full rent that was in arrear prior to the filing of the suit on the 17th June, 1925, was not tendered until the 23rd June, 1925. The plaintiff refused to accept the rent tendered on the 16th June, 1925, and also that tendered on the 23rd June, 1925, upon the ground that he had given notice to the defendant on the 15th June, 1925, that the tenancy stood determined, and that he required possession of the premises to be delivered to him.

In these circumstances the defendant admitted that a forfeiture of the lease for non-payment of rent had occurred. He seeks relief from the forfeiture, however, under s. 114 of the Transfer of Property Act of 1882, and he has deposited in Court the amount of the rent due up to the date of the written statement which was filed on the 4th August, 1925, and has offered to pay interest upon the rent in arrear, and the full costs of this suit. The defendant has not paid or tendered formally to the lessor "at the hearing of the suit" the sum fixed under s. 114, but I will assume for the purpose of my judgment that he has brought himself within s. 114, and that the Court is at liberty to grant the defendant relief according to the terms of that section.

Now, it is to be observed that under s. 114 the Court is invested with a discretionary power to grant relief which it may or may not exercise in favour of the tenant. Learned Counsel for the defendant has urged that if the sum required under the section has been paid or tendered to the lessor at the hearing of the suit the Court has no discretion in the matter, and must grant relief to the tenant. The old rule in equity is stated concisely by Lord Esher, Master of the Rolls, and Rigby, L. J., in

Newbolt v. Bingham (1). Lord Esher in that case observed that:

"If, at the time relief is asked for, the position has been altered, so that relief could not be given without causing injury to third parties, I think that the case that was cited to us [*Stanhope v. Haworth* (2)] applies. But if, at the time of the application, the position is not altered, so that no injustice will be done, I think, if the conditions mentioned in the section are complied with, that, according to the settled practice in equity, there is no longer a discretion in the Judge, but that he ought to make the order. It does not matter whether it is called discretionary or not, if the discretion ought always to be exercised in one way. If the conditions are complied with, and no interests of third parties have intervened there is no longer any real discretion in the matter."

And Lord Justice Rigby added that:—

"It was the settled practice of a Court of Equity to grant relief against forfeiture for non-payment of rent on payment of all rent in arrear and costs. Of course, the Court was not absolutely bound by its practice where it would not do justice, and if some new interest had been created before the application, the Court would refuse to interfere. That was not done to put the landlord in a better position, but because rights of third parties had intervened."

Now, in exercising the discretion with which it is invested under s. 114 a Court in India is not bound by the practice of a Court of Chancery in England, and I am not disposed to limit the discretion that it possesses. "Those who seek equity must do equity", and I do not think merely because a tenant complies with the conditions laid down in s. 114 that he becomes entitled as of right to relief. But, in my opinion, the Courts in India in exercising the discretion entrusted to them under s. 114, in the absence of any special circumstances, should adopt the rule that prevailed in the old Courts of Chancery, and, subject to any equities that may have arisen between the date of the forfeiture and the application for relief, e.g., where the landlord during that period has re-let the premises to other persons, or otherwise has dealt with them, or where the conduct of the tenant *qua* tenant has been such that it would be unreasonable that the landlord

should be compelled to keep him as a tenant, the Court, provided the tenant complies with the conditions laid down in s. 114, ought to exercise its discretion in the tenant's favour, and grant him relief.

I now proceed to consider the position of the tenant under the general covenant to repair into which he has entered. At the time when the premises in suit were demised to Sassoon Cohen the premises consisted of—

"All that upper room brickbuilt house and messuage together with the piece or parcel of land thereunto belonging containing by estimation rent free one *bigha* be the same a little, more or less, and situate between the boundaries thereafter set out in the lease".

After Sassoon Cohen had obtained possession under the lease he proceeded to erect the buildings in respect of which it is now contended that a breach of the covenant to repair has been committed upon the parcel of land adjoining the two-storied brick house. The new buildings that were erected facing Dhurrumtolla Street were one-storied structures contiguous and joined to the original house, and I am satisfied from the evidence of Sassoon Cohen that the effect of the additional work of construction that he carried out on the premises was merely to increase the area of the two-storied building that was upon the premises at the time when the lease was granted. With reference to the additional structures that he erected Mr. Cohen was asked certain questions in the course of his examination:

How long did it take you to construct this building?—6, 7 or 8 months.

The new rooms which you allege you built they were all made part of the premises of the two-storied building?—Joined to it.

And made part of the same premises?—Yes.

Sassoon Cohen further stated:—

Did you have to bond these new buildings on to the old buildings?—Yes.

You made them part of the old building?—I joined them together.

After you completed the building, the buildings became one whole building?—Yes, the front portion.

Now, the general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in

(1) (1895) 72 L. T. 852 at p. 853; 14 R. 526.

(2) (1886) 3 T. L. R. 34.

repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses", unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections: *Doe v. Rowlands* (3), *Cornish v. Cleife* (4), *Smith v. Mills* (5).

Upon the evidence in this case I am clearly of opinion that the new buildings fall within the ambit of the covenant to repair, both because of the general terms in which the covenant is couched, and also because, even if the covenant to repair was restricted to the upper room brickbuilt house, the new structures were an addition to and became part of the building that was specifically demised, and to which the covenant to repair attached. Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration. Notwithstanding the general terms of the covenant to repair learned Counsel for the defendant has contended, however, that upon a true construction of the lease the additional erections were not within the covenant to repair; and in support of his argument he relied upon the provisions in the lease that gave permission to the tenant to make such additions and alterations to the demised premises.

In my opinion, the provisions in the lease to which he refers were not introduced for the purpose for which he cited them. If a tenant makes additions or improvements upon the premises it is provided under s. 108 of the Transfer of Property Act that he is entitled to remove them during the currency of the term. In my opinion, the special provisions introduced into this lease with respect to the additions and alterations which the tenant was at liberty to make to the premises were inserted for two purposes: (i) in order to avoid the provisions of s. 108 of the Transfer of Property Act, and (ii) in order that it should

not be open to the defendant, in the event of some part of any additional premises that he might erect being destroyed in the manner set out in the lease, to escape a proportionate payment of rent so long as the additional structures were not re-built or repaired. In my opinion, therefore, the general covenant to repair extended to the whole of the block including the additions thereto carried out by Sassoon Cohen.

The issue, therefore, that remains to be considered is one of fact: did the defendants at all times during the term keep the premises in good and substantial repair? Now, the test as to whether any particular renovation amounts to repair or not, in my opinion, is "whether the act to be done is one which in substance is the renewal or re-placement of defective parts, or the renewal or re-placement of substantially the whole" *per* Buckley, L. J. in *Laurcatt v. Wakeley* (6). See also *Calthorpe v. McOscar* (7).

[After discussing the evidence his Lordship proceeded:—] The defendant elected to call no evidence in rebuttal, and as the result of the evidence I am disposed to accept the somewhat picturesque phrase in which Mr. Shrosbree depicted the state of the premises by saying that "they were starved"; by which he meant, and I find, that for years they have not been kept in such repair as would comply with the conditions of the covenant to repair contained in the lease.

Under these circumstances, in my opinion, there was such a breach of the general covenant to repair as entitled the plaintiff to the relief which he claims and there will be a decree in his favour. There will be a declaration that the lease has been determined. There will be a decree for possession. There will be a decree for arrears of rent up to the date when the lease was determined, that is the 15th June, 1925; and thereafter until possession is given a decree for mesne profits at the rate at which rent is payable, and costs on scale No. 2.

N. H.

Suit decreed.

(6) (1911) 1 K. B. 905 at p. 925; 80 L. J. K. B. 713; 104 L. T. 290; 55 S. J. 290.

(7) (1924) 1 K. B. 716; 93 L. J. K. B. 273; 130 L. T. 691; 68 S. J. 367; 40 T. L. R. 223.

(3) (1840) 9 Car. & P. 734.

(4) (1864) 3 H. & O. 446; 34 L. J. Ex. 19; 11 Jur. (N. S.) 181; 13 W. R. 389; 11 L. T. 606; 159 E. R. 605; 140 R. R. 547.

(5) (1899) 16 T. L. R. 59,

ODDH CHIEF COURT.

DIVORCE CASE No. 7 OF 1927.

October 24, 1927.

Present:—Mr. Justice Pullan.

MRS. NAN GREENWOOD—PETITIONER

versus

MAJOR L. V. GREENWOOD—

RESPONDENT.

Divorce Act (IV of 1869), s. 2—Parties not domiciled in British India—Residence and adultery within British India—Jurisdiction of Courts of India to grant divorce—Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V, Ch. 40), applicability of.

Courts in India have jurisdiction under the Divorce Act to grant a divorce which will be valid for all purposes throughout British India in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in British India. The fact that the parties are not domiciled in British India and that the decree will not be binding for international purposes, is no bar to the granting of a petition for divorce. The Indian and Colonial Divorce Act, 1927, has no application to a marriage celebrated in the Irish Free State.

Petition under s. 10 of the Indian Divorce Act (IV of 1869) for dissolution of marriage.

Mr. Moti Lal Saksena, for the Applicant.

JUDGMENT.—Mrs. Nan Greenwood has applied in this Court under s. 10 of the Indian Divorce Act for dissolution of her marriage with Sergeant Major L. V. Greenwood of the Gloucestershire Regiment. The petition is not contested and a letter has been filed by the petitioner written, as she states on oath, by her husband which gives ample ground for divorce. It appears from this letter that he left his wife more than two years ago in order to live with another woman, a certain Mrs. Pearl Cottrell, who is mentioned in the petition. In this letter the respondent definitely refuses to make any provision for the petitioner or to leave the woman with whom he is living. There is, therefore, *prima facie* a case entitling the petitioner to a decree for divorce on the ground of adultery and desertion.

The petitioner states and there is no reason to doubt her statement that there is no collusion between herself and her husband, and it is not necessary for her to prove cruelty on his part in view of his admission of adultery and desertion.

The only question which gives rise to any difficulty is that of jurisdiction. Neither of the parties are proved to be domiciled in India. The petitioner is an Irish woman and the respondent is an Englishman. They were married in a Roman Catholic

Church in Cork in South Ireland in the year 1915. They have been living in India since the year 1921. They are still resident in India and the petitioner states that she has no intention of leaving the country and that her husband before deserting her also expressed his intention of remaining in India when he obtains a discharge from the Army. But at present he is a Sergeant Major in a British regiment and cannot as such acquire Indian domicile. Thus for purposes of international law no divorce can be granted to the petitioner, but the Indian Courts are authorised under the Indian Divorce Act to grant a petition, which will be valid for all purposes throughout British India, in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India. I opine that the recent English enactment, the Indian and Colonial Divorce Act, 1926, has no application to a marriage celebrated in what is now the Irish Free State. Both the required conditions are present in this case and I, therefore, decree this petition *ex parte* and grant the petitioner a divorce from her husband Sergeant Major L. V. Greenwood. She will be at liberty to apply to this Court after expiry of six months from to-day to have her decree made absolute. At present no application is made for alimony, but the petitioner claims her costs. I allow the costs of the petitioner which amount to:—Rs. 20 for the stamp, Re. 1 for process fee, Rs. 2 *vakalatnama* and Rs. 100 Pleader's fees according to the certificate filed.

A. N. A.

Divorce granted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 441 OF 1927.

November 18, 1927.

Present:—Mr. Justice Zafar Ali.

NUR DIN—PLAINTIFF—APPELLANT

versus

ALLAH DITTA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Contract Act (IX of 1872), s. 134—Principal and surety—Abatement of suit against principal debtor—Discharge of surety.

Where a suit against the principal debtor abates in consequence of his death and failure of the plaintiff to bring his legal representative on the record in time, the sureties are discharged under s. 134, Contract Act.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 12th November, 1926, reversing that of the Subordinate Judge, Fourth Class, Lahore, dated the 15th May, 1926.

Mr. *Badri Nath*, for the Appellant.

Mr. *M. R. Wali*, for the Respondents.

JUDGMENT.—According to the bond sued one Charagh Din was the principal debtor and Nur Ilahi and Allah Ditta were his sureties. One of the sureties died and the olige brought a suit against the principal debtor and the surety who was alive, and the sons of the other, to recover his bond debt. The principal debtor also died during the pendency of the suit but his death was not brought to the notice of the trial Court and that Court eventually passed a decree against all the defendants. On appeal by one of them it was argued that the decree against the principal debtor was a nullity, having been passed after his death without bringing his legal representatives on the record that as the suit has abated against the principal debtor by the omission of the plaintiff the sureties were discharged. The learned Additional District Judge, who heard the appeal accepted this contention and dismissed the suit.

The plaintiff has come up to this Court in second appeal and it is argued on his behalf that though the suit had abated as against the principal debtor the sureties were not discharged. The principle of law applicable to the case is embodied in s. 134 of the Indian Contract Act (IX of 1872). The relevant portion of the section runs thus: "The surety is discharged * * by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor". Now the legal consequence of the omission on the part of the creditor to bring the legal representatives of the principal debtor on the record was that he (the creditor) had no remedy left against his representatives, that is, to say they were discharged. The section is so clear that no other interpretation can be placed upon it.

I, therefore, dismiss the appeal with costs.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1924.

April 27, 1927.

Present :—Mr. Justice Devadoss and
Mr. Justice Jackson.

DESU RATTAMMA—DEFENDANT No. 2

—APPELLANT

versus

KAKARAPARTHI KRISHNAMURTHI
AND ANOTHER—PLAINTIFF AND—DEFENDANT
No. 1—RESPONDENTS.

Sale of goods—Payment of advance, whether constitutes deposit—Right of vendor to retain amount on default by purchaser.

In mercantile contracts for sale of goods, when a seller accepts an "advance" from the purchaser, he cannot be held to take the amount, in the absence of evidence to the contrary, as a deposit with all its implications under the Common Law, so as to entitle him to retain the money in case of default by the purchaser in the performance of the contract. [p. 483, col. 2.]

Collins v. Stimson (1) and *Howe v. Smith* (2), relied on.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Bezwada, in A. S. No. 36 of 1924, presented against that of the Court of the District Munsif, Bezwada, in O. S. No. 158 of 1922.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *L. S. Veeraraghava Ayyar*, for the Respondents.

JUDGMENT.

Jackson, J.—Plaintiff sued for recovery of Rs. 1,497-5 advance made by him as purchaser to defendants as vendors in respect of a sale of gunnies, and damages. The lower Courts have found that the transaction fell through owing to plaintiff's default. Therefore, there is no question of damages, but the lower Appellate Court has decreed the return of plaintiff's advance of Rs. 750, though without interest, except from date of suit. The 2nd defendant appeals. First respondent files a memorandum of objections.

The question for determination is, strictly speaking, one of fact, whether there was an implied contract between the parties that the money paid in advance should be treated as security for plaintiff's fulfilment of the bargain, and as such liable to be forfeited on plaintiff's default. There can only be an implied contract because no express stipulation is to be found in the agreement itself Ex. A, which merely runs "you have paid advance Rs. 750 at Rs. 15 per bale. Hence the same has been received."

Looking at the language of this instrument, can it be inferred that the advance was made as a guarantee for the performance of the contract?

In the English cases it has usually been so inferred that a deposit is paid as guarantee. In *Collins v. Stimson* (1) and *Howe v. Smith* (2) the word 'deposit' has been held to carry that inference. Lord Bowen in the latter case observes: "It is a deposit.....and the special clause in the contract does not deprive the deposit of the character which it would bear if there were no special clause.....a deposit is in the ordinary parlance of business man a security for the completion of the purchase." Then Lord Fry explains how that common understanding has grown up deriving this idea of security from Phœnician and Roman sources. So that it may be said that if the money paid in advance is intended to be a deposit of this character, and the buyer is unwilling to pay the goods, the seller may retain the deposit *cf.* Halsbury's Laws of England, Vol. XXV, page 237. Benjamin on Sales is equally clear as regards an undoubted deposit. A deposit is no doubt not recoverable. Exhibit VI, page 1084. But "where part of the price has been paid otherwise than as a deposit and, as in this case there is no question of damages, the buyer may perhaps be entitled to recover the part of the price paid," page 1090.

That in sales of goods apart from conveyances of real property it is not customary to give money paid in advance the peculiar characteristics of a deposit, is laid down by the learned Chief Justice of this Court in *Manepalli Satanarayana-murthi v. Thommandra Erikalappa* (3): "I can content myself with saying that it is never the practice in mercantile contracts, to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit." This, of course, is not, as was suggested, a ruling running counter to the established English cases, but a statement that in mercantile contracts in England, as a matter of fact, it is not inferred that money paid in

advance is in the absence of words to that effect, a deposit by way of security.

That being so it would be indeed hazardous to infer that is in the Kistna District when a vendor accepts what he calls "advance" he is taking a deposit clothed with all the implications which that term has acquired in the west, through the course of the European civilization. Far safer is the finding of the learned Subordinate Judge that as the defendants neither alleged nor proved that the advance was earnest money, and as it was treated merely as part payment of purchase-money in the account books of the defendants it is not a deposit in the strict sense of the word. Even if that finding can be canvassed in second appeal, there is no reason why it should be reversed.

In a case of this sort which turns on the interpretation of a particular contract, little is to be gained by considering how Courts have interpreted other contracts. In *Manian Patter v. Madras Railway Co.* (4) and *Natesa Aiyar v. Appavu Padayachi* (5) there was a clause of forfeiture; in *Vellore Taluq Board v. Gopalsami Naidu* (6) the deposit was in terms by way of security; it was a deposit as earnest money in *Roshan Lal v. Delhi Cloth and General Mills Co. Ltd.*, (7) and also in *Mohammad Habib-ul-lah v. Mohammad Shafi* (8). In *Bishan Chand v. Radha Kishan Das* (9) it is also found that the money was paid as a guarantee for the ruling is based on *Ex parte Barrell, In re Parnell* (10) which proceeds on that assumption.

Therefore, the finding of the lower Court in this matter is confirmed and the appeal is dismissed with costs.

The 1st respondent in a memorandum of objections claims interest on the advance ordered to be returned and also damages. It is stipulated in Ex. A that the advance should bear interest at $\frac{1}{2}$ per cent. per mensem. "The lower Appellate Court disallows interest because it was not claimed apart from damages. The mere fact that

(4) 29 M. 118; 16 M. L. J. 37.

(5) 19 Ind. Cas. 462; 33 M. 173; (1913) M. W. N. 341; 24 M. L. J. 483; 13 M. L. T. 391.

(6) 26 Ind. Cas. 226; 38 M. 801; 17 M. L. J. 84 (F. B.).

(7) 7 Ind. Cas. 794; 33 A. 166; 7 A. L. J. 1019.

(8) 50 Ind. Cas. 948; 41 A. 324; 17 A. L. J. 339.

(9) 19 A. 489; A. W. N. (1897) 123; 9 Ind. Dec. (N. S.) 316.

(10) (1375) 10 Ch. A. 512; 33 L. T. 115; 23 W. R. 846.

(1) (1883) 11 Q. B. D. 142; 52 L. J. Q. B. 440; 48 L. T. 828.

(2) (1884) 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(3) 92 Ind. Cas. 962; 50 M. L. J. 150; 23 L. W. 396; (1926) M. W. N. 282; A. I. R. 1926 Mad. 410.

damages were also wrongfully claimed can hardly invalidate a legitimate claim for interest. So far the memorandum of objections must be allowed. First respondent is entitled to interest at the contract rate. But there is no reason for holding, nor was it pressed in argument, that the lower Courts have erred in disallowing damages. So far the memorandum of objections fails. Therefore, the 1st respondent will not have the costs of this memorandum.

Devadoss, J.—I agree.

V. N. V.

Appeal dismissed.

A. N. A. *Cross objections allowed in part.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 377 OF 1927.

June 8, 1927.

Present:—Mr. Justice Dalip Singh.

BHOLA—DEFENDANT—APPELLANT

versus

SHEO CHAND AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Estoppel—Party taking particular position in previous litigation—Change of position in subsequent litigation, whether permissible.

It is a well-known rule of law that where a party has asserted a certain position in a previous litigation he cannot re-agitate the matter on the assumption of fresh fact against persons who were parties whether as plaintiffs or defendants in the previous suit. [p. 485, col. 1.]

Second appeal under s. 41 of the Punjab Courts Act VI of 1918, against the decree of the Senior Sub-Judge, Rohtak, dated the 12th October, 1926, reversing that of the Fourth Class Sub-Judge, Jhajjar, District Rohtak, dated the 29th March, 1926.

Mr. Shamair Chand, for the Appellant.

Mr. Mehr Chand Mahajan, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued for a declaration to the effect that 3 *bighas* 10 *biwas* of land belonged to them and were not liable to partition on the application of all the proprietors of Pana Harsa in Mauza Matan Hel. The facts are that one Har Dayal was a proprietor of the land along with some other land 16 *bighas* odd in all. After his death Musammatt Nanhi, who was either his widow or his mother, succeeded to a life-estate. After the death of Musammatt Nanhi, Musammatt Ladho, who is either the daughter or sister of Har Dayal, was in possession of the whole of

the property of Har Dayal. On the 8th of January, 1914, Musammatt Ladho sold the land in dispute to the plaintiffs and mutation was attested on the 23rd of February, 1915, and according to this mutation possession had been delivered to the vendees. At the mutation some of the proprietors protested against the mutation on the ground that Musammatt Ladho had no title. On the 3rd of April, 1914, Shadi and Mathra two of the proprietors brought a suit as representatives of the proprietary body against Musammatt Ladho only on the ground that after the death of Har Dayal his land reverted to the proprietary body. The present plaintiffs who are also members of the proprietary body were plaintiffs in that suit and the suit included the whole of the property of Har Dayal including the 3 *bighas* 10 *biwas* now in dispute. The suit was decreed on the 14th of April, 1915, and Musammatt Ladho's appeal was dismissed on the 6th of January, 1916. Some proceedings were taken in execution and symbolical possession was delivered to one Ram Karan on behalf of the proprietary body on the 25th of March, 1918, and on the 29th of April, 1918, the execution proceedings were filed in full satisfaction of the decree. Actual possession seems to have remained all along with the present plaintiffs. The proprietors next applied for partition of the *shamilat* including the land in suit and the plaintiffs have brought the present suit for a declaration that they are the sole owners of the land in dispute and that it is not liable to partition.

The trial Court held that the plaintiffs were bound by the findings given in the previous case and were estopped from contesting the title of the proprietary body. It accordingly dismissed the suit. On appeal the learned Senior Sub-Judge held that the suit brought by Shadi and Mathra in a representative capacity was brought without giving notice of the case to all the proprietors and the plaintiffs were not, therefore, bound by the judgment in the previous case. He next held that there was no complete delivery of possession because only symbolical possession and not actual possession was delivered and the present defendants, i. e., the proprietors, decree for possession was now, time barred. He further held that under O. II, r. 2, sub-cl. (3) of the Civil Procedure Code as the defendants had not impleaded the present plaintiffs in the previous suit as defendants the

defendants had, therefore, now no right to disturb the plaintiffs' possession. He, therefore, accepted the appeal and decreed the plaintiffs' suit with costs.

On appeal it has been urged that the learned Judge is wrong in holding that there was no notice to the plaintiffs. I find on the plaint in the previous suit that the Court ordered notice to issue to all the then plaintiffs according to the terms of O. I, r. 8 and presumably this order was complied with. The present plaintiffs, therefore, had notice of the suit.

It is argued next that the plaintiffs are bound by the decree in favour of the proprietary body either because it is *res judicata* or because the plaintiffs are estopped from denying the position that they took up as plaintiffs in the previous suit. I do not consider it necessary to decide whether the matter is *res judicata* for I certainly consider that the plaintiffs are now estopped from taking any position contrary to what they alleged in the previous plaint. They had full knowledge of the fact of the suit and it seems to me clear that the only possible inference from their conduct is that they allowed the other proprietary body to sue for possession of the whole land including the 3 *bighas* 10 *biswas* which had already been sold to them and of which they were in possession because they wished to share in the total property which had been left by Har Dayal and which amounted as previously stated to nearly 16 *bighas*. It seems clear, therefore, that they waived their exclusive title, if any, to 3 *bighas* 10 *biswas* and they are estopped from now alleging the contrary. It is a well-known rule of law that where a party has asserted a certain position in a previous litigation he cannot re-agitate the matter on the assumption of fresh fact against persons who were parties whether as plaintiffs or defendants in the previous suit. In this view of the case it is unnecessary to go into the other points that were raised by Counsel on either side.

I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

R. L.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 337
OF 1925.

July 22, 1927.

Present :—Mr. Justice Madhavan Nair
and Mr. Justice Curgenvin.

ADIVI KRISHNAYYA—APPELLANT

versus

THUMMALAPALLY SRIRAMULU

AND OTHERS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 183 (5)—
Execution application, unstamped, whether invalid—
Civil Procedure Code (Act V of 1908), O. XXI, r. 16—
Assignment of personal decree—Want of registration,
effect of.*

An unstamped execution application is not necessarily invalid. Where action is taken on the application and properties are attached it will save a subsequent execution application from limitation.

The assignment of a personal decree does not require registration under O. XXI, r. 16, Civil Procedure Code.

Appeal against the order of the Court of Godavari at Rajahmundry, dated the 4th of July, 1925, in I. A. No. 271 of 1924, in O. S. No. 34 of 1917.

Mr. K. Venkatramana Raju, for the Appellant.

Mr. G. Lakshmanan, for the Respondent.

JUDGMENT.—Two arguments have been urged before us: (1) That the execution petition dated 3rd September, 1920, is not a proper execution petition as it was not stamped at the time of presentation and, therefore, the petition dated 10th August, 1923, is barred by limitation. (2) That the assignment application under O. XXI, r. 16, of the Civil Procedure Code, is bad as it has not been registered. Both these arguments must be overruled. As regards the first, it has not been shown that, if an execution application is not stamped, it becomes necessarily invalid. Further, in this case action was taken on this application and properties were attached but no objection seems to have been taken by the appellant at that time. We hold, therefore, that the execution petition dated 10th August, 1923, was not barred by limitation.

There is no substance in the second argument also. There was a personal decree all along against the 1st defendant (the present appellant). It is conceded that the assignment of a personal decree does not require registration. The fact that in the same decree there was also a mortgage-decree against the 2nd defendant does

not make it necessary to pass against a personal decree against the 1st defendant after the sale of all the mortgaged properties, however necessary it may be to pass such a decree against the 2nd defendant.

In these circumstances we dismiss this civil miscellaneous appeal with costs.

V. N. V.

Appeal dismissed.

A. N. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2819 of 1926.

November 10, 1927.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Zafar Ali.

SHANKAR DAS AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

HUKAM CHAND AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Interest—Suit on mortgage—Interest from date of suit up to date fixed for payment, duty of Court to award.

In a suit on a mortgage the Court is bound to award to the mortgagee interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage-debt, at the rate stipulated in the mortgage-deed, unless the rate is penal or is excessive and the transaction is substantially unfair.

First appeal from the preliminary decree of the Senior Subordinate Judge, Sheikhupura, dated the 16th August, 1926.

Mr. Anant Ram Khosla, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for the recovery of a certain sum of money on the basis of a mortgage-deed; and the question for determination is whether the trial Judge was justified in disallowing interest from the date of institution of the suit to the date of payment. As pointed out in Mulla's Commentary on the Code of Civil Procedure, at page 106, the Court is bound to award to the mortgagee interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage-debt, at the rate stipulated in the mortgage-deed, unless the rate is penal or the rate is excessive and the transaction is substantially unfair. It is not suggested that interest at 12 per cent. per annum can be regarded as penal or that the transaction embodied in the mortgage-deed was unfair. The trial Judge has acted in an

arbitrary manner, and the appeal of the mortgagee must succeed.

We accordingly allow the appeal and direct the defendant to pay interest on Rs. 7,070 at 12 per cent. per annum, from the date of the institution of the suit up to the date on which the money was paid by him to the mortgagee. The sum thus calculated, together with the costs of the appeal shall be paid on or before the 1st of February, 1928. A decree in accordance with the terms of O. XXXIV, r. 4, Civil Procedure Code, shall be drawn. The respondents must pay the costs of this appeal.

R.L.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 37 of 1926.

July 27, 1927.

Present :—Mr. Percival, J. C., and Mr. Aston, A. J. C.

VIRJILAL VIRCHAND—APPELLANT

versus

DHARAMDAS THAWERDAS—

RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 69, 70—Order directing complaint to be made to nearest Magistrate of First Class—Debtor, whether should be called upon to show cause why such order should not be passed.

Under s. 70 of the Provincial Insolvency Act, the Insolvency Court has the alternative of either enquiring into an offence itself or, instead of inquiring into the offence under s. 69, of making a complaint thereof in writing to the nearest Magistrate of the First Class having jurisdiction. [p. 487, col. 1.]

Section 70, cl. (1) does not provide that notice is to be served on the debtor to show cause why a complaint in writing should not be made to the nearest Magistrate of the First Class having jurisdiction. It only requires that a notice shall be served, calling on him to show cause why a charge or charges should not be framed against him by such Magistrate. [*ibid.*]

Appeal against the order of Mr. Kincaid, Judicial Commissioner, dated the 5th May, 1925, in Insolvency No. 47 of 1923.

Mr. Kalumal Pahlumal, for the Appellant.

Mr. W. Lobo, for the Respondent.

JUDGMENT.—This is an appeal from the order of the learned Judicial Commissioner directing a complaint in writing to be made to the nearest Magistrate of the First Class having jurisdiction against the appellant of certain alleged offences in

contravention of s. 69 of the Provincial Insolvency Act V of 1920.

It appears that on a report submitted by the Official Receiver, the Judicial Commissioner ordered a notice to be served on the appellant unders. 70, cl. (1) of the Provincial Insolvency Act calling upon him to show cause why a charge or charges should not be framed against him. The notice was served on the appellant's Pleader on the 9th of April, 1926, and the date of hearing fixed was the 5th of May, 1926. On that day, the appellant's Pleader stated to the Court that his client had suddenly been taken ill. The Court was not satisfied with the explanation of the insolvent's absence, directed a complaint to be filed under s. 70, cl. (5) and forwarded to Mr. Richardson the City Magistrate for enquiry.

Mr. Kalumal for the appellant has produced a certificate from Dr. S. W. Anklesaria of the Epidemic Diseases Hospital to the effect that the appellant was admitted in the Hospital on the 5th of May, 1926, suffering from a mild attack of Diphtheria and was discharged on the 7th of May. He has also put in an affidavit to the effect that he was ill as an indoor-patient in the Karachi Hospital. Mr. Kalumal contends that a reasonable explanation for his client's absence at hearing of the notice was forthcoming and that his client had not had an opportunity of showing cause why action should not be taken against him in respect of the alleged offence and he has appealed that the order of the learned Judicial Commissioner should be set aside.

I am of opinion that no reasonable grounds for interfering with the order complained of are made out. Under s. 70 of the Provincial Insolvency Act, the Court has the alternative of either enquiring into the offence itself or instead of enquiring into the offence under s. 69 of making a complaint thereof in writing to the nearest Magistrate of the First Class having jurisdiction. Section 70, cl. (1) does not provide that notice is to be served on the debtor to show cause why a complaint in writing should not be made to the nearest Magistrate of the First Class having jurisdiction. It only requires that a notice shall be served, calling on him to show cause why a charge or charges should not be framed against him. In cases where the Court instead of itself enquiring into the offence under s. 69 makes a complaint in writing to the nearest Magistrate of the First Class,

the need for serving a notice on the accused to show cause why such a complaint should not be made does not exist. In the present case, the Court, no doubt, served a notice on the accused and such a notice would be necessary before the Court framed a charge against him or proceeded with the enquiry itself. But this procedure was not, however adopted. A complaint was filed in the Court of the learned City Magistrate and the appellant's proper course, in my opinion, is to make whatever defence he has in that Court.

Quite apart from these questions of law, it seems to me that there are certain very suspicious circumstances about the alleged illness of the appellant. He appears to have entered the Hospital on the very day when the notice matter was fixed for hearing. The Doctor's certificate shows that it was a mild case and his absence does not seem to me to have been satisfactorily explained.

Taking the circumstances into consideration, we dismiss this appeal.

P. B. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 473 OF 1927,
May 2, 1927.

Present :—Mr. Justice Devadoss.

S. V. KAILASANATHA AYYAR—
PETITIONER

versus

M. NALLASIVAM PILLAI—RESPONDENT.

Madras Religious Endowments Act (II of 1927), s. 78—Ex parte order directing trustee to deliver possession without notice, legality of.

An *ex parte* order under s. 78 of the Madras Religious Endowments Act of 1927 directing a trustee to deliver possession without giving him notice or getting his explanation is illegal and is liable to be set aside.

It is an elementary principle of law that no order should be passed which prejudices a person without giving him an opportunity to show cause against it.

Petition, under ss. 115 and 151 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Tinnevely, dated the 21st March, 1927.

Mr. T. M. Krishnaswami Iyer, for the Petitioner.

Mr. B. Sitarama Rao, for the Respondent.

JUDGMENT.—This is an application by a trustee of Sri Krishnaswami Temple at Ambasamudram to set aside an order of the District Judge of Tinnevely, passed under s. 78 of the Madras Religious Endowments Act of 1927. The first contention raised before me is that the petitioner had no notice of the application and the learned District Judge passed an order *ex parte* without sending notice to the petitioner or getting any explanation from him. The respondent was only appointed as an additional trustee of the temple and at best he would be only entitled to joint possession with the petitioner. The order as drawn up directs the petitioner to hand over charge of Sree Krishnaswami Temple and other minor temples attached to it with all the properties belonging to them. I consider the order illegal because it was posted without giving notice to the person who was to be bound by it. It is an elementary principle of law that no order should be passed which prejudices a person without giving him an opportunity to show cause against it. I, therefore, set aside the order of the District Judge, direct him to restore the application to his file and dispose of it according to law after notice to the petitioner. The petitioner will have the costs of this application.

V. N. V.

*Petition allowed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1800 OF 1923.

November 10, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Zafar Ali.JAM BUDHA—DEFENDANT—APPELLANT
*versus*DASU RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.*Adverse possession—Co-sharer's possession when adverse.*

The possession of one co-sharer is the possession of all the co-sharers and in the absence of an ouster or overt act amounting to ouster, time does not run against the co-sharer who is not in actual possession of his share. In order to establish adverse possession, the co-sharer in possession must explicitly deny and repudiate the title of the other co-sharers to their knowledge and at least 12 years must expire from the date of denial and repudiation before his possession matures into ownership.

Second appeal from the decree of the District Judge, Multan, dated the 2nd May, 1923, affirming that of the Senior Subordinate Judge, Muzaffargarh, dated the 22nd December, 1922.

Mr. Hargopal, for the Appellant.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—The learned District Judge concurring with the trial Judge has held that the suit brought by the plaintiffs for possession of the immoveable property sold to his father by the defendant was within time and the only question for determination is whether the suit was barred by limitation. Now, it is beyond dispute that the defendant sold to the plaintiffs' father a certain share in joint property and the plaintiffs' father became, in pursuance of the sale, a co-sharer in that joint property. It has been frequently pointed out that the possession of one co-sharer is the possession of all the co-sharers and that in the absence of an ouster or overt act amounting to ouster, time does not run against the co-sharer who is not in actual possession of his share. In order to establish his adverse possession the co-sharer in possession must explicitly deny and repudiate the title of the other co-sharers to their knowledge and at least 12 years must expire from the date of the denial and repudiation before his possession matures into ownership. Now the learned District Judge holds that the adverse possession in the present case began only in 1910 and the suit was admittedly brought within 12 years from that date.

The defendant, therefore, has failed to establish the bar of limitation and the appeal preferred by him is dismissed [with costs].

R. L.

*Appeal dismissed.***PRIVY COUNCIL.**

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 12, 1927.

Present:—Lord Blanesburgh, Sir John Wallis and Sir Lancelot Sanderson.Lala JAGMOHAN SARAN—PLAINTIFF—
APPELLANT
*versus*Sahu DEOKI NANDAN alias
JWALA PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.*Limitation Act (IX of 1908), Sch. I, Art. 118—Suit*

to declare that adoption did not take place and is invalid—Limitation.

A suit for a declaration that the defendant was not in fact adopted and that his adoption is invalid is governed by Art. 118 of Sch. I of the Limitation Act, and will be barred by limitation if it is not instituted within six years of the date on which the plaintiff became aware of the fact that a claim was being made on the basis of the alleged adoption.

Appeal by special leave from a judgment and decree of the High Court, Allahabad (Sir Grimwood Mears, C. J., and Sir Promada Charan Banerji) dated May 3, 1922, reversing a judgment and decree of the Subordinate Judge, Moradabad, dated May 7, 1919.

Messrs. Dunne, K. C., and Dube, for the Appellant.

Messrs. Lowndes, K. C., and Wallach, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—As a result of the opening of this appeal by Mr. Dunne, it is possible for their Lordships to dispose of the case on a very short ground. It has been made clear that this action is in truth and substance a suit for a declaration that a particular adoption was invalid. It is plain that the fact that a claim was being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that he himself had attained majority nearly nine years before the suit was commenced. The suit being in substance one for a declaration to the effect just stated, their Lordships, on these uncontested facts, are of opinion that it is barred by Art. 118 of the Limitation Act. In these circumstances no useful purpose would be served by any further examination here and now of the matters in controversy, and for the reason that the suit is out of time their Lordships will humbly advise His Majesty that this appeal by the plaintiff should be dismissed. The appellant must pay the costs.

A. N. A.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Barrow, Rogers & Nevill.

Solicitors for the Respondents:—Messrs. T. [L. Wilson & Co.]

ODH CHIEF COURT.

SECOND CIVIL APPEAL No. 293 of 1927.

November 2, 1927.

Present:—Mr. Justice Misra.

MAHADEO SINGH—DEFENDANT—

APPELLANT

versus

HAR BUKHSH DUBE—PLAINTIFF—

RESPONDENT.

Evidence Act (I of 1872), s. 108—Person not heard of for more than seven years—Presumption of death but not of time of death—Mortgage by unauthorised person, validity of—Transfer of Property Act (IV of 1882), s. 43—Abandonment, what constitutes.

Under s. 108 of the Evidence Act when the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years there can be no presumption that he was dead at a particular time. [p. 490, col. 2.]

A, a Muhammadan widow, executed a mortgage of certain property at a time when it was not certain whether her husband was dead. In a suit upon the mortgage instituted more than seven years after her husband was heard of:

Held, that under s. 43 of the Transfer of Property Act the mortgage was valid. [*ibid.*]

The mere fact that a tenant leaves a particular village and goes to take residence in another village but retains control over his property situate in the village in which he originally resided, can be no indication of the fact that he intended to leave the village permanently. [p. 490, col. 2; p. 491, col. 1.]

Second appeal against the judgment and decree of the Subordinate Judge, Sultanpur, dated the 31st May, 1927, affirming that of the Munsif, Musafirkhana at Sultanpur, dated the 8th March, 1927.

Messrs. Mahabir Prasad Srivastava and Ram Bharosey Lal, for the Appellant.

Messrs. Hyder Husain and M. N. Khan, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit in which the plaintiff as a mortgagee claims possession of the property mortgaged. The facts of the case are: one Waris Ali owned certain trees situate in village Dakkhin Gaon, District Sultanpur. Defendant No. 1 is his wife, and defendant No. 2 his minor son. It was alleged that Waris Ali had left the village some eight years ago for Rangoon and had not been heard of since then. On the 22nd September, 1924, a usufructuary mortgage in respect of the trees in suit was executed by the widow of Waris Ali in favour of the plaintiff. The plaintiff alleged that he had been in possession of the trees but was illegally dispossessed in March, 1926, by defendants Nos. 3 to 5 who are the zemindars of the village. The plaintiff, therefore, claims

possession of the trees and also damages. Defendants Nos. 1 and 2 did not put in any defence. The suit was contested only by defendants Nos. 3 to 5. Their defence was to the effect that the mortgage-deed in suit was invalid on the ground that on the date when it was executed Waris Ali was not dead; and consequently defendant No. 1 had no right to mortgage the trees in suit, or in any case, it was contended, she had no right to mortgage more than 2 annas share in the trees in dispute. It was also contended that shortly after Waris Ali had left for Rangoon, defendant No. 1 left the village and began to reside in another village close by and consequently defendants Nos. 3 to 5 being *zemindars* of the village became entitled to the trees in suit by right of escheat.

The learned Munsif of Musafirkhana at Sultanpur, who tried the suit, held that Waris Ali had not been heard of for more than seven years, and consequently there was a presumption that he was dead, or in any case he must be presumed to be dead at the time when the inquiry was being made, and in that case the mortgage-deed executed in plaintiff's favour would be treated as a valid mortgage under s. 43 of the Transfer of Property Act. He also held that the mere fact that Waris Ali's widow had left the village to reside with her father in a neighbouring village, would not indicate that she had become '*mafrur*' and that she had left the village with an intention of permanently abandoning her residence therein. In this view of the case, the learned Munsif decreed the plaintiff's suit.

Defendants Nos. 3 to 5 appealed against the decision of the learned Munsif and the learned Subordinate Judge of Sultanpur, agreeing with the finding of the learned Munsif, dismissed the appeal.

In second appeal the same pleas are again raised on behalf of the defendant-appellant. I do not, however, see that there is any force in any of these contentions, and it appears to me that the decisions of the Courts below are quite correct and must be maintained.

As to the plea that the mortgage-deed in suit is invalid, I agree with the contention raised by the learned Pleader for the appellant that the mere fact that Waris Ali had not been heard of for more than seven years, would not raise any presumption that he was dead at the time when the

mortgage-deed was executed in September, 1924. In *Lal Chand Marwari v. Ramrup Gir* (1) it has been held by their Lordships of the Privy Council that under s. 108 of the Indian Evidence Act when the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years, there can be no presumption that he was dead at a particular time. The utmost that can be considered is that he was dead at the time when the suit was brought. I cannot, therefore, hold that on the evidence produced in the case it can be presumed that Waris Ali was dead in September, 1924, when the mortgage-deed in suit was executed by his widow in favour of the plaintiff. The only presumption which can justifiably be made, would be that he was dead on the 25th October, 1926, the date when the present suit was brought. It, however, appears to me that the plaintiff's mortgage has become a good mortgage under the provisions of s. 43 of the Transfer of Property Act (IV of 1882). Under that section when a transfer is made by an unauthorised person who subsequently acquires interest in the property transferred, the transfer operates on any interest which the transferor subsequently acquires during the time that the contract subsists. I, therefore, hold that the mortgage in suit is valid because Waris Ali must now be deemed as dead at the date of the suit and the mortgage must be considered to be an operative deed at that date.

As to the contention raised on behalf of the appellant that defendant No. 1 could not mortgage more than 2 annas share in the trees in suit, I am of opinion that the mortgage-deed cannot be read in that way. It is admitted that defendant No. 2, the son of Waris Ali, is a minor and lives under the protection of defendant No. 1. She must, therefore, be deemed to have executed the deed in the capacity of the guardian of defendant No. 2. I, therefore, overrule this objection.

As to the plea of escheat, I am of opinion that it has been rightly overruled by the Courts below. The mere fact that a

(1) 93 Ind. Cas. 280; 53 I. A. 24; 24 A. L. J. 105; A. I. R. 1926 P. C. 9; (1926) M. W. N. 203; 7 P. L. T. 163; 43 C. L. J. 249; 50 M. L. J. 239; 3 O. W. N. 335; 5 Pat. 312; 30 C. W. N. 721; 28 Bom. L. R. 855; 42 T. L. R. 159 (P. C.).

tenant leaves a particular village and goes to take residence in another village but retains control over his property situate in the village in which he originally resided, can be no indication of the fact that he intended to leave the village permanently. In my opinion defendant No. 1 cannot be considered to have abandoned the village to give rise to a right of escheat in favour of the defendant-appellant. This plea, therefore, has no force.

The appeal, therefore, fails and is dismissed with costs.

G. H.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 100 OF 1927.

September 27, 1927.

Present:—Mr. Justice Jai Lal.

BARKAT ALI AND OTHERS—PETITIONERS
versus

FATTU, DECREE HOLDER AND OTHERS—
JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 97, 98—Obstruction to delivery of possession to decree-holder—Court's power to order possession on Bailiff's report complaining obstruction—Notice to obstructor, necessity of.

A Court has no jurisdiction to pass an order under O. XXI, r. 98, Civil Procedure Code, directing the decree-holder to be put in possession of property upon the report of a Bailiff complaining of obstruction, without giving notice to the party against whom the complaint is made to appear and answer the same.

Petition under s. 44 of Act VI of 1918, for revision of the order of the Subordinate Judge, Third Class, Nakodar, District Jullundur.

Mr. Shamair Chand, for the Petitioners.

Mr. Muhammad Munir, for the Respondents.

JUDGMENT.—In a decree awarding possession of immovable property to the decree-holder a warrant of possession was issued by the Court. The Bailiff was obstructed by certain persons in his attempt to give possession to the decree-holder and a report was made to the Court describing the circumstances under which the possession could not be given to the

decree-holder. The Court thereupon sent a notice to the alleged obstructors to show cause why they should not be prosecuted, and, after recording some evidence, held apparently under O. XXI, rr. 97 and 98 of the Civil Procedure Code that the decree-holder was entitled to possession and that the obstructors should be restrained from offering any obstruction to the grant of possession to the decree-holder. This is a petition for revision of that order.

It is contended that no application such as contemplated by O. XXI, r. 97 of the Civil Procedure Code was made by the decree-holder and, secondly, that the Court never gave notice to the petitioners that it would investigate the matter as required by rr. 97 and 98 of O. XXI of the Civil Procedure Code. There is force in this contention. The lower Court under the circumstances had no jurisdiction to proceed with the enquiry which resulted in an order under O. XXI, r. 98, that the decree-holder be put in possession.

I accept this petition, set aside the order complained against and leave the parties to take what further steps they may be advised to take in the matter. The petitioners will have their costs against the respondent.

R. L.

A. N. A.

Petition allowed.

POUDH CHIEF COURT.

CIVIL REVISION No. 45 OF 1927.

November 17, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge.

RAM LAL—DEFENDANT—APPLICANT
versus

BADAL KHAN—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 8, 13—Suit for fees payable to Municipality for permission to sell from sites within Municipal limits—Jurisdiction of Small Cause Court—Suit for rent.

A suit to recover fees payable by a vendor of goods to a Municipality for permission granted to him by the Municipality to sell his goods from a site within the Municipal limits is cognisable by a Small Cause Court. It is neither a suit for rent within Art. 8 of Sch. II of the Provincial Small Cause Courts Act, nor a suit for dues payable by reason of an interest in immovable property within Art. 13 of the said Schedule. [p. 493, col. 1.]

Revision, under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) and s. 115 of the Civil Procedure Code against the judgment of the First Additional Judge, Small Cause Court, Lucknow, dated the 1st August, 1927.

Mr. K. P. Misra, for the Appellant.

Mr. Zahur Ahmad, for the Opposite Party.

JUDGMENT.—This application involves the decision of several questions. Under the provisions of s. 265 of Local Act II of 1916. (The United Provinces Municipalities Act) a person is not allowed to expose any article for sale, whether upon a stall or booth or in any manner, so as to cause obstruction in any street, and is not allowed to deposit or suffer to be deposited any building materials, box, bale, packages or merchandise in any street without the written permission of the Board and is liable to prosecution and to a fine of Rs. 50 for transgressing these provisions. It is, however, stated at the end of that section, that nothing contained in that section shall apply to any obstruction of a street permitted by the Board under any section of the Act, or any rule or bye-law made, or license granted thereunder. The word 'street' as defined by s. 2 (23) of the Act includes the land up to the defined boundary of any abutting property. Thus in the word "street" is included the *patri* or side walk. Under the provisions of s. 293 (E) of the same Act, the Board is authorised with the sanction of the Local Government to make bye laws consistent with the Act, and with other rules, permitting, prohibiting, or regulating the use or occupation of any public streets or places by itinerant vendors or by any person for the sale of articles, or for the exercise of any calling, or for the setting up of any booth or stall, and providing for the levy of fees for such use or occupation. The Lucknow Municipal Board has in accordance with the provisions of s. 293 (E) framed bye-laws, which have been sanctioned by the Local Government for the levy of fees from persons selling or exposing for sale any goods otherwise than as hawkers, or setting up any stall or booth, or allowing any cart or animal to stand for business in any public street or place except in certain specified places on payment of fees. Amongst the places which are not excepted are the *patri* or side walks of all roads within the Municipal

limits. The present application is concerned with a portion of the Sitapur road which is within the Municipal limits. The bye-laws in question lay down that persons selling articles on these *patri*s are liable to pay certain fees. These fees are called *tahe-bazari* fees. The name is unimportant. The questions are what is the authority to charge these fees and what is the nature of the fees charged. I have already stated the authority. The nature of the fees is clear. They are fees for permission to do certain acts, the acts in question being the sale of goods in certain places. The fees are assessed according to the circumstances of the sale. An itinerant vendor selling vegetables loaded on a pony has to pay an anna a day for the privilege if the sale takes place within these limits. A man selling goats has to pay to the Municipality a fee of six pies per goat sold. Amongst these fees are fees for persons selling off stands. Such dealers as prefer to adopt this method are permitted to sell their wares from a site and they pay per day according to the area of land occupied. There are no contracts, no agreements, and no rents. The Municipality has authority to refuse to grant permission to a person to carry on such business, but if that permission is not refused a man selling his goods from a site is permitted to select his own site and to change his site at will. Apparently what happens is that the first comer gets every day his choice of vacant sites, subject to the reservation of certain sites for certain established traders as a matter of good feeling among the traders themselves. This preamble is necessary in order to explain some of the questions raised in the application.

It appears that the Lucknow Municipality, instead of collecting these fees in this particular area of the Sitapur road through their own servants, gave a contract to the plaintiff in these Small Cause Court suits a man of the name of Badal Khan to collect these fees. The Board farmed out the fees to Badal Khan. Badal Khan has instituted a certain number of suits in the Small Cause Court to recover certain of these fees. The application raises the question as to whether such suits as these can be instituted in a Small Cause Court under the provisions of Act IX of 1887. The learned Counsel, who appears against Badal Khan, has argued that these suits which are suits brought against

persons who were occupying a certain area of land, are in reality suits for rent, and are thus suits excepted from the cognisance of the Court of Small Causes under the provisions of cl. 8 of the Second Schedule, and in the alternative he argues that they are suits to enforce the payment of dues payable to a person by reason of his interest in immoveable property, and are thus excluded from the cognisance of the Court of Small Causes under cl. 13 of the same Schedule. I do not consider that these suits are for either such relief. They are certainly not suits for rent. In order that a suit can be a suit for rent there must be a lessor and a lessee, and that involves the existence of an agreement to give out the land on one side and to take it on the other side. Here the Municipal Board in no way leases the site. The man takes the site at his own free will, occupies it for a few hours and pays fees, not for the occupation of the site, but for the privilege of selling goods upon the site. There is no real distinction between such a person who sells his goods seated with the goods laid out upon the ground and a person who sells his goods in standing with the goods in a tray. Each pays the fees for the privilege of vend, not for the occupation of the land. It is true that the fees increase according to the extent of the land upon which the vendor has laid his goods, but the suits are not, in my opinion, suits for rent. They are suits for fees. Suits for fees under the provisions of cl. 13 are excepted from the cognisance of a Court of Small Causes only when the fees are of the nature of *malikana* or *haq*. The fees in question are not of the nature of *malikana* or *haq*. The suits are not suits for dues payable to a person by reason of his interest in immoveable property. They are suits for fees payable for the privilege of doing certain specified acts. In these circumstances I find that the suits were brought rightly in a Small Cause Court. I am unable outside these clauses to find any other clause excepting these suits from the cognisance of the Small Cause Court.

The next point which has been argued by the learned Counsel supporting this application is that the Municipal Board is not the owner of that portion of the *patri* on which his clients carried on their business but that that portion of the *patri* had been transferred to a body called the

Lucknow Improvement Trust, and that the Municipal Board had no longer any right to collect fees in respect of persons carrying on business in that portion. There is no evidence on the record to support this objection. The applicant's case is that he was wrongfully debarred from producing evidence. I do not find that he was wrongfully debarred from producing evidence. I do not consider that the applicant has any grievance in this matter. The remaining arguments were directed to questions of fact. I see no reason to interfere thereon. I therefore, dismiss this application with costs.

A. N. A.

*Application dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1062 of 1927.

November 10, 1927.

Present.—Mr. Justice Tek Chand.

WADAHAWA—DEFENDANT—APPELLANT

versus

JAI KISHAN DAS—PLAINTIFF—

[RESPONDENT.

Expert evidence—Report, whether admissible—Examination of expert, necessity of.

Reports of experts are not legal evidence unless they appear in Court as witnesses and are examined in respect of their opinion.

Second appeal from the decree of the District Judge, Sialkot, dated the 24th February, 1927, varying that of the Subordinate Judge, Fourth Class, Narowal, dated the 24th of August, 1926.

Mr. Balkishen Mehra, for the Appellant.
Messrs. Lal Chand and Hazara Singh, for the Respondent.

JUDGMENT.—The plaintiff instituted the suit out of which this second appeal has arisen, for ejectment of the defendant from two houses (Nos. 89 and 90) which he alleged the defendant had mortgaged to him with possession and in respect of which he had executed rent deeds in his favour. The trial Court decreed the suit with regard to house No. 89 but dismissed it with regard to house No. 90 holding that the relationship of landlord and tenant was not proved in respect of that house. On appeal the learned District Judge reversed this finding and held that there was sufficient oral and documentary evidence on the record to prove that the deed (Ex. P.) relating to house No. 90 had been duly executed

by the defendant. He accordingly decreed the plaintiff's suit in full. On second appeal the only point argued is that the lower Appellate Court has acted illegally in excluding from consideration the reports of experts from the Finger Print Bureau at Phillaur and Allahabad to the effect that the thumb-impression on the rent-deed in question did not tally with the admitted thumb-impression of the defendant. The learned District Judge held this evidence to be inadmissible because the experts were not examined in Court in respect of their reports. After hearing both Counsel I am of opinion that the learned District Judge acted rightly in excluding this evidence. It is obvious that the reports of the experts are not legal evidence unless they appear in Court as witnesses and are examined by both parties in respect of their opinion.

I, therefore, see no force in this appeal and dismiss it with costs.

R. L.

A. N. A.

Appeal dismissed.

OUDE CHIEF COURT.

SECOND CIVIL APPEAL No. 219 OF 1927.

November 1, 1927.

Present:—Mr. Justice Misra.

Lala GAURI SHANKAR—PLAINTIFF—
APPELLANT

versus

NISAM-UD-DIN KHAN AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Landlord and tenant—Planting of trees by tenant—Ejection of tenant—Mortgagee of trees, rights of.

The ejection of a tenant from his holding extinguishes his right in the trees which had been planted by him on it during the continuance of the tenancy and a mortgagee of such trees has consequently no right to retain possession of the trees after the ejection of the tenant. [p. 495, cols. 1 & 2.]

Chandi Singh v. Syed Arjumand Ali (1), followed.

Second appeal against the decree of the Sub-Judge, Lucknow, dated the 14th March, 1927, allowing the appeal preferred against that of the Munsif, Hawali, Lucknow, dated the 28th October, 1926.

Mr. Mukund Bihari Lal, for the Appellant.

Messrs. Zahur Ahmad and Zaibul Hasan, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendants-respondents to re-

cover Rs. 150 by way of damages on account of the cutting down of the trees standing in plots Nos. 196, 197 and 198 situate in village Karoni, Pergana Bijnor, District Lucknow. The plaintiff alleged that Chokhey, Nohri, Bhikhari and Dayal, sons of one Nanda were originally the owners of the groves standing on these plots, and that they had mortgaged them to Ganga Ghulam and Ganga Bishan under two usufructuary mortgage-deeds, dated the 20th January, 1900, and 8th August, 1910, respectively. It was further alleged that the plaintiff had obtained a transfer of the mortgagee rights from these persons by means of a sale-deed, dated the 4th December, 1916, and that he had been in possession since that date of the groves in suit as a mortgagee. It was further alleged that the defendant No. 1 had illegally cut *dhak* trees from the said groves on account of which they were entitled to damages amounting to Rs. 150. Defendant No. 2 was the *zemindar* of the village; and defendant No. 1 was his *ziledar* (collecting agent) acting on his behalf. It was for this reason that he was also impleaded as a defendant in the suit.

It was contended by the defendants that Chokhey, Nohri, Bhikhari and Dayal were not the owners of the groves in suit and that they had no right to mortgage the trees standing on the said plots. It was further contended that the persons mentioned above were merely in occupation of the plots in suit as tenants having planted the trees during their tenancy and that Nohri the survivor of them was ejected in execution of a decree from the Rent Court in the year 1923, the effect of which was that whatever rights he had in the trees were lost to him on his ejection; and that the plaintiff also lost all his rights as mortgagee on the extinction of the rights possessed by Nohri.

The learned Munsif of Hawali, Lucknow, who tried the suit, found that Chokhey and his brothers were the owners of the groves in suit and had a right to mortgage the trees; and that the ejection of Nohri the survivor of them from the plots in suit did not affect the rights of the plaintiff to the trees as a mortgagee of the said groves. On these findings he passed a decree for damages to the extent of Rs. 15 in favour of the plaintiff.

On appeal the learned Additional Subordinate Judge of Lucknow, took a different view. On a consideration of the entire

evidence on the record he came to the conclusion that Nohri and his brothers were not in occupation of the plots in suit as grove-holders but were in possession as tenants paying rent for the same and had planted trees on those plots while in occupation thereof as tenants. In this view of the case he held that Nohri and his brothers had no right to mortgage the trees and that the decree for ejectment passed against Nohri was, therefore, binding upon the plaintiff. He, therefore, decreed the appeal and dismissed the plaintiff's suit.

In second appeal it is contended before me that the decision of the learned Subordinate Judge is erroneous. It is again contended that Nohri and his brothers were in occupation of the plots in suit as grove-holders and had a right to transfer the trees standing on those plots and, therefore, the plaintiff as a mortgagee from them was entitled to remain in possession of the trees and the defendants were not entitled to cut them down.

It appears to me that the finding of the learned Subordinate Judge is binding upon me as a Court of second appeal. I have gone through the entire evidence on the record and I am of opinion that the finding is correct. Nohri and his brothers were not in possession of these plots as grove-holders but had planted the trees thereon during their tenancy. That being the case, it appears to me to be clear that they had no right to mortgage the trees. They had only a right to enjoy the produce of the trees as long as they were in possession of these plots as tenants but could not have a right of possession over the trees after the ejectment. I am supported in this view by a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Chandi Singh v. Syed Arjumand Ali* (1). It was held in that case that the ejectment of a tenant from his holding extinguished his right in the trees which had been planted in it during the continuance of the tenancy. The question has been exhaustively dealt with by Mr. Spankie, A.J.C., in that judgment, and I am in entire agreement with the view of law taken by him in that case. I, therefore, hold that the mortgages executed by Nohri and his brothers ceased to have any effect in law after the ejectment of Nohri from the plots in suit; and the plaintiff has no right to retain the posses-

sion over the trees after the ejectment of the surviving mortgagor.

I, therefore, dismiss this appeal with costs.

G. H.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 176 of 1927.

October 10, 1927.

Present:—Mr. Findlay, J. C.

SHRINIWAS BALKISANDAS—

DEFENDANT—APPLICANT

versus

MUNICIPAL COMMITTEE, NAGPUR—

PLAINTIFF—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 1—Suit for damages for use and occupation, whether triable by Small Cause Court.

A suit against a trespasser for damages for use and occupation is triable by a Small Cause Court.

Vira Pillai v. Rangasami Pillai (1) and *Krishna Prosad Nag v. Maizuddin Biswas* (2), followed.

Revision against the order of the Small Cause Court Judge, Nagpur, dated the 19th March, 1927, in Small Cause Suit No. 2085 of 1926.

Mr. N. G. Bose, for the Applicant.

Mr. B. R. Mandlekar, for the Non-Applicant.

ORDER.—The present suit was brought by the Municipal Committee, Nagpur, against the present defendant-applicant for damages for the use and occupation of certain land, and decree was granted by the Judge of the Small Cause Court in favour of the plaintiff.

The first point urged in revision on behalf of the defendant-applicant is that the suit was excluded from the jurisdiction of the Small Cause Court under Art. 1, Sch. II of the Provincial Small Cause Courts Act. I am, however, wholly unable to regard the present suit as one which can properly be described as a suit for the profits derived from immoveable property. It is, on the contrary, a suit against a trespasser for damages for the use and occupation of land: cf. *Vira Pillai v. Rangasami Pillai* (1) and *Krishna Prosad Nag v. Maizuddin Biswas* (2).

(1) 22 M. 149; 8 Ind. Dec. (N. S.) 106.

(2) 17 C. 707; 8 Ind. Dec. (N. S.) 1013.

The only other ground pressed on revision is founded on the notice (A-1) which I have seen cause to admit on revision. It is suggested that it is unlikely that the two rooms in question would have been let out to the present applicant without also some adjoining land, but the plaintiff non-applicant has filed in this Court the office copy of this notice and when this is read along with the resolution of the Municipal Committee, of which page 2 is a copy, it is perfectly clear that, either through collusion with the present applicant or through some misapprehension, the *Muharrir* Mahebubali issued the notice in question in terms which were entirely unjustified. I, therefore, see no ground whatever for differing from the Judge of the lower Court in holding that the defendant-applicant had encroached on the land and am unable to interfere.

The application is accordingly dismissed. The applicant must bear the non-applicant's costs. Costs in the lower Court as already ordered.

G. R. D.

Application dismissed.

ODDH CHIEF COURT.

MISCELLANEOUS APPLICATION No. 640
OF 1927.

November 16, 1927.

Present:—Sir Louis Stuart, Kt., Chief
Judge, and Mr. Justice Raza.

Musammât BRAJ RANI—PLAINTIFF—
APPLICANT
versus

SIBTA DIN AND ANOTHER—DEFENDANTS—
OPPOSITE PARTY.

Oudh Courts Act (IV of 1925), ss. 11, 12 (2)—Application for declaration that case is fit one for appeal—Period of limitation—R. 7 in Ch. XII of the Rules framed by Chief Court, validity of.

The Chief Court of Oudh has authority under s. 11 of Act IV of 1925 to fix the period of limitation for an application for a declaration that a case is a fit one for appeal to the Bench under s. 12 (2) of the Oudh Courts Act. Rule 7 of the Rules framed by the Chief Court under s. 11 of Act IV of 1925 and published in the Gazette of 24th September, 1927 is not *ultra vires* and is applicable to an application under s. 12 (2) of Act IV of 1925 and the period of limitation for such an application is 30 days. [p. 498, col. 1.]

An application made after 30 days from the date of the judgment should ordinarily be refused unless the Judge deciding the case extends the period under the said rule. [*ibid.*]

Application under s. 12 (2), Oudh Courts Act IV of 1925, for leave to appeal from

the judgment and decree of Mr. Justice Raza, in S. C. A. No. 178 of 1927, dated August 8, 1927, and reported as 105 Ind. Cas. 132.

Mr. *Ishuri Prasad*, for the Applicant.

JUDGMENT.

Stuart, C. J.—(7th November, 1927.)—This is an application for a declaration that an appellate decree made by the Hon'ble Mr. Justice Raza sitting as a Single Judge of the Chief Court in second appeal is a fit decree for appeal to a Bench consisting of two other Judges of the Chief Court. The decree in question is dated the 8th of August, 1927. Section 12 (2) of Act IV of 1925 directs that before an appeal can be admitted from an appellate decree made by a Single Judge of the Chief Court to a Bench consisting of two other Judges of the Chief Court, the Judge who made the decree must make a declaration that the case is a fit one for appeal. Act IV of 1925 and the Limitation Act are both silent as to the period within which such an application should be made. Under s. 11 Act IV of 1925 the Chief Court may make rules to provide in such manner as it may think fit for the exercise of any of its powers by a Bench of two or more Judges of the Court. As s. 12 (2) directs that before a Bench of two Judges of the Court is competent to hear such an appeal, the Judge who made the decree must make a declaration that the case is a fit one for appeal, the question as to the period within which an application for such a declaration should be made is a question affecting the exercise of the powers of a Bench of this Court, and the question has to be provided for in rules made by the Court. Under the provisions of s. 122 of the Code of Civil Procedure (Act V of 1908) the Chief Court may from time to time after previous publication make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence. Before such rules become authoritative they must be approved by the Local Government and published in the Local Official Gazette. This Court worked after its inception on provisional rules which had been prepared before it came into being. As soon as it came into being on the 2nd November, 1925, the Court commenced framing permanent rules. These rules are not now absolutely complete. The rule to which this application

refers is r. 7 in Chap. XII. In the provisional rules it was laid that an application for a declaration could be made within ninety days of the date of the judgment. The Court, however, considered that this period was too long, and in the rule as finally drafted reduced that period to thirty days. The draft rule was published for information in the United Provinces Gazette Part II on the 18th of June, 1927. It was published with other rules. Persons wishing to object were directed to object on or before the 13th July, 1927. No one did object to this draft. The rules in question as published in the Gazette of the 18th of June, 1927, remained unaltered. They received the sanction of Government according to the provisions of s. 126 of the Code of Civil Procedure under G. O. No. 1153 VII-393, dated 8th September, 1927, from the Secretary to Government United Provinces to the Registrar of the Chief Court of Oudh, Lucknow. They were then published in the Gazette of the 24th September, 1927. As the rules stand now the period is thirty days. I have had to go into these matters as the application presented by the learned Counsel questions the validity of the rule upon the ground that the Court had no authority to make the rule. The suggestion is that the action of the Court was *ultra vires*. The application further suggests that as the Code of Civil Procedure and the Limitation Act have no express provision to cover the case, the limitation must be held to be governed by the provisions of Art. 181 of the First Schedule of Act IX of 1908, which lays down that in the case of applications for which no period of limitation is provided elsewhere in the Schedule or by s. 48 of the Code of Civil Procedure, 1908, the period of limitation is three years from the date when the right to apply accrues. According to the view, any person who wishes to obtain a declaration that an appellate decree made by a Single Judge of the Court is a fit decree to appeal to a Bench would be allowed three years from the date of the judgment within which to make the application. I have no hesitation in repelling this suggestion *in limine*. It is perfectly clear to me that the Court had authority to fix the period of limitation under the provisions of s. 11 of Local Act IV of 1925. I find that the rule so framed has received all the sanction that it could possibly be

expected to receive. It has been approved by the Local Government. It has been published in the *Local Official Gazette* and it now has the same authority as a rule contained in the First Schedule of the Code of Civil Procedure. The limitation for presentation of an appeal under s. 10 of the Letters Patent of the Allahabad High Court is provided for in a similar rule of the Allahabad High Court contained in r. 6 in Chap. III. The period of limitation is given as ninety days from the date of judgment appealed from. Under this rule the provision of s. 12 (2) and (3) of the Limitation Act (IX of 1908) are not given effect to. The period requisite for obtaining a copy of the decree and the judgment on which the decree is founded are not excluded. This clearly shows that Art. 156 of the First Schedule is not considered to have application and that such an appeal is not considered as an appeal to a High Court. It is, of course, not an appeal to a High Court. It is an appeal from the appellate judgment of a Judge of the High Court sitting singly to a Bench of two Judges which is allowed under the special provisions of s. 10 of the Letters Patent. The rule in question provides, that a memorandum of appeal need not be accompanied by a copy of the decree order or judgment appealed from. In these circumstances there is no doubt in my mind as to the fact that since the publication of that rule a person making an application for such a declaration more than thirty days after the date of the judgment will ordinarily have his application refused on the ground that it is time-barred.

This does not, however, conclude the matter. Rule 7 allows discretion for the admission of such an application by the Judge who has decided the case. The Judge who has passed the appellate decree in question can for good cause shown grant further time for presentation. Whether Mr. Justice Raza will consider that there is good cause in this case, when the applicant overlooked the fact that the proposed rule was published in the Gazette of June, and when it is clear upon the applicant's own statement that he did not even present the application within ninety days, but took the further benefit of a Gazetted holiday and a Sunday and has presented it to-day the 7th November, 1927, will be a matter for Mr. Justice Raza

to decide. I send the application to Mr. Justice Raza to decide in the first place whether he will admit it as being within time, and secondly whether he will be ready to grant the declaration desired on the full consideration of the merits of the case.

Messrs. *Ishuri Prasad* and *Kedar Nath*, for the Applicant.

Raza, J.—(March 16, 1927).—This is an application under s. 12 (2) of the Oudh Courts Act of 1925.

I decided the appeal on the 8th August, 1927. The present application was filed on the 7th November, 1927. This Court worked after its inception, on provisional rules, which had been prepared before it came into existence. As soon as the Court came into being on the 22nd November, 1925 it commenced framing permanent rules. In the provisional rules it was laid down that an application for a declaration under s. 12 (2) of the Oudh Courts Act could be made within 90 days from the date of the judgment. The Court considered that this period was long and reduced that period to 30 days in the rules as finally made. The rules were sanctioned by the Local Government and were finally published in the *Government Gazette* dated the 24th September, 1927. They came into force from the 1st October, 1927. As the rules stand now the period is 30 days as already observed. I am not prepared to accept the contention that the action of the Court in making the rules was *ultra vires*. As pointed out by Hon'ble Chief Judge, in his order dated the 7th November, 1927, the Court had authority to fix the period of limitation under the provisions of s. 11 of the Oudh Courts Act of 1925. The rule so framed has received all the sanction that it could possibly be expected to receive. It has now the same authority as a rule contained in the First Schedule of the Code of Civil Procedure. There is no doubt that since the publication of the rule in question a person making an application for declaration under s. 12 (2) of the Oudh Courts Act more than thirty days after the date of the judgment will ordinarily have his application refused on the ground that it is time-barred. The rule under consideration (r. 7, Chap. XII of the Oudh Chief Court Rules) allows discretion for the admission of such an application to grant further time if good cause is shown for its presentation. I have heard the applicant's learned Counsel. I am not

satisfied that there is any good cause in this case. The proposed rules were published in the *Government Gazette* of the 18th June, 1927. The rules were sanctioned by the Local Government on the 8th September, 1927, and were finally published in the *Gazette*, dated the 24th September, 1927, under this Court's Notification dated the 19th September, 1927. They came into force from the 1st October, 1927. However, the applicant did not think of presenting the application under consideration before the 7th November, 1927. Even granting that the applicant had good cause for not presenting the application before the 7th November, 1927, I am not prepared to grant the declaration desired on the full consideration of the merits of the case. I have considered my judgment of the 8th August, 1927. I have also heard the applicant's learned Counsel at some length. I am not prepared to declare that the case is a fit one for appeal.

Hence I reject this application.

G. H.

Application rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1239 OF 1924.

March 21, 1927.

Present :—Mr. Justice Devadoss.

R. NARAYANASWAMI IYER—DEFENDANT—APPELLANT

versus

VEDAMBAL AMMAL—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 28—Defective trial by shutting out relevant evidence—Power of Appellate Court to call for revised findings after taking such evidence.

Where the trial of a case is defective by reason of relevant evidence having been shut out or by refusal of an adjournment which should have been granted to enable a party to adduce all the evidence or for any other reason, the Appellate Court can ask the lower Court to take the evidence so shut out or to give the party, who had not the opportunity to adduce all his evidence, an opportunity to adduce evidence, and to record a finding on the evidence so taken. The mere fact that the Appellate Court has not set aside the decree of the lower Court, does not in any way take away the jurisdiction it has to set aside the judgment and direct the lower Court to take evidence and record fresh findings. [p. 499, cols. 1 & 2.]

Second appeal against the decree of the District Court, East Tanjore at Negapatam, in A. S. No. 300 of 1922, preferred against

that of the Court of the Additional Subordinate Judge, East Tanjore at Mayavaram, in O. S. No. 8 of 1921.

The Advocate-General and Mr. *M. S. Sankara Iyer*, for the Appellant.

Messrs. *A. C. Sampath Aiyangar* and *K. S. Venkatarama Aiyar*, for the Respondent.

JUDGMENT.—The first point raised in this second appeal is that the learned District Judge had no jurisdiction to send the case down to the Sub-Court for sending up revised findings. The Subordinate Judge who tried the case in the first instance refused a short adjournment to the plaintiff and closed the case. On appeal, the District Judge held that the Subordinate Judge could have granted the adjournment prayed for in the circumstances of the case and he sent the case down to the lower Court to take the evidence adduced by the plaintiff and any evidence adduced by the defendants and to submit revised findings. On receipt of the revised findings the District Judge disposed of the case. Mr. Sankara Iyer's contention is that the District Judge had no jurisdiction to call for revised findings in the case and he relies upon a recent decision of a Bench of this Court in *Venkatarama Aiyar v. Sundaram Aiyar* (1). If the Appellate Court wants additional evidence to be taken it must take the evidence itself or ask the lower Court to take the evidence and send it up. Where a trial is defective by reason of the trial Court excluding relevant evidence or by not giving an opportunity to the one party or the other to adduce all the evidence it can or where the trial Court shuts out evidence improperly and disposes of the case, the question is whether the Appellate Court can ask the trial Court to take the evidence shut out or to give an opportunity to the party which had been deprived of it to adduce all the evidence it wants and then to consider the whole evidence and send up revised findings. I think in a case where the trial is defective by reason of relevant evidence having been shut out or by refusal of an adjournment which should have been granted to enable the party to adduce all the evidence or for any other reason, the Appellate Court can ask the lower Court to take evidence shut out or to give the party, which had not the opportunity to adduce all its evidence, opportunity to adduce evidence and to record a finding on the evidence so taken. The appel-

lant could not complain if the learned Judge in asking for revised findings had at the same time set aside the decree of the lower Court. The mere fact that he has not set aside the decree of the lower Court, I do not think in any way takes away the jurisdiction he has to set aside the judgment and direct the lower Court to take evidence and record fresh findings. Here the learned Judge has practically asked the lower Court to re-try the case. Can it be said that his not setting aside the judgment of the lower Court has in any way taken away his jurisdiction to set aside all the findings of the lower Court and directing a re-trial. In *Venkatarama Aiyar v. Sundaram Aiyar* (1) the facts were different. As I read the judgment, it appears that the Appellate Court wanted some additional evidence to be taken. The law is that the Appellate Court should take the evidence or direct the Court from whose decree the appeal is preferred or any other Subordinate Court to take such evidence and send it up to the Appellate Court. That is r. 28 of O. XLI. In that case the Subordinate Judge who wanted additional evidence instead of taking the evidence himself or asking the lower Court to take evidence and send it up, called for revised findings in the light of the evidence directed to be taken which he had no power to do. I find this point against the appellant.

The next point urged is that the case found by the Judge is opposed to the averments in para. 8 of the plaint. The real question in this case is whether the suit properties were purchased in the name of the defendant's father *benami* for the plaintiff's husband? In para. 8 the plaintiff says that if any portion of the consideration came from the defendant's father she is willing to give credit for it. Mr. Sankara Iyer urges that inasmuch as the plaintiff in a way admits that a portion of the consideration came from the defendant's father, the learned Judge ought to have found what the amount was. The defendant's case was that his father paid the whole of the consideration, and he did not place the materials before the learned Judge as to how much of it came from the plaintiff's husband and how much from his father. He was for having the whole of the property or none at all. That being so, he cannot now complain that the learned Judge did not record a finding as to how much came from the defendant's father. The

(1) 92 Ind. Cas. 1945; (1925) M. W. N. 48.

learned Judge has carefully considered the evidence on record and Mr. Sankara Iyer is not able to point out any misstatements of fact or misreading of the evidence. I, therefore, dismiss the second appeal with costs.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1352 OF 1924.

March 30, 1927.

Present:—Mr. Justice Srinivasa Iyengar.

YENAMANDRA GANAPATI RAO—

PLAINTIFF—APPELLANT

versus

PENDAM NAGANNA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Inam—Suit for ejectment by plaintiff claiming to be pre-settlement inamdar—Inam found to be darmilla and not pre-settlement—Plaintiff's right to maintain suit in Civil Court.

A landlord claiming to be a pre-settlement inamdar sued to eject the defendants from their holding on the ground that they were tenants-at-will. The only ground on which the plaintiff sought to make out in both the Courts that the tenant was a tenant-at-will was because and only because he, the plaintiff landlord was a pre-settlement inamdar. The Court below found that the inam was a darmilla inam and not a pre-settlement inam, and directed the plaint to be presented to the proper Court:

Held, that it was not open to the plaintiff to contend in second appeal that even on the footing of the inam being darmilla inam the defendants were liable to be ejected in a suit in the Civil Court itself. [p. 501, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 32 of 1923, preferred against that of the Court of the District Munsif, Cocanada, in O. S. No. 322 of 1919.

Mr. C. Rama Rao, for the Appellant.

Mr. P. Somasundram, for the Respondents.

JUDGMENT.—This second appeal has been filed by the plaintiff. He sued as landlord to eject the defendants from their holding on the ground that they were tenants-at-will. There is no other allegation in the plaint. The issues framed in the case were as follows:—

“(1) Were the defendants-tenants from year to year under the plaintiff?

(2) Is the plaint land a pre-settlement inam?

(3) Is the 2nd defendant entitled to a permanent right of occupancy apart from the provisions of s. 6 of the Estates Land Act?”

The trial Court dismissed the suit. It is perfectly clear that there was before the trial Court no evidence whatever of any agreement of tenancy from year to year

or of anything from which a tenancy from year to year would be the only or necessary inference. In fact, it seems to me to be perfectly clear that the entire contest between the plaintiff on the one side and the defendants on the other both in the Court of first instance and in the lower Appellate Court ranged round the question whether the inam in favour of the plaintiff was or was not darmilla inam, the plaintiff contending that it was not a darmilla inam but was a pre-settlement inam and the defendants contending that it was a darmilla inam. The parties put their contentions in that manner with a view to avoid or secure the rights incidental to a darmilla inam as declared by the decisions of this Court. The Court of first instance having found that the inam was a darmilla inam and there was no evidence whatever that it was a pre-settlement inam, dismissed the suit of the plaintiff.

The lower Appellate Court while coming to the same conclusion with regard to the origin of the inam found that the order dismissing the suit was wrong and the proper order that should have been passed by the Court of first instance was an order merely returning the plaint to be presented to the proper Court and, therefore, the lower Appellate Court passed an order to that effect. This appeal is against that order.

Mr. Rama Rao on behalf of the appellant has drawn my attention to an unreported judgment of two learned Judges of this Court in S. A. No. 752 of 1922. Apart altogether from the inconvenience of such reference to unreported decisions it seems to me that the present case is one with regard to which the observations made by the learned Judges in that case would not apply. If in the present case the plaintiff had sought by any evidence which any Court of Law can regard as material evidence to establish his case of tenancy of the defendants as tenants-at-will apart from the nature of the tenancy of the plaintiff himself, no doubt the questions referred to and discussed by the learned Judges in their judgment in the said second appeal might have some bearing. But when we find, as I do find in this case, that the only ground on which the plaintiff sought to make out in both the Courts that the tenant was a tenant-at-will was because

And only because he, the plaintiff landlord, was a pre-settlement *inamdar* and in that he has failed and that the finding is that the *inam* was a *darmilla inam*, then it follows that it is not open to him now to ask the Court to speculate about any matters which he has not either averred or sought to prove. According to the decision of the learned Judges in this second appeal, as I understand it, even if it should be held that the *inam* is a *darmilla inam*, it may still be open to a landlord to show the real nature of the *inam* and from that to ask the Court to determine the legal incidents and the rights and obligations of the parties. On the analysis made by the learned Judge who delivered the judgment of the Court in that case with regard to the three ways in which the *darmilla inam* might come to be made and known as such no question could arise in second appeal if the plaintiff did not in the course of the evidence seek to show or establish any facts by reason whereof even though *inam* might be a *darmilla inam* he still must be regarded as a *darmilla inamdar* having rights to treat the tenants as tenants-at-will. If on a fair construction of the contest as it was understood and carried on in both the lower Courts I should come to the conclusion that the point in contest between the parties was merely this and that the parties took their success or failure on the determination of that issue and that issue alone, it seems to me, having regard to the manner in which the lower Appellate Court has found the issue against the plaintiff, the order of the lower Appellate Court directing the return of the plaint cannot be regarded as wrong. In that case no doubt there are certain observations by the learned Judges to the effect that the defendants it was that set up the plea of occupancy right and that every presumption should be made in favour of the plaintiff in such a case such as would make his suit maintainable and that on these considerations the appeal before them should be dismissed. But in this case the plaintiff did not come into Court setting up in the first instance any case of *darmilla inam* or any other tenure but simply with a case that the defendants were tenants-at-will and that the record made by the Revenue Officer that the *inam* was a *darmilla inam* was an erroneous finding. The burden of proving

that the finding was erroneous is clearly on the plaintiff. He who comes into Court asking for a declaration to that effect must make it out. The finding so far as that is concerned is against the plaintiff.

The other cause of action, namely, that the defendants are tenants-at-will, has not been sought to be made out independently of any question of tenure and the plaintiff's case having been throughout that the plaintiff was a pre-settlement *inamdar* and that, therefore, he had the rights claimed by him, and that having been found against, it seems to me that on the matter on which the parties went to trial the finding has been against the plaintiff and it is not now open to him to fall back upon any other speculations. The plaintiff's case having been a general one of the tenants having been merely tenants from year to year, it was open to the plaintiff to establish that not only by seeking to prove, as he did do, by showing that he was a pre-settlement *inamdar* but also by showing in the alternative if he could have done so that even though the Court should hold that it was a *darmilla inam* the object of the *inam* was such that he would still have a right to treat the defendants as merely tenants from year to year. That has not been done. On the decision by the majority of the Full Bench in the case of *Jurugumilli Brahmayya v. Chellaghali Achiraju* (1), the plaintiff is the land-holder within the meaning of the Estates Land Act and it is on that ground that his plaint has been returned to be presented to the Revenue Court. The learned Vakii for the appellant has also drawn my attention to another unreported decision by Wallace, J. I do not see what bearing the decision in that case has on the present case. There the learned Judge has referred to the allegations specially made in the plaint in that case to the effect that even at the time when the Estates Land Act came into force the plaintiff landlord was in possession of the property and that he let the property to the tenants and it was in respect of these matters that a finding was called for by the learned Judge. In this case there are no such allegations, there is no room for any such contention and there is no necessity

(1) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; A. I. R. 1922 Mad. 373.

for any such finding. I am, therefore, unable to hold that the order passed by the lower Appellate Court was wrong.

In the result the second appeal must be dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 83 OF 1925.

May 2, 1927.

Present:—Mr. Justice Waller and
Mr. Justice Madhavan Nair.

CHINNA NADAN—DEFENDANT No. 9—

APPELLANT

versus

A. R. V. ARUMUGAM CHETTI—PLAINTIFF
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Compromise decree—Provision for payment of lesser sum to decree-holder if paid within fixed time—Closing of Court before expiry of time fixed—Payment into Court on re-opening day, whether compliance with terms of decree—Time, whether of the essence.

By the terms of a compromise decree, the appellant was to pay to the respondent a certain sum of money in two months from a specified date. In default, the whole amount claimed in the suit was to be paid with interest and costs. Before the expiry of the two months the Court closed :

Held, that since the party had the option of paying either to the decree-holder or into the Court, a deposit of the amount into Court on the re-opening day, though beyond the period of the two months specified in the decree, was a sufficient compliance with the terms of the decree.

Sankaran Unni v. Raman (1), followed.

Where a person agrees to accept a lesser sum than is due to him in consideration of payment within a fixed period, time is of the essence of the contract.

Appeal against an order of the Court of the Subordinate Judge, Sivaganga, in A. S. No. 4 of 1924, preferred against that of the Court of the District Munsif, Sivaganga, dated the 30th August, 1923, in O. M. P. No. 221 of 1923 in O. S. No. 466 of 1921.

Mr. V. Ramaswami Ayyar, for the Appellant.

Mr. K. S. Venkatarama Ayyar, for the Respondent.

JUDGMENT.—The respondent sued the appellant to recover a sum of Rs. 2,293-6-3 with interest and costs. The suit was eventually compromised. By the compromise it was agreed that the appellant was to pay to the respondent Rs. 2,100 in two months from 9th March, 1925, that is to say,

on or before 9th May, 1925. In default, the whole amount claimed in the suit was to be paid by him with interest and costs. It was, of course, the intention that the money should be paid on or before the due date. Where a litigant agrees to accept a lesser sum than is due to him in consideration of payment within a fixed period, time is of the essence of the contract. In this case, however, the parties overlooked the fact that the Court would be closed for the vacation before 9th May. The appellant took advantage of that fact to delay payment till 11th June, when the Court reopened, thus extending the period of two months by one month and two days. The question is whether he was entitled to this advantage. Both the lower Courts found against him. There is a decision of Krishnan, J., in a case exactly similar to this *Sankaran Unni v. Raman* (1) which is entirely in favour of the appellant. The learned Judge held that under O. XXI, r. 1 of the Civil Procedure Code, the defendant had the option of paying either to the plaintiff or into Court, and that the deposit made on the re-opening day was sufficient compliance with the terms of the decree. When once it is conceded and we think that it has to be conceded, there being no distinction in this respect between a compromise and any other decree that a party has the option of paying either to the decree-holder or into Court no further argument is possible. We must follow that ruling and allow the appeal. As regards costs, however, we consider that the appellant should not be allowed any. Had he made an attempt to pay the respondent within the time agreed on and failed, the matter would have been different. As it is, he made no such attempt. The order will be that each party shall bear his own costs throughout.

V. N. V.

Appeal allowed.

A. N. A.

(1) 87 Ind. Cas. 560; 48 M. L. J. 596; 21 L. W. 469; A. I. R. 1925 Mad. 743; (1925) M. W. N. 566.

RANGOON HIGH COURT.

LETTERS PATENT APPEAL No. 62 OF 1926.

July 18, 1927.

Present:—Sir Guy Rutledge, Kt., Chief Justice, and Mr. Justice Brown.**MAUNG KIN LAY AND ANOTHER—
PLAINTIFFS—APPELLANTS***versus***MAUNG TUN THAING AND ANOTHER—
DEFENDANTS—RESPONDENTS.***Mortgage, usufructuary—Absence of registration—Redemption suit, whether maintainable—Suit for recovery based on title, effect of—Oral evidence, whether admissible—Pyatpaing, effect of—Evidence Act (I of 1872), s. 91.*

When a plaintiff sues for redemption alleging that possession of immoveable property was given to the defendant as security for a loan of Rs. 100 or upwards, but without the execution of any registered instrument, his suit would fail, as oral evidence would not be admissible to prove the transaction. [p. 503, col. 2.]

But if the plaintiff instead brings a suit merely for recovery of possession based on title, without alleging the usufructuary mortgage, he would be entitled to succeed if he can show his title, unless the defendant can show that he is in possession under a contract of sale. [p. 504, col. 2.]

The burden of proving such contract of sale would be on the defendant, and on his bringing evidence of such contract of sale, the plaintiff would be entitled to bring rebutting evidence that no such contract was entered into. Such rebutting evidence would in no way contravene the provisions of s. 91 of the Evidence Act. [*ibid.*]

The *pyatpaing* or report to the Revenue Authorities is signed not for the purpose of recording the transaction, but for reporting to the Revenue Authorities for revenue purposes what has been done. When all that a *pyatpaing* suggests is that a certain land is sold for a certain sum, it cannot bar oral evidence of the transaction under s. 91 of the Evidence Act. [p. 505, col. 1.]

Mr. *Kyaw Myint*, for the Appellants.Mr. *S. M. Bose*, for the Respondents.**JUDGMENT.**

Brown, J.—The land in suit was admittedly at one time the property of the respondents. In the year 1917, they made over possession of the land to appellants and received from the appellants the sum of Rs. 500. The transaction was entered in the land revenue registers as a sale, but it is admitted that no registered document was executed. The respondents say that the Rs. 500 was given by way of loan on the understanding that the land would be returned when the loan was re-paid. The appellants say that the land was made over under a contract of sale.

The trial Court held that the respondents' account of the transaction was the true one and decreed the suit, which was a suit for recovery of possession of land on payment

of Rs. 500. The trial Court's judgment was confirmed in appeal by the District Court and was subsequently again confirmed by a single Judge of this Court in second appeal. The appellants have been given a certificate under s. 13 of the Letters Patent to file a further appeal before a Bench of this Court and it is this appeal which is now before us.

It is not seriously contended that on the question of fact we can go behind the concurrent finding of all the three Courts which dealt with the case. But this appeal is argued on two grounds: *firstly*, it is urged that the suit was in fact a suit to redeem a mortgage and must fail because of the want of any registered document; and, *secondly*, it is contended that even if it be held that the suit should not fail on this ground, the terms of the contract between the parties were reduced to the form of a document in their report to the Revenue Surveyor and, therefore no oral evidence contradicting the terms of that report was admissible.

As regards the first point, reference has been made to the ruling in *Maung San Min v. Maung Po Hlaing* (1) by a Full Bench of which I was a member. In that case we held that when a plaintiff alleges that possession of immoveable property has been given to a defendant as security for a loan of Rs. 100 or upwards but without the execution of any registered instrument, oral evidence is not admissible to prove the transaction. In that case we were following a previous decision of the late Chief Court of Lower Burma in the case of *Ma Htwe v. Maung Lin* (2). It had been found by the learned Judge who made the reference to the Bench that the plaint in *Maung San Min's case* (1) was based on a usufructuary mortgage, and it was on that assumption that we came to our finding in the case. In his judgment the late Chief Justice remarked: "Had the plaintiff brought a suit merely alleging that she was the owner of the land and that the defendant was in wrongful possession thereof and claiming a decree for possession based on her title alone, there would be no objection to such a suit lying." That was, of course, merely an *obiter dictum* but it was an *obiter dictum* with which I expressed agreement in my judgment and which still seems to me to be correct. The same view

(1) 94 Ind. Cas. 567; 4 R. 1; A. I. R. 1925 Rang. 291; 4 Bur. L. J. 118.

(2) 33 Ind. Cas. 163; 8 L. B. R. 334; 9 Bur. L. T. 114.

was suggested in *Ma Htwe's case* (2) also. The question for decision is, therefore, whether the suit in the present case was a suit for recovery of possession based on title; or whether it was, in fact, a suit for redemption of the usufructuary mortgage. The plaint in the suit is headed "Suit for recovery and confirmation of possession of land." It then goes on to recite that the plaintiffs are the owners of the land and that in 1917 they borrowed Rs. 500 from the defendants and delivered possession of the land to them on the condition that they should pay Government revenue and enjoy rents and profits of the same in lieu of interest and that they would deliver possession of the same back to them on payment of the said sum of Rs. 500 but that the transaction was not effected by registered instrument. They finally ask for a decree for possession on payment of Rs. 500. It is true that the giving to them of a decree in the terms they ask would have the same effect as a decree for redemption of a usufructuary mortgage. But it is clear that the plaintiffs do not allege in the plaint the existence of any usufructuary mortgage. They definitely say that there was no registered instrument and it follows from that that no mortgage was effected.

The defence is that the intention of the parties was to effect a sale and that the plaintiffs had agreed to execute a registered instrument of sale. The position on the admitted facts was, therefore, this:—

The plaintiffs were the owners of the land and no title has passed either by way of sale or by way of mortgage because no registered instrument has been effected. The title, therefore, vests in the plaintiffs and ordinarily the person who owns land is entitled to possession thereof. On the facts alleged no mortgage was effected; the plaintiffs could not sue for redemption of the mortgage but they could sue for possession of the land based on title and I do not consider that the mere fact that they stated in their plaint what they allege to be the true facts can debar them from enforcing their title. It may be that they could have sued for possession of the land without any mention as to the claim of Rs. 500 and have treated that sum merely as a personal debt. They have, however, expressed their willingness to pay Rs. 500 as a condition precedent before obtaining their decree. If the present suit is bound to fail then it is difficult to see how any

plaintiff who had made over his land to a defendant on similar terms could ever recover possession of that land. In my view of the case, on the pleadings of the parties, the plaintiffs were owners of the land and the defendants were in possession and the plaintiffs were, therefore, entitled to possession unless the defendants could show that they had a good right to resist their claim. The transaction took place only about seven years before the suit was filed, and no question of limitation, therefore, arises. In such a case I consider that the position is as indicated by me in my judgment in *Maung San Min's case* (1); that is to say, it was open to the defendants to bring evidence to show that they were in possession under a contract of sale. But if they failed to prove this then the plaintiffs would be entitled to a decree.

The District Court in appeal held that the plaintiffs were entitled to plead a contract of mortgage; but, in my opinion, it is quite unnecessary to decide that point. The burden of proof lay on the defendants and on the defendants' bringing evidence of a contract of sale the plaintiffs were clearly entitled to bring rebutting evidence to show that no such contract was entered into. By doing this they would in no way be contravening the provisions of s. 91 of the Evidence Act, as their evidence could not be produced to prove the terms as to a contract of mortgage but simply to negative the evidence produced by the other side as to the existence of a contract of sale. There has been a clear finding by the Courts that the defendants failed to prove their contract of sale and that being so, I am of opinion that the plaintiffs were entitled to a decree.

It remains to consider the second point raised, which is to the effect that the parties having admittedly signed on a *pyatpaing* that *pyatpaing* contains the terms of their contract and that no oral evidence is admissible to contravene the written document. This is a somewhat revolutionary doctrine which, if accepted, would have a far reaching effect. These reports to the Revenue Authorities are of almost daily occurrence, but so far as I know, no such claim has been made with regard to them before.

Section 91 provides that when the terms of a contract have been reduced to the form of a document no other evidence shall be given of these terms except the document

itself. Now in the first instance what the plaintiffs desired to prove in this case was not a sale—that they cannot possibly prove—but a contract of sale. Looked at in that light it is clear that the *pyatpaing* relied on is evidence of no such contract. It purports to be a report of an actual sale. Further, I do not consider that in the *pyatpaing* the terms of the contract have been reduced to the form of a document within the meaning of s. 91. A document is described in s. 3 of the Evidence Act as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. The *pyatpaing* is signed not for the purpose of recording a contract but for the purpose of reporting to the Revenue Authorities for revenue purposes what has been done. It is true that such documents are referred to as evidence of what actually has taken place. But they do not purport to record in a formal manner the terms of the contract. In the present case all that the *pyatpaing* suggests is that the land is sold outright for Rs. 500. No terms of a contract beyond this are given in the *pyatpaing*, and admittedly the statement in the report is not legally correct.

In these circumstances I do not consider that the *pyatpaing* can be considered as a document recording the terms of the contract. In my opinion the contents of the *pyatpaing* in the present case do not bar the production of any oral evidence. And if it had debarred such evidence then it would have been fatal to the appellant's case.

I, therefore, think that no good reason has been made out for interference in this appeal and I would dismiss it with costs.

Rutledge, C. J.—I concur. The appeal is dismissed with costs.

N. H.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION Nos. 433

to 491 of 1925.

April 28, 1927.

Present :—Mr. Justice Wallace.

MEDDAI DE LAVOIT
THIRUMALAYAPPA MUDALIAR—
DEFENDANT—PETITIONER

versus

KARUPPAYI AMMAL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 6—Suit in Revenue Court for patta—Burden of proof of right to sue in special forum—'Kattukuthagai,' meaning of—Kattukuthagai village, whether 'estate'—Construction of documents.

In a suit by a tenant in a Revenue Court for issue of *patta*, the onus of proving that he is entitled to bring the suit in the Special Revenue Court lies on the plaintiff.

'Kattukuthagai' is in essence a lease or grant of land at a favourable rent. There is nothing in the term itself from which it can be inferred that a *kattukuthagaidar* is merely a renter or farmer of the *melwaram*.

It is not open to a Court to infer retrospectively from recent documents that an ancient grant was of *melwaram* alone.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise the decrees of the District Court, Tinnevely, in A. S. Nos. 278 to 292, 294 to 336 and 395 of 1913, preferred against those of the Court of the Sub-Collector, Tuticorin in S. S. Nos. 3 to 17, 21, 24, 26 to 65 and 23 of 1917.

Messrs. A. Krishnaswamy Iyer, and M. Balasubramania Mudaliar, for the Petitioner.

Mr. K. Bhashyam Iyengar, for the Respondents.

JUDGMENT.—The point for decision in these civil revision petitions is whether the village of Yellamaikanpatti of which the petitioner is an *inamdar* has been shown to be an estate under the Madras Estates Land Act. This is a mixed question of fact and law.

The plaintiffs are tenants of the village and sued in the Revenue Court of the Sub-Collector of Tuticorin for *pattas* on the footing that they possess occupancy rights. That Court held that the village was not an estate and dismissed the suits. The District Judge on appeal held that the village is an estate and remanded the suits for hearing on the other issues. The defendant comes up in revision. His main contention is that the District Judge has not rightly understood the law on the matter and has passed his judgment not on the evidence but on unfounded surmises of his own.

The onus of showing that they are entitled to bring suits in the Special Revenue Court lies undoubtedly on the plaintiffs. Both the lower Courts have found that the oral evidence is of practically no use in deciding the present point; and the only documents that have been relied upon before me on the one side or the other are Exs. UU, an Olagu Ayacut account of 1803 and Ex. XLIX, an Inam Register of 1805. These are the only early documents which are available to show what was the nature of the *inam*. The original grant is not available. From Ex. XLIX, column 15 it appears that the *inam* was granted in 1775 for "populating the village." The natural inference from that entry is that the village was then derelict or waste, and that is the defendant's contention. Plaintiffs contend that the fact that the Olagu account, Ex. UU, mentions tenants is evidence that there probably were tenants also in 1775. I am clear that no such inference can be drawn. The more reasonable inference is that the populating of the village for which the *inam* was granted in 1775 had been in some measure successful by 1803. The entry in column 8 of Ex. XLIX, 'Description of *inam*' is 'for subsistence as charity.' This does not carry the case any further. Converting waste land into arable land might without any stretch of language be termed charity. No other form of charity has been suggested by the plaintiffs.

Finally the plaintiffs rely on the description of the village in Ex. XLIX as a *kattukuthagai* village. The District Judge concludes from that term that the *inamdar* in 1775 was "a renter or farmer of the *melwaram* right from Government, failing to see that such a conclusion puts the plaintiffs out of Court for, if the *inamdar* was merely renting or farming the *melwaram*, then there was no grant of the *melwaram* at all and, therefore, the *inam* is not an estate. Now Wilson's Glossary definition of *kattukuthagai* is "land held on farm at a permanently fixed money rent which is usually light." The *Tinnevely Gazetteer* defines it as a form of lease in which a fixed rental is paid in money or in kind. The other authorities quoted in para. 42 of the District Judge's judgment do not alter the essential nature of the term. But when the District Judge concludes from them that the *kattukuthagaidar* was a renter of the *melwaram* I am

quite unable to follow him. The *kattukuthagai* was in essence of a lease or grant of land at a favourable rent.

The use of this term in the Inam Register only makes the plaintiffs' case worse, since it implies that the village lands were handed over to the original *inamdar* at a favourable rent. There is nothing in the term itself from which one is entitled to infer that what was handed over was only the *melwaram*, and if the village was, as I am inclined to hold, waste at the time of the grant, there would be no *melwaram* to hand over. I think, so far as one can infer anything from the very meagre records, the correct inference is that the village as a whole was handed over to the *inamdar* at a favourable rent in order that it might attract cultivators and tenants and that there was no grant of the *melwaram* only. Plaintiffs in any case have entirely failed to prove that the grant was of the *melwaram* only.

The existence of tenants with occupancy rights much later on will not help them. It may be remarked incidentally that the Olagu account of 1803 does not describe the tenants as occupancy tenants, or use any word implying occupancy right. It is not till very much later that we meet any evidence from which it is possible to infer the existence of occupancy rights, and no document implying such and emanating from the *inamdar*; for example, *patta* or *muchilka*, has been so far filed.

This appears to me to be a case in which the District Judge has concluded in favour of the plaintiffs on no evidence whatever. The Inam Register and Olagu account afford no support to the plaintiffs' version as to the terms of the original grant, nor will a finding that some of the tenants have for some years past exercised occupancy rights assist in proving that the village is an estate, since it is not open to the Court to infer retrospectively from recent documents, that the original grant in 1775 was of the *melwaram* only—see the Privy Council case *Nainapillai Marakayar v. Ramanathan Chettiar* (1).

The discussion about *swamibhogam* also

(1) 82 Ind. Cas. 226; 47 M. 337 at p. 348; A. I. R. 1924 P. C. 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

is of no assistance on this point as has been candidly admitted before me.

The District Judge's decision is, therefore, passed on no evidence and cannot be supported. It is hereby set aside. The Sub-Collector's decrees dismissing the suits are restored but without prejudice to plaintiffs' rights to agitate their rights in the Civil Court. The plaintiffs will pay the defendant's costs in all Courts upto date. A consolidated fee of Rs. 350 for the set, to be distributed among the suits is allowed. I regret the necessity for revising the order of the District Court, since it is now nearly 10 years since the plaints were filed. A great deal of delay occurred before the District Judge, and that will have to be explained on a separate reference.

V. N. V.

A. N. A.

Decree set aside.

MADRAS HIGH COURT.

APPEAL SUIT No. 213 OF 1924.

CIVIL MISCELLANEOUS APPEAL No. 48
OF 1925

AND

CIVIL REVISION PETITION No. 56
OF 1925.

March 23, 1927.

Present:—Justice Sir Kumaraswami
Sastriar Kt., and Mr. Justice Davadoss.IN APPEAL SUIT No. 213 OF 1924,
SUPPAYAN PILLAI AND ANOTHER—
DEFENDANTS NOS. 5 AND 1—APPELLANTS

versus

LAKSHMANA PATTAR AND OTHERS—
PLAINTIFF AND DEFENDANTS NOS. 2 AND 3
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Decree declaring charge in favour of defendant—Charge, whether can be enforced in execution—Separate suit, maintainability of.

A mere declaration in a decree that the property in respect of which a decree is given to the plaintiff is subject to a charge for a named sum in favour of the defendant by itself would not entitle the parties to work out their mortgage rights in execution. [p. 508, col. 1.]

In a suit for partition by a Hindu co-parcener, to which a purchaser of one of the items in execution of a money decree was a party the Court passed a decree directing that the property should be divided into 3 shares subject to the payment by the plaintiff of a sum of money which the alienee defendant had paid to discharge a binding mortgage on the property. The purchaser resisted delivery of possession

except on payment of the amount for which the charge was declared. Thereupon the plaintiff brought a suit for possession on payment of the amount:

Held, that the suit for possession was not barred by s. 47, Civil Procedure Code. [ibid.]

Appeals against the decree and order of the Court of the Subordinate Judge, South Malabar at Palghat, in O. S. No. 52 of 1920, and petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of South Malabar at Palghat, dated the 4th November, 1924, made in M. P. No. 2056 of 1924, in O. S. No. 52 of 1920.

Mr. C. S. Venkatachariar, for the Appellants.

Mr. C. V. Anantakrishna Iyer, for the Respondents.

JUDGMENT.—The facts which gave rise to this appeal are simple. The shop in dispute belonged to a Pandaram family. It was mortgaged to one Sardambal in 1905 under Ex. I. It was then attached by a simple money decree-holder in execution of the decree he got against the Pandarams. A decree was obtained by a third person against the Pandarams and that decree was assigned to the 1st defendant in the present suit. He purchased the property in execution of the decree in 1907 and got possession. In 1910 a suit for partition was filed by one of the members of the Pandaram family, O. S. No. 45 of 1910, in the Sub-Court against the other members of the family, and the present 1st defendant was the 10th defendant in that suit. One of the items of property of which the partition was sought for was this shop. The plaintiff's case was that the purchase by the present 1st defendant (10th defendant in that suit) was *benami* for the family. In the meantime the present 1st defendant discharged the mortgage debt due to Saradambal. In the partition suit it was held that the plaintiff was entitled to a share but as the 10th defendant (the present 1st defendant) had discharged the mortgage he was entitled to Rs. 1,852-3-2 due to him. There was a preliminary decree and a final decree in which it was directed that the property should be divided into 3 shares subject to the payment of Rs. 1,852-8-2 and interest thereon. Then the plaintiff prayed for delivery of possession. This charge was set up as a ground for resisting the delivery. The Judge held that on account of this charge possession could not be given except on payment of Rs. 1,852 and interest. This suit

is filed to get possession. The 5th defendant in this suit, a brother of the 1st defendant was not a party to the previous suit, and he raised some objections. A decree has been passed directing delivery of possession on payment of Rs. 1,620 and subsequent interest. It seems to us that on the facts proved in this case and the facts that the 5th defendant was a brother of the 1st defendant there can be no question of adverse possession.

The next point is that the present suit is barred under s. 47 as the matter was one relating to the execution of the partition decree. We find it difficult to see how in the absence of any decree in that suit for payment, a mere declaration that the property is subject to a charge and that possession could not be given until that amount is paid would entitle parties to work out their mortgage rights in execution of that decree. In some partition suits where the property is subject to a charge or mortgage, the parties are not in a position to pay before the final decree is passed. A mere declaration that the property is subject to a charge by itself would not give the right to work out in execution the mortgage rights. We do not think that the present suit is barred by s. 47. We might also state that this objection was not taken when the suit was tried. If it had been taken at that time it would have been open under sub-s. 2 to the Court to treat the suit as a proceeding in execution and work out the rights of the parties if by that time the claim was not barred; so that there was no technical objection to that course having been followed if objection was taken in time. However it is unnecessary to pursue that matter further, for even if we thought that s. 47 applied we would be inclined to send this case back and not dismiss the suit.

The only substantial question that remains is what is the amount due on redemption? The mortgage states that out of the income of the property Rs. 127-8-0 should be appropriated towards interest and that after paying the revenue the balance (*michavaram*) should be paid to the mortgagors. It has been found by the Subordinate Judge that the revenue is Rs. 20-7-6 which sum would ordinarily be payable every year by the mortgagor. It has also been found that Rs. 352-8-2 was paid in addition to the

amount of Rs. 1,500 and in fact in the partition suit the amount was fixed at Rs. 1,852-8-2. It seems to us that the amount payable will be Rs. 1,852 plus taxes paid every year from 1913 upto the date of payment which will be Rs. 259-3-8. The decree of the lower Court will be modified by declaring the amount payable at Rs. 1,928-13-0 within 11th August, 1927, instead of the amount awarded by the Subordinate Judge.

As regards Civil Miscellaneous Appeal No. 48 of 1925 which is an appeal against the order of the Subordinate Judge refusing to extend the time for payment it appears that an *interim* stay was obtained by the defendant which was dissolved by the High Court on 10th October after the period fixed. We think that this is a fit case for extension of time. But as we have already given time for payment of the money in the appeal we think it is unnecessary to pass any order on this civil miscellaneous appeal.

As regards the appeal the appellant will pay respondent proportionate costs and receive the costs on the difference between the decree amount in lower Court and this Court and in civil miscellaneous appeal. They will bear their own costs. The Vakil's fee and Court-fee will be calculated on Rs. 1,852 in appeal.

The memorandum of objections is not pressed. It is dismissed. No costs.

No order necessary on Civil Revision Petition No. 56 of 1925.

V. N. V. *Memo. of objections dismissed.*

A. N. A.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 388 OF 1925.

May, 5 1927.

Present:—Mr. Justice Waller and

Mr. Justice Madhavan Nair.

MANKADA KOVILAGATH RAO

BAHADUR KRISHNA VARMA *alias*

VALIA RAJA AVERGAL—CLAIMANT

APPELLANT

versus

OFFICIAL RECEIVER, SOUTH

MALABAR, CALICUT—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 100—
Chit fund—Security bond—Words creating charge—
Provision for execution of mortgage-deed on demand—
Charge, creation of, whether prevented,*

The introduction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed, does not determine the question whether the instrument creates a present charge or not. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it the less a present charge.

A prize holder in a *kuri*-chit in furnishing security according to the rules of the chit executed a deed stamped as a mortgage by which he undertook, when required by the stake-holder, to give him a mortgage on his property; but there was a later clause in the deed which provided that "we and the properties mentioned in the partition deed are liable for any arrears of future subscription".

Held, that the deed created a charge on the immovable properties in respect of such arrears.

United Realization Co. v. Inland Revenue Commissioners (1), followed.

Appeal against an order of the District Court, South Malabar at Calicut, dated the 17th February, 1925, in C.M. A. No. 125 of 1924, preferred against that of the Court of the Official Receiver of South Malabar at Calicut, dated the 21st November, 1924, in M. P. No. 62 of 1924, in I. P. No. 25 of 1923 on the file of the District Court.

Mr. C. Unikanda Menon, for the Appellant.

Mr. T. S. Anantha Raman, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the bond executed by the insolvents on 26th July, 1911, created a charge on the immoveable property. They subscribed for half a ticket in a *kuri* and took a prize of Rs. 10,000. By the rules of the *kuri* a subscriber who took a prize was to furnish security for the payment of future subscriptions and it is significant that the bond given by the insolvents was stamped as if it was a mortgage. It seems to us clear that the intention of the parties was to create a charge. The respondent relied on two features of the deed. The first is that the insolvents undertook, when required by the stake-holder, to give him a mortgage on the property. The second is that the clauses on which the appellant relies were added to the deed as a sort of supplement, though, before it was signed by the insolvents.

The first point would, undoubtedly, be conclusive in favour of the respondent, were it not for the supplementary clause. That clause runs, "We and the properties mentioned in the aforesaid partition deed are liable for any arrears of future subscription mentioned above. The properties

in A and B schedules of the said partition deed are situated in Purayiri Amsom, Kannadi Amsom, included in Koyalmannan District and Kallutikode Amsom comprised in Mannarkat Sub-District." We attach no significance to the fact that it is a supplementary clause. It is as much part of the completed deed as the undertaking to give a mortgage when required and we see no reason why it should not be given effect to, if it creates a charge. A number of decisions have been cited before us. That most in point seems to be *United Realization Co. v. Inland Revenue Commissioners* (1) Wills, J., said: "It is plain, I think, from the cases to which the Solicitor-General called our attention, that the introduction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed, does not determine the question whether the instrument creates a present charge or not. That question is to be decided upon perfectly different considerations. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it the less a present charge." As we have already observed, we are satisfied that the intention here was to create a present charge. The rule of the *kuri* was that security should be furnished for future subscriptions and the document was stamped as if it was a mortgage.

The appeal is allowed with costs throughout. Costs to come out of the estate.

V. N. V.

Appeal allowed.

(1) (1899) 1 Q. B. 361; 63 L. J. Q. B. 218; 47 W. R. 331; 79 L. T. 556.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 50
OF 1926

WITH

REVISION CASE No. 364 OF 1926.

April 14, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Roy.

DWARKA NATH CHAKRABARTI
CHOWDHURY—PLAINTIFF—APPELLANT
versus

ATUL CHANDRA CHAKRABARTI
CHOWDHURY AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 1
—Reference to arbitration—Compromise agreement.

The words 'arbitration' and reference to arbitration are used in common parlance. The Code of Civil Procedure uses the same expressions but lays down certain forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed, there cannot be said to be any valid reference to arbitration. [p. 511, col. 2.]

In a suit by the plaintiff for possession, alleging that defendants Nos. 4 and 5 had sold half of certain plots to him but had subsequently colluded with defendants Nos. 1 to 3 the other co-sharers and allowed the latter to take possession, a compromise petition was filed under which the whole lands in the village were to be divided between the plaintiff and his co-sharers on the one hand and the defendants Nos. 1 to 3 on the other proportionately to the admitted shares they had therein on reference to the last Settlement Survey. A gentleman was appointed as arbitrator to equalise possession as far as possible and it was agreed that after the said arbitrator had made the proposed division, the plaintiff would withdraw from the suit and the defendants would withdraw the allegations they had made with respect to the plaintiff's purchase :

Held, that this was not an application for an order of reference to arbitration within cl. 1 of Sch. II of the Civil Procedure Code. [p. 511 col. 2; p. 513, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Mymensingh, dated the 2nd January, 1926.

Babu Brajo Lal Chakravarti, Mr. Gunada Charan Sen, Babus Kali Kinkar Chakravarti, Somnath Chakravarty and Jatindra Nath Khasnabis, for the Appellant.

Babus Jogesh Chandra Roy and Krishna Kamal Moitra, for the Respondents.

JUDGMENT.

Roy, J.—This appeal is directed against the decree passed by the Subordinate Judge, Second Court, Mymensingh amending the decree passed by his predecessor in the suit brought by the plaintiff. We learn that the plaintiff commenced this action in the Munsif's Court but the valuation of the suit was found to be over Rs. 5,000 and it came eventually before the Subordinate Judge. It is said that the defendants Nos. 4 and 5 were owners of some parcels of land in villages Gangatiya and Saidpur lying within Kharija taluk No. 1760-28 of the Mymensingh Collectorate and that they were in exclusive possession of some of the plots and were in possession of some shares in the other plots with the other defendants Nos. 1—3, who owned the remaining shares. The plaintiff alleged that the defendants Nos. 4 and 5 sold half of what they had in these plots to the plaintiff by a *kobala* dated the 26th June, 1915, but the said defendants subsequently colluded with defendants Nos. 1—3 and allowed the latter to take possession of these lands.

The plaintiff thereupon brought the present suit (from which this appeal arises) and he sought to establish his title to the lands he purchased and he asked for partition and for *khas* possession of his share in these lands. The defendants Nos. 1 3 disputed plaintiff's title and that of his vendors and the vendors denied the sale. Issues were drawn up and after protracted proceedings a commission was taken out to examine the plaintiff who resides in Calcutta. Before the Commissioner the parties entered into a compromise and this was embodied in a petition dated the 16th March, 1925.

The decision of the case turns on the terms of this petition of compromise. The plaintiff gave up his claim based on his alleged purchase. It was settled that the lands in these villages Gangatiya and Saidpur appertaining to Taluk 1760/28 were to be divided between the plaintiff and his co-sharers on one side and the defendants Nos. 1, 2 and 3 on the other, proportionately to the admitted shares they had therein, on reference to the last Settlement Survey. The plaintiff and his co-sharers and the defendants Nos. 1, 2 and 3 appointed Babu Sarat Chandra Bhattacharjee a Pleader to be the arbitrator. The arbitrator was to equalise possession as far as possible and it was agreed that after the said arbitrator had made the proposed division, the plaintiff would withdraw from the suit and the defendants would withdraw the allegations they had made with respect to the plaintiff's purchase. Babu Sarat Chandra declined to arbitrate. Efforts were made to have a joint petition filed agreeing on a partition by some other person or persons but these efforts were unsuccessful. The learned Subordinate Judge thereafter on plaintiff's petition, purporting to act under ss. 5 (3), Sch. II of the Civil Procedure Code called on the defendants Nos. 1—3 to appoint an arbitrator. The defendants objected and protested that there was no reference to arbitration as understood under Sch. II of the Civil Procedure Code, that the petition of compromise dated the 16th March, 1925, was not signed by all the parties and that the compromise did not relate to the subject-matter of the suit and so on, but the learned Subordinate Judge refused to listen to any objection and being of opinion that the defendants were trying to back out of the compromise they had entered into "on flimsy technicalities" he appointed a Pleader

Babu Satyaranjan Guha as an arbitrator in place of Babu Sarat Chandra Bhattacharjee and asked him to complete the division. This gentleman filed a so-called award though the defendants objected and protested all throughout that the proceedings were illegal and *ultra vires*. The award was returned by the learned Subordinate Judge for consideration on a particular point. The Pleader re-filed his award and thereafter the learned Subordinate Judge made a decree in conformity with the said award, the defendants objecting and protesting throughout these proceedings. The defendants Nos. 1, 2 and 3 then filed an application for amendment of the decree to bring it in conformity with the judgment of the Subordinate Judge. It came for hearing before his successor and he had no hesitation in deleting the so-called award from the decree. The decree, as it stands, now, merely states that the claim of the plaintiff is treated as withdrawn without liberty to bring a fresh suit and the allegations made by the defendants in their written statements in the *kobala* of the plaintiff are deleted.

The plaintiff has appealed and the learned Vakil appearing for the plaintiff seeks to restore the previous decree which was achieved and which purported to embody the arbitrator's so-called award. The appeal to say the least is audacious.

Certain preliminary objections were taken by the learned Vakil for the respondents. They are not serious; one was that no appeal lay from a decree which is based on a compromise. The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has a right in appeal to show what the compromise was. The second ground is that the period of limitation should be counted from the date of the original decree and that counted from that time the appeal is barred. The plaintiff was not aggrieved, however, until the amended decree was passed and he is within time from that point of time, allowance being made for time taken in obtaining a copy. The third ground is that the stamp fee of Rs. 20 is insufficient and *ad valorem* fees should have been paid. The answer of the plaintiff that so far as the present dispute is concerned it is in respect of partition and that at any rate the relief claimed

is not capable of being valued, seems sufficient.

Returning to the merits of the case it may be mentioned that the words 'arbitration' and 'reference to arbitration' are used in common parlance. The Code of Civil Procedure uses the same expressions but lays down certain forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed it is idle to appeal to s. 5 of the Sch. II of the Civil Procedure Code by which the learned Subordinate Judge purported to have appointed Babu Satyaranjan Guha as arbitrator in place of Babu Sarat Chandra Bhattacharjee who refused to act. Section 1 of Sch. II of the Civil Procedure Code says that where all the parties to a suit agree that any matter in difference between them shall be referred to arbitration, they may, before judgment is pronounced, apply to the Court for an order of reference. Clearly there was no such application before the Court nor did the Court make an order of reference as contemplated by s. 3. Finally the Court has to pronounce judgment according to the award of the arbitrator. The petition of compromise does not contemplate that any award was to be made by the arbitrator and that it should be embodied in the judgment of the Court. The learned Subordinate Judge seems to have realised this for in his judgment he states "a petition of compromise is more appropriate in describing it, rather than a petition of reference to arbitration. For there is no prayer in this petition that the suit would be disposed of in terms of the award filed by the *salis* (arbitrator) or that the award would be incorporated into a decree." In spite of this conclusion he, however, fell back on r. 5 of the Second Schedule and that this rule has a wide application and could act on it and dispose of the matter by saying that he appointed another gentleman to effect the partition according to the original wishes of the parties. He says this gentleman "has filed his report. Call it an award or anything else. The partition has been effected and as the parties are bound by their petition of 16th March, 1925, the suit will be disposed of on its terms."

On the face of it this was very arbitrary and the learned Subordinate Judge who

succeeded could hardly maintain the so-called award of this kind. He held that his predecessor had treated the petition of 16th March, 1925, as a petition of compromise, and he thought that so much of the compromise that the plaintiff would withdraw from suit without liberty to bring a fresh suit and that the defendants would withdraw their imputations against the purchase, could be maintained and he thereupon deleted the award and amended the decree.

The learned Vakil appearing for the plaintiff has referred to O. XXIII, r. 3 and he seeks to justify the action taken by the trial Judge thereunder. All the parties did not join, and all that the petition said was that there will be a partition done by Pleader Sarat Babu and on his doing so the suit would be withdrawn and the imputations against the plaintiff deleted. Sarat Babu declined to make the partition with the result that the compromise was hung up. If it be argued as the trial Judge did, that there was a valid compromise between the parties, viz., that the lands would be divided according to their respective shares it is not clear how the trial Judge could insist on carrying it through in the manner he did. The plaintiff may have his remedy elsewhere but it could not be done in this suit. The plaintiff gave up his claim based on a purchase and the compromise was in respect of something else. The compromise did not relate to the subject-matter of the suit. New parties were again brought in, viz., the principal co sharers. The compromise so far as the suit before us is concerned must be in the circumstances of the case taken to have fallen through and the only order, in my opinion, which the Subordinate Judge could have passed on 3rd April, 1925, was that he should proceed with the trial of the suit.

The amended decree cannot be maintained for the simple reason that the compromise was not completed. The suit was to be withdrawn and the imputations made by the defendants also withdrawn on the happening of a certain event, viz., the division of the lands by Pleader Sarat Babu. That contingency did not happen and the petition of compromise cannot be acted upon—for obviously the two parts are connected and it would not be right to pass a decree on a portion of the compromise ignoring the first part. We do

not know of course what the plaintiff wishes to do, viz., to continue the suit from the point the compromise could not be effected or seek his remedy on the settlement that the lands are to be divided according to the admitted shares of the parties. In the present suit we must leave out the compromise. In case the plaintiff wishes to continue the suit, he should be given the chance. As the amended decree stands he cannot and a future suit by him may also be barred as it happened in the case of *Gulkāndi Lal v. Manni Lal* (1).

The original decree has been superseded. It cannot be restored. The amended decree shall also be set aside. The appeal, therefore, is allowed in part. The parties are relegated to the position they stood on 3rd April, 1925. The learned Judge will now allow the plaintiff to continue his suit from that day and thereafter dispose of it according to law. The contesting respondents will get their costs, the hearing-fee being assessed at 3 gold *mohurs*.

The plaintiff appellant had an application in revision as an alternative on which a Rule was issued. The Rule is discharged.

Mukerji, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I agree in his conclusions and the order which he has proposed to pass, and I desire to add a few words.

The true character of the petition dated the 16th March, 1925, appears to have been very much misconceived by the Court below. Obviously it is not, and cannot be regarded as, an application to file in Court an agreement to refer to arbitration such as is contemplated by cl. 17 of Sch. II, or as an application to file in Court an award made in an arbitration held without the intervention of the Court, as provided for by cl. 20 of Sch. II. Could it be treated as an application to the Court for an order of reference within the meaning of cl. 1 of Sch. II? The Court below treated it as such an application, and made an order under cl. 3 stating that the arbitrator was to do the work mentioned in the petition within two weeks (*vide* Order No. 74 dated 31st March, 1925); an order appointing a new arbitrator under cl. 5, (*vide* Orders No. 74 dated 3rd April, 1925, No. 80 dated 18th April, 1925, and No. 81 dated 29th May, 1925, Orders extending the

(1) 23 A. 219; A. W. N. (1901) 66.

time for filing the award under cl. 8 *vide* Orders No. 83 dated 30th May, 1925, and No. 84 dated 15th June, 1925) and also an order remitting the award under cl. 14 (*vide* Order No. 87 dated 29th June, 1925). There are several weighty reasons why the petition cannot be regarded as one made for an order for reference in a pending suit such as cl. 1 contemplates. In the first place the petition does not contain any prayer for such reference, and it does not appear anywhere that it was in the contemplation of the parties that there should be a judgment according to the award. Secondly, the foundation of the jurisdiction of the Court is an agreement between all parties interested. As pointed out by the Judicial Committee in *Ghulam Khan v. Muhammad Hassan* (2) in dealing with Ch. XXXVII of the Code of 1882 in which the words were "where in any suit all the parties agree," that the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court, and that large powers are given to the Court with the view of making the award in such cases, complete, operative and final. The word "interested" was added by the Code of 1908 to give effect to the decision in *Pitam Mal v. Sadiq Ali* (3) which laid down that the words "all the parties to a suit" "would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit." In the present case the defendants Nos. 4 and 5 were not parties to the agreement. They, no doubt, denied having any interest in the subject-matter of the suit, but the plaintiff claimed relief as against them, and, therefore, it cannot be said that they are not parties interested. Moreover the agreement affected the shares of the plaintiff and his co-sharers but it is not known who these co-sharers are and what their shares are. Thirdly, the expression any matter in difference must mean matter in difference arising in the suit. This is clear from the context, as well as the form prescribed for an Order of Reference, Form No. 2 of the Appendix. That this is so has been explained by the Judicial

Committee in the case of *Rim Protap Chamria v. Durga Prosad Chamria* (4). In the present case what the arbitrator had to do was wholly outside the scope of the pleadings in the suit. The Subordinate Judge, therefore, was clearly wrong in proceeding on the supposition that the petition of the 16th March, 1925, was one which gave him jurisdiction to proceed under paras. 1 to 16 of Sch. II.

The intention of the parties appears clearly from the wording of the petition itself. It stated: "The arbitrator shall within 14 days from this day or as soon as possible, make the division in the aforesaid manner. After the aforesaid arbitrator files his report in Court after effecting the division in the aforesaid manner, the plaintiff shall withdraw the aforesaid Suit No. 269 of 1922 of the Court of the Subordinate Judge of Mymensingh without permission to institute a fresh suit, and after the plaintiff withdraws the aforesaid suit, the defendants shall withdraw the allegations made in their written statement against the truth of the plaintiff's purchase." It was an adjustment by a lawful agreement or compromise which the petition purported to notify to the Court as contemplated by O. XXIII, r. 3, and if the terms were carried out as intended by the arbitrator appointed by the parties, it could have been recorded and the suit allowed to be withdrawn and dismissed, and the objectionable passages in the written statement could have been deleted. If the adjustment had taken place, that is to say if the said arbitrator had not refused to act but had done what was expected, the compromise or agreement would then have been recited in the decree, though the decree would have been confined in its operation to so much of the subject-matter of the suit as was dealt with by the agreement: *Hemanta Kumari Debi v. Midnapore Zemindari Co. Ltd.* (5). The result of the proceedings before the arbitrator and his award could not have been enforced under O. XXIII, r. 3: *Dekari Tea Co. Ltd. v. Assam Bengal Ry Co.* (6),

(4) 92 Ind. Cas. 633; 53 O. 258 at p. 265; 43 C. L. J. 14; 3 O. W. N. 127; A. I. R. 1925 P. O. 293; 49 M. L. J. 812; 24 A. L. J. 13; (1926) M. W. N. 96; 3 Pat. L. R. 330; 28 Bom. L. R. 217; 53 I. A. 1; 27 P. L. R. 35 (P. O.).

(5) 53 Ind. Cas. 534; 47 O. 485 at pp. 495, 496; 46 I. A. 240; 31 C. L. J. 298; 37 M. L. J. 525; 17 A. L. J. 1117; 24 O. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 22 Bom. L. R. 488 (P. O.).

(6) 61 Ind. Cas. 919; 25 O. W. N. 127.

(2) 29 I. A. 51; 29 C. 167; 6 O. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. O. J. 154; 25 P. R. 1902 (P. O.).

(3) 24 A. 229; A. W. N. (1902) 19.

Amar Chand Chamaria v. Banwari Lal Rakshit (7). The agreement, however, fell through as the arbitrator appointed did not act.

N. H. *Appeal allowed in part: Case remanded: Rule discharged.*

(7) 69 Ind. Cas. 808; 49 C. 608; A. I. R. 1922 Cal. 404.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1335 OF 1924

AND

CIVIL MISCELLANEOUS PETITION No. 2473 OF 1926.

March 31, 1927.

Present:—Mr. Justice Srinivasa Iyengar.

OPPORTI PADHI—APPELLANT
versus

PAILA UJJULA AND ANOTHER—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Omission to cite decision of High Court, whether ground for review of judgment—'Error apparent on the face of the record,' meaning of.

The mere omission on the part of a Judge to consider a decision, however regrettable and however wrong, cannot possibly be regarded as constituting an error apparent on the face of the record affording a proper and sufficient ground for granting review of a judgment. [p. 516, col. 1.]

Muddapur Morari Rao v. Balwanth Dikshit (3) and *Brindaban Chandra Ghosh v. Damodar Prosad Panday* (4), doubted and distinguished.

The power of Court to grant review is circumscribed and limited by r. 1 of O. XLVII, Civil Procedure Code. It is only when new material is overlooked by excusable misfortunes, mistake or error apparent on the face of the record that a review can generally be granted and the expression "other sufficient reason" following in the rule must be construed *ejusdem generis* and the sufficiency required must be of a kind analogous to the two matters already specified in the rule. [p. 515, col. 2; p. 516, col. 1.]

S. A. No. 1335 of 1924.

Second appeal against the decree of the Court of the Subordinate Judge, Berhampore, in A. S. No. 206 of 1923 (A. S. No. 56 of 1923, Ganjam District, Court) preferred against that of the Court of the District Munsif, Berhampore, in O. S. No. 519 of 1926.

O. M. P. No. 2473 of 1926.

Petition to admit in evidence in Second Appeal No. 1335 of 1924, the document filed therewith.

Mr. B. Jagannath Doss, for the Appellant.
Mr. Sambasiva Rao, for the Respondents.

JUDGMENT.—The defendant in the

action from which the second appeal has arisen has now taken the point that the judgment of the Court appealed against was one made on an application for review to the lower Appellate Court. The plaintiff whose suit had been dismissed by the trial Court appealed to the lower Appellate Court. In the first place his appeal was also dismissed. He thereupon applied to the lower Appellate Court for review and the review was granted and in the place of the dismissal of the appeal a decree was made in favour of the plaintiff for possession of the property sued for. This is what the learned Subordinate Judge says with regard to the ground on which he granted the review:

"The only ground urged for review was that the Court failed to note the decision in *Subbe Goundan v. Krishnamachari* (1) quoted by the appellant's Vakil, and wrongly noted the contention of the appellants in para. 5 of its judgment. After hearing both parties, I have come to the conclusion that the appellant's contentions are correct. The appellants no doubt urged the contention mentioned in para. 5 of this Court's judgment in the lower Court. In appeal they seem to have given up that contention and relied on the decision reported in *Subbe Goundan v. Krishnamachari* (1). The decision helps the case of the appellants, and if it is followed the judgment of this Court cannot stand. I am of opinion that there are sufficient grounds for allowing review of the judgment, and I accordingly set aside the decree."

As pointed out by their Lordships of the Judicial Committee in the case of *Chhajju Ram v. Neki* (2), the power of Court to grant review is circumscribed and limited by r. 1 of O. XLVII. It is there pointed out that it is only when new material is overlooked by excusable misfortunes, mistake or error apparent on the face of the record that a review can generally be granted and that the expression "other sufficient reason" following in the rule must be construed *ejusdem generis* and that the sufficiency required must be of a kind analo-

(1) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; A. I. R. 1922 Mad. 112.

(2) 72 Ind. Cas. 566; 3 Lah. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

gous to the two matters already specified in the rule. There is no question in this case of any new evidence.

Then the question is whether the mere fact that the learned Judge in the Court of Appeal failed to take into consideration a decision of this Court cited to him at the Bar could be regarded, as he seems to have thought, as a proper and sufficient ground for granting the review. My attention has been drawn by the learned Counsel for the respondent to two judgments, one of which is of this Court, viz., *Muddapur Morari Rao v. Balwanth Dikshit* (3). In that case the view was taken by the learned Judges that an error made by a Court in considering that the sister's sons of a deceased Hindu governed by Mitakshara Law were preferential heirs to the nearest agnates was an error apparent on the face of the record. It is possible to doubt the correctness of that decision because though it may be regarded as an error appearing on the record still I fail to see how such an error can be regarded as an error apparent on the face of the record. In a statutory enactment every word used must receive its full and proper connotation in the construction. I doubt very much whether even such an error as the one that was under consideration in that case can properly be regarded as an error apparent on the face of the record. But the learned Judges have said so and it is not necessary for me for the purpose of this second appeal to discuss that further, because it may be possible to regard such an elementary and clear rule of succession in Hindu Law as so well established that the error may even be described as an error apparent on the face of the record. But it cannot possibly be said that the error of law in this case can be regarded at all in the same light as the error which was the subject of consideration in that case or on the same level with a mistake made regarding such an elementary rule of succession. The question that arises for consideration in this case did not depend for its solution on any such elementary rule of succession but depended on various complicated matters of law and equity and after all it is difficult to say that there are not even with regard to the question itself decisions on either side of the line, the same Court taking one view at one time and taking another view at other

times. With regard to such a matter it seems to me that an error of law made by a Judge can scarcely be regarded as an error apparent on the face of the record. There can be no doubt that such an error as had been referred to by the learned Subordinate Judge was an error that would in the ordinary course be dealt with and be the subject of consideration in a proper and regular appeal from the decree itself and I refuse to believe that by enacting the new section the Legislature intended the deciding Court itself to sit in appeal over its own judgment and exercise the rights of a Court of Appeal. The other case that was referred to and relied upon by the learned Counsel for the respondent was the case of *Brindaban Chandra Ghosh v. Damodar Prosad Panday* (4). In that case the learned Judges held that a decision in a second appeal by the High Court, based on an interpretation of an earlier judgment of their Lordships of the Judicial Committee, may be reviewed by the Court on the ground that at the time of the granting of the review the decision of the Judicial Committee, originally relied on by the High Court had come to be explained by their Lordships of the Judicial Committee themselves in a later case. With all respect again it is possible to doubt the correctness even of this decision. In this case also it seems to me that the learned Judges failed to give any effect whatever to the expression "face of the record" appearing in the section and proceeded to hold that a review was competent merely on the ground that they were satisfied that an error of law had been made. But here again I do not think it necessary for me to proceed at present on the doubt I entertain with regard to the correctness of the decision. A misunderstanding of a judgment of the Judicial Committee may conceivably be on a different footing altogether from the mere omission of the Judge at the time of the case to consider one of the decisions cited for consideration before him. The learned Vakil for the appellant has addressed some argument to me with regard to the decision relying upon which the learned Judge came to the conclusion that his original decision was wrong. But it seems to me unnecessary to refer to or consider that question at all. I am at present only called upon to decide whether this granting of the review by the learned Subordinate Judge was or was not proper having

(3) 76 Ind. Cas. 312; 46 M. 955; 45 M. L. J. 309; 18 L. W. 363; (1923) M. W. N. 781; A. I. R. 1924 Mad. 98.

(4) 85 Ind. Cas. 65; 29 C. W. N. 148; A. I. R. 1925 Cal. 304.

ing regard to the terms of the section laying down the rule with regard to the granting of review of judgments. It seems to me sufficient to say that the mere omission on the part of a learned Judge to consider a decision, however regrettable, however wrong, cannot possibly be regarded as constituting an error apparent on the face of the record. Even assuming it to be an error that may be discovered from the record itself, it seems to me to be almost impossible to regard such error as an error apparent on the face of the record. Any other view, it seems to me, would be to fail to give proper significance to the two words 'apparent' and 'face' appearing in the section. I, therefore, come to the conclusion that this appeal should be allowed. The lower Appellate Court was clearly wrong in granting the review. It is unfortunate that the proposal made on behalf of the respondent by the learned Counsel for the respondent that he had no objection even now to the suit being treated as one for partition and the case being proceeded with on the footing that the defendant would on partition be entitled to what may be found to be his proper share, should not have been accepted on behalf of the appellant. The review having been wrongly granted, it follows that the judgment made on review should be set aside. I, therefore, set aside the judgment passed on the review and the decree originally passed in the appeal will, therefore, be restored. The respondent must pay the appellant's costs of this appeal.

In the view that I have taken no orders are necessary with regard to the civil miscellaneous petition put in for the reception of additional evidence and the same, therefore, is dismissed with costs.

V. N. V.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1407 OF 1926 WITH RULE NO. 860 (S) OF 1926.

May 26, 1927.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mallik.

MATHURA NATH CHOUDHURY—

DEFENDANT—APPELLANT

versus

SREEJUKTA BAGESWARI RANI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 231, 251—Bailee,

position of—Partnership—Partners, liability of—Undisclosed principal—Civil Procedure Code (Act V of 1908), s. 99—Relief not asked for—Decree, whether good.

The bailee is responsible to the bailor for loss, destruction, or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of bailment; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract. [p. 518, col. 1.]

Section 251 of the Contract Act which contains the law of partnership controls the relation between partners which is similar to the relation between principal and agent; and under s. 251 of the Contract Act the principal is as much liable for the act of the agent as the agent himself. [p. 519, col. 1.]

Kush Kanta Barkakati v. Chandra Kanta Kakati (1), relied on.

Under s. 251 of the Contract Act a partner is liable for the act of another partner if the act was necessary for or usually done in carrying on the business of the partnership. [p. 518, col. 2.]

Ram Chandra Sahu v. Kasem Khan (2), distinguished.

If the principal be not known at the time of the purchase made by the agent, when discovered, the principal or the agent may be sued at the election of the seller. [p. 519, col. 1.]

Paterson v. Gandasequi (3), relied on.

Where a person is added as a defendant by a plaintiff on an allegation of partnership by the original defendant, a decree passed against the latter is fully covered by s. 99, Civil Procedure Code, even though the plaint was not properly amended and no relief was asked as against him. [p. 517, col. 2.]

Appeal against a decree of the District Judge, Assam Valley Districts, dated the 13th February, 1926, affirming that of the Special Subordinate Judge, Assam Valley Districts, dated the 13th May, 1925.

Babus *Joges Chunder Roy* and *Manmatha Nath Roy (Jr.)*, for the Appellant.

Dr. *Bijan Kumar Mukherjee*, Babus *Umasankar Sarkar* and *Panchanan Ghosal*, for the Respondents.

Mr. *Khitis Chandra Chakrabarty* and Babu *Durga Charan Roy Chowdhry*, for the Petitioner in Rule No. 860 (S).

JUDGMENT.—The facts which have given rise to the suit and this appeal are that the plaintiff was the owner of an elephant by the name of Lal Bahadur. Defendants Nos. 1 and 3 carried on the business of catching wild elephants and the plaintiff's case is that defendant No. 1 and his servant defendant No. 2 hired from her the elephant for the purpose of employing him in their business. There was an agreement between the plaintiff and the defendants Nos. 1 and 2 of which the material portion was to the following effect: "I remain liable to pay to you Rs. 5,000 as the price of

the elephant and Rs 200 as the balance of the hire (money); if during the period the elephant remains in my possession be broken in health or becomes unfit for work or dies and I cannot return it to you at the stipulated time." Under this agreement the defendant No. 1 took possession of the elephant and used it for *shikar* or catching wild elephants in the Garo Hills up till the 29th December, 1923, when it was found that the animal was ill and it died soon after. The plaintiff thereupon on the basis of the agreement brought the present suit for recovery of Rs. 5,000 from defendants Nos. 1 and 2. The defendant No. 1 in his written statement alleged that defendant No. 3 (the appellant before us) was a partner in the business and should have been made a party and that the suit should not proceed in his absence. Thereafter the plaintiff made an application in which she applied to make the defendant No. 3 a party defendant and said that she was making the application on the objection taken by defendant No. 1 and as defendant No. 3 was an undisclosed partner in the business. The Subordinate Judge before whom the application was made passed the following order: "The plaintiff makes an application to add Mathuranath Choudhury as a party. It occurs thus he is a necessary party. Add him as a party. Issue summons." On the body of the plaint the name of Mathuranath Choudhury, the appellant, was inserted at the heading under the names of the other defendants but no further alteration was made in the plaint either in the body of the plaint or in the prayers alleging facts against defendant No. 3 and seeking particular relief against him. The order adding defendant No. 3 as a party was passed after the settlement of issues in the case. The plaintiff, therefore, applied again to frame fresh issues with reference to defendant No. 3 and the following issues were added: (a) "Was defendant No. 2 an agent of defendant No. 3 Mathuranath Choudhury and was he authorised by defendant No. 3 to enter into the agreement with plaintiff? If not, is defendant No. 3 liable? (b) Was defendant No. 3 a partner of defendant No. 1 in the elephant catching business and as such liable to the plaintiff? The defendant No. 3 in his written statement denied any knowledge of the agreement with the plaintiff and otherwise supported

the defendant No. 1 in his contention that no decree could be passed in the suit. The parties went to trial and evidence was adduced on both sides and it appears that it was admitted by defendant No. 3 that he was a partner of defendant No. 1 in the business. The trial Court decreed the suit against all the defendants jointly. On appeal by defendant No. 3 the learned District Judge of the Assam Valley District maintained all the findings of the trial Court and dismissed the appeal. Defendant No. 3 appeals before us and it has been contended on his behalf, firstly, that the suit should not have been decreed as against him as the plaint was not properly amended and no relief was asked against him by the plaintiff in the plaint. This objection was not specifically raised in any of the Courts below nor in the grounds of appeal in this Court. Moreover we do not think that there is any substance in it. The objection is a highly technical one and is fully covered by s. 99, Civil Procedure Code. There has been no failure of justice on account of the omission in asking for a particular relief against defendant No. 3. By the addition of defendant No. 3 as a defendant to the suit the plaintiff intended to claim a decree against him as well, being a partner in the business for the conduct of which the defendant was let out. This objection must, therefore, be overruled.

It is next argued that defendant No. 1 exceeded his authority in entering into an agreement like the present. This objection should also be overruled on the ground that it was not taken in any of the Courts below; and it is an objection which must be decided on the evidence and on the facts of the case. The learned Subordinate Judge in dealing with the liability of the appellant under s. 251 of the Indian Contract Act observed that not a word was said in the written statement to suggest that he was not liable for or was not bound by the act of defendant No. 1 and that the said act was not necessary for the business. The ground upon which this portion of the appellant's case has been placed before us is that the condition to pay the sum of Rs. 5,000 in the event of the elephant being lost was an unusual condition into which the defendant No. 1 entered without obtaining a valid authority from his partners; and he is, therefore personally liable and not the other partners of the business. There is nothing on

the record to support this contention except the fact that in some agreements by which elephants were hired for the business defendant No. 1 made different stipulations. There does not seem to be anything unusual in the agreement before us. It has been found upon the evidence that the plaintiff was not willing to let out the elephant, but on the insistence of the defendants she agreed to do so on condition that she must be paid Rs. 5,000 if the elephant died or disappeared. It is also found that the elephant was a trained elephant for the purpose of catching wild elephants.

It has been strenuously argued that on the agreement defendant No. 3 cannot be made liable, firstly on the ground that the agreement was with defendant No. 1; and, secondly, because it has not been proved that it was in the course of the partnership business that this contract was entered into. It is said that the agreement was with the defendant No. 1. (We may leave out of consideration the defendant No. 2 as he was merely a servant of defendant No. 1, though an *ex parte* decree was passed against him) and for this construction of the agreement reliance has been placed upon the case of *Kush Kanta Barkakati v. Chandra Kanta Kakati* (1). In that case the law which is so well-known was thus laid down: "The bailee is responsible to the bailor for loss, destruction or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of bailment; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract." On the particular facts of that case it was held that a partner who was not a party to the agreement should not be made liable though the contracting defendant took the elephant and employed it for the purpose of the business of the company and which contract the company refused to execute to the knowledge of the plaintiff. On these circumstances it was held that no other partner of the business besides the contracting defendant might be made liable under the agreement though the hire was for the benefit of the partnership business. That case, therefore, does not support the defendant's conten-

tion and if it is carefully scrutinised it goes a great way to help the plaintiff's case. Reliance has also been placed upon the decision in the case of *Ram Chandra Sahu v. Kasem Khan* (2) the headnote of which is to the following effect: "The liability of the dormant partner extends only to sums borrowed by the active partner in his capacity as a member of the firm. The ultimate use by the firm of money borrowed by one of its members individually on his own credit does not render the firm liable for the loan." In that case, it appears that the borrowing defendant was a partner of the firm and had also other businesses in which he was interested. He borrowed some money on his own account and in his own name. He found subsequently that the defendant firm was in need of pecuniary help and the money he had borrowed he employed for the business of the firm. In these circumstances the learned Judge held that the firm or all the members constituting the firm could not be made liable for the money thus borrowed, as it was not borrowed originally for the purposes of the firm by the borrowing defendant as a partner of it and was not also so borrowed with the knowledge of the plaintiff. The learned Judges also observed that where one member of a partnership borrowed money upon his own credit by giving his own promissory note for the sum so borrowed and subsequently used the proceeds of the notes in the partnership business, of his own free-will, without being under any obligation to or to contract with the lender so to do, the partnership was not liable for the loan. The substance of the matter is whether the firm is liable for the money borrowed by one of its partners is pre-eminently a question of fact and depends upon the circumstances of each particular case.

With regard to the liability of defendant No. 3; if it be conceded that the money was borrowed and spent for the purpose of the business, there can be no question on the law as embodied in the Indian Contract Act and laid down by innumerable cases. Under s. 251 of the Contract Act the appellant is liable if the act of defendant No. 1 was necessary for or usually done in carrying on the business of the partnership of which he was a member. It

(1) 83 Ind. Cas. 151; 28 C. W. N. 1041; A. I. R. 1924 Cal. 1056.

(2) 81 Ind. Cas. 513; 28 C. W. N. 824; A. I. R. 1925 Cal. 29.

is not the appellant's case that defendant No. 1 did not act as a partner or his act was one which could be brought under the exemption to s. 251. As to undisclosed or dormant partner the law is clear. The leading case upon this point is the case of *Paterson v. Gandasequi* (3) where the law is thus laid down: "If the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued, at the election of the seller"; and it was observed in that case that a dormant agent might be assimilated to a dormant partner where though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he might afterwards pursue his remedy against the dormant partner, when discovered. Section 251 of the Contract Act which contains the law of partnership controls the relation between partners which is similar to the relation between principal and agent; and under s. 251 of the Contract Act the principal is as much liable for the act of the agent as the agent himself. It cannot, therefore, be said that on the contract as it stands and on the findings of fact arrived at the Court below the defendant No. 3 is not liable under the agreement made between the plaintiff and defendant No. 1.

The last point taken by the appellant is that the sum of Rs. 5,000 stipulated to be payable to the plaintiff on the loss of the animal was in the nature of a penalty and the Court should have enquired as to the real value of the elephant and passed a decree accordingly. This point also was not raised in any of the Courts below and consequently there has been no enquiry as to the value of the animal. In the agreement the value of the elephant was given as Rs. 5,000 and it was stipulated that if the defendant failed to return the animal to the plaintiff he would pay Rs. 5,000 as the value of the animal. To the agreement as it stands s. 74 of the Contract Act has no application. It is a simple agreement. The plaintiff said that she would part with her thing if the defendant guaranteed to pay a certain amount if the thing was lost. It was not a case of a breach of contract or the non-performance of any particular agreement by the

defendant. It was a sort of contract on hire with the reservation that if the article is not returned the value stipulated in the agreement should be paid to the owner. In our opinion this contention fails.

The result is that all the points urged on behalf of the appellant fail and this appeal is dismissed with costs. The appellant will pay full costs to the plaintiff-respondent Bageswari Rani and half costs to the defendant No. 1 respondent Bhagyamal Bama. We make no order as regards costs in favour of defendant No. 2 respondent.

RULE No. 860 (s) of 1926.

This Rule was obtained from this Court by defendant No. 1 respondent for the purpose of transporting that defendant-respondent to the category of appellant on the ground that he apprehended that the plaintiff and the appellant might collude and did not place the case properly before the Court. Such contingency has not arisen and the learned Advocate for the defendant does not press the application. The Rule is accordingly discharged.

N. H.

*Appeal dismissed :
Rule discharged.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 494 of 1924.

June 9, 1927.

*Present :—*Mr. Justice Sulaiman
and Mr. Justice Banerji.

SHIKAR CHAND *alias* SRI CHAND—
PLAINTIFF—APPELLANT

versus

JAGMANDAR DAS AND OTHERS—

DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Void and voidable transactions—Bona fide purchaser, position of.

Where property has been transferred under a voidable contract some title passes to the transferee which remains till the contract is avoided. On the other hand, in cases of void transfers no title whatsoever passes to the transferee. If a person who has taken property under a voidable contract transfers it to a stranger who purchases it for consideration and in good faith, such a stranger would be completely protected. [p. 522, col. 1.]

A person who has acquired property under a voidable title can himself give a good title to that property to a bona fide purchaser or mortgagee from him, who deals for value and has no notice of the defects in the title. [*ibid.*]

Parthasarathy Aiyar v. Subbaroya Gramony (1) and *Pothane Puthan Vittel v. Adrasseri Raru Nair* (2), relied on.

Basti Begam v. Banarsi Prasad (3), distinguished.

(3) (1812) 15 East 62; 13 R. R. 368; 2 Sm. L. C. 378; 104 E. R. 768.

First appeal from a decree of the Subordinate Judge, Saharanpur.

Mr. Akhtar Husain Khan, for the Appellant.

Messrs. Kailas Nath Katju and. Durga Prasad, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for a declaration that certain Revenue Court partition proceedings were fraudulent and are not binding on the plaintiff. The facts of the case are that the plaintiff's father owned a 10 *biswas* out of 19 *biswas* share in village Bhat Kheri, and died leaving the present plaintiff as the sole surviving son who was then a minor. The other co-sharer was Hoshyar Singh, the father of defendant No. 1. In 1909 Musammât Jia, the mother of the plaintiff, was appointed the certificated guardian of the plaintiff during his minority by the District Judge. In 1912 Hoshyar Singh, the co-sharer, filed an application for partition of the village in the Revenue Court. The Court, however, did not itself get the lots prepared, but acted upon two lots which were filed in the case signed by Hoshyar Singh and purporting to have the thumb-impression of Musammât Jia. The village was divided into two separate *mahals*, one of which was allotted to the plaintiff, Shikar Chand, exclusively and was called after his name, and the other was allotted to Hoshyar Singh. Hoshyar Singh subsequently died and his son Jagmandar Das sold the entire *Mahal* Hoshyar Singh to Mohan Lal and others for a sum of Rs. 30,000 under a deed dated the 30th January, 1921. The plaintiff alleges that in the preparation of the lots fraud was practised by Hoshyar Singh on the plaintiff and his guardian in this way that land of better quality was allotted to Hoshyar Singh's share and that of inferior quality to the plaintiff's share, and that a grossly unequal share of the occupancy holding was put in the plaintiff's lots as well as lands yielding no produce. It is further alleged that Hoshyar Singh showed these lots to Musammât Jia and assured her that these were of equal quality and value and got the same accepted by her. The plaintiff's claim accordingly is that the partition proceedings were fraudulent and are in no way binding on him. The suit was contested mainly by Mohan Lal and others who denied that any fraud had been practised and who pleaded that they were *bona fide* transferees for value and were protected.

The learned Subordinate Judge has dismissed the suit. On the question whether there was an unequal partition, he has come to a clear finding that it was so and that on a rough estimate the plaintiff has suffered loss from 5 to 10 per cent. of the value of his share. He also was clearly of opinion that the defendants were *bona fide* transferees for value, who have acquired the property in good faith and were protected. As regards the question of fraud his finding is by no means clear and satisfactory. He began by saying that as regards fraud the plaint did not show the circumstances under which the fraud was committed, and the detail of the fraud. This is rather a surprising statement in view of the facts alleged by the plaintiff in paras. 7 and 8 of his plaint the purport of which we have recited above. He next proceeded to say that the only evidence on the point is the statement of the plaintiff's mother and that believing her statement to be true, there is no conclusive evidence of fraud as to vitiate the partition proceedings. We cannot understand how the learned Subordinate Judge could make this remark when he had himself recorded the evidence of Musammât Jia. If the whole of the evidence of Musammât Jia were to be believed, there would be no doubt that a gross fraud was practised on her and that her thumb-impression was obtained on the application on a misrepresentation and at a time when she had been assured "that the partition had been made, and lots had been prepared". The learned Subordinate Judge has evaded a clear finding as to whether the statement of Musammât Jia should be believed in its entirety. He has at places criticised her evidence without specifically saying that he disbelieves her. It is also curious that at the end of the judgment he wound up by saying that the plaintiff did not claim any relief against defendant No. 1, the representative of Hoshyar Singh, and that there was not sufficient material on the record to ascertain the extent of the liability of this defendant due to his father's conduct. All this suggests in a vague way that the learned Judge was inclined to believe that some fraud was practised though in his opinion that fraud was not sufficient to vitiate the partition proceedings.

We have, therefore, had to examine the evidence of Musammât Jia in some detail

as well as the statement of Hoshyar Singh, Mukhtar, who was appearing for *Musammât Jia* in the partition proceedings. This witness is different from Hoshyar Singh, co-sharer. We agree with the Court below that the partition was unfair. It is clear from a comparison of the two lots that Hoshyar Singh in his 9 *biswas* share got 153 *bighas* of non-occupancy land while the plaintiff in his 10 *biswas* share got only 136 *bighas*, 19 *biswas* of non-occupancy lands; on the other hand, 114 *bighas* 3 *biswas* of occupancy lands on which enhancement of rents would be difficult, were thrown into the share of the plaintiff while Hoshyar Singh was given only 34 *bighas*, 9 *biswas* of occupancy lands in his share. It also appears that double the area of lands recently brought under cultivation were allowed to Hoshyar Singh, though the division of the old cultivated lands was equal. It is also clear that Hoshyar Singh got two *pucca* wells in his lot and also got a larger share of *abadi* land. On the other hand, the entire burial ground was thrown into the lot of the plaintiff. All these facts, no doubt, indicate the division was unfair and that the plaintiff has suffered in consequence. The learned Judge has estimated the loss of the plaintiff from 5 to 10 per cent. of the value of his share, but we are unable to say from the evidence whether this is any approximate estimate or not.

We are also satisfied that this unequal partition was brought about by taking some advantage of the position of *Musammât Jia* who was a *purdah nashin* lady, the plaintiff then being a minor of tender years. We are also satisfied that but for the carelessness and slackness of *Musammât Jia* and for her not getting proper advice, she would not have assented to such a division. It also appears that she had relations like Anand Sarup, who was helping her, and there were also other relations whom she might have consulted. Apparently she did nothing of this kind. Although we believe so much of her statement, we find ourselves unable to accept her statement that any active misrepresentation was made to her and that she put so much confidence in her opponent, Hoshyar Singh, as to accept his word that the lands were absolutely equal. She admits that she observes *purdah* before Hoshyar Singh, and we doubt whether she could have put her thumb-impression on papers brought by Hoshyar Singh without consulting anyone else. We are,

therefore, unable to find that there was any active misrepresentation made or any direct fraud practised by Hoshyar Singh on *Musammât Jia*. At the same time, it is almost certain that Hoshyar Singh did not disclose to *Musammât Jia* that the lands were unequal.

The position of Mohan Lal and others who are transferees from the son of Hoshyar Singh, is, however, much stronger than that of Hoshyar Singh and his heirs. We agree with the Court below that there is no evidence whatsoever on the record to suggest that the defendants-vendees were not acting in good faith. On the other hand, the evidence of Mohan Lal proves conclusively that he inspected the revenue records and found Jagmandar Das' name recorded, and found him to be in exclusive possession of the entire *mahal*. He has sworn that he acted throughout in good faith after having made thorough enquiries and that he has not failed to pay the full consideration. There was nothing which could have put Mohan Lal on further enquiry, and to have cast the duty on him to go behind the order of the partition Court, examine and compare the two *mahals* and ascertain whether they were equal or unequal. We believe that Mohan Lal and others had no knowledge or idea that any fraud had been practised, or any undue advantage taken, by Hoshyar Singh as against the plaintiff's guardian. It is also a noteworthy fact that from 1912, when the partition took place, till the year 1921, *Musammât Jia* herself made no protest or attempt to get the order revoked. She appears to have acquiesced in the division. It is also a significant fact that as soon as the plaintiff attained majority he executed a deed of transfer of the entire *mahal* in favour of his mother. The plaintiff apparently did not at that time consider that the partition was a nullity, and that he was still a co-sharer entitled to a 10 *biswas* share in the undivided village, Bhat Kheri. As a matter of fact he did not transfer any such undivided share, but transferred the whole *Mahal* Shikar Chand to his mother. This suggests that he himself accepted that the partition had been effected and that he was entitled to deal with the *mahal* allotted to him as he liked. No doubt, subsequently this deed of gift was set aside under a compromise decree, dated the 19th December, 1923, between the plaintiff and his mother, but that leaves the significance of the transfer untouched.

The last point for consideration that remains is whether, in view of the fact that the contesting defendants were *bona fide* transferees for value from Hoshyar Singh's heir, even if a fraud had been practised by Hoshyar Singh, their transfer could be affected by it. On this point we are of opinion that a distinction might very well exist between voidable and void transactions. Where property has been transferred under a voidable contract some title passes to the transferee which remains till the contract is avoided. On the other hand, in cases of void transfers no title whatsoever passes to the transferee. If a person who has taken property under a voidable contract transfers it to a stranger who purchases it for consideration and in good faith, it seems to us that such a stranger would be completely protected. We think that the law on this point has been correctly stated by Schwabe, C. J., in the case of *Parthasarathy Aiyar v. Subbaroya Gramony* (1) when he remarked that a person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him, who deals for value and has no notice of the defects in the title. The same principle had been accepted by another Bench of the Madras High Court in the case of *Pothane Puthan Vittil v. Adraseri Raru Nair* (2). In that case also a transferee from a person who had acquired the property under a voidable conveyance, with intent to defraud creditors, was held to be protected if he was a *bona fide* transferee. So far as that point is concerned, we entirely agree with that view. It does, however, appear that the learned Judges thought that the case of *Basti Begam v. Banarsi Prasad* (3) had been wrongly decided and was not supported by the authorities relied upon in the judgment. We think that the case of this Court was somewhat misunderstood and is clearly distinguishable. In that case there was a wholly fictitious mortgage without any consideration whatsoever which was executed with the intention of defeating existing creditors. The mortgage was a totally inoperative document and was never intended to be in any way effective. It was almost a waste paper and passed no title to the ostensible mortgagee.

(1) 72 Ind. Cas. 559; (1923) M. W. N. 763; 45 M. L. J. 175; A. I. R. 1924 Mad. 67; 17 L. W. 763.

(2) 72 Ind. Cas. 727; 46 M. 478; 44 M. L. J. 527; 17 L. W. 547; 32 M. L. T. 372; A. I. R. 1923 Mad. 558.

(3) 30 A. 297; 5 A. L. J. 305; A. W. N. (1908) 116.

The learned Chief Justice at page 308*, therefore, remarked that the ostensible mortgagee had no interest in the property under the fictitious mortgage made to him and that he had nothing which he could transfer to his wife. He pointed out that the transfer of the fictitious mortgage to his wife, notwithstanding that it was made *bona fide* and for value and consideration, did not validate the security as against the plaintiff. The lady took the transfer subject to all defects and title of her transferor and could not in equity set up the fictitious document against the *bona fide* mortgage. The case before the Allahabad High Court was, therefore, entirely different and related to a wholly fictitious document which was void and not merely voidable. This differentiation appears to have been overlooked by the learned Judges of the Madras High Court. The authorities on which they have relied are all on the point that a fraudulent grantee takes the entire estate of the fraudulent grantor and that a *bona fide* purchaser for value and consideration, whether he purchases from a fraudulent grantor or a fraudulent grantee takes the entire estate even though the deed is voidable at the instance of the creditor. Under the circumstances, it is clear that it is now too late for the plaintiff to get the partition upset when the *mahal* allotted to Hoshyar Singh has been transferred in its entirety to Mohan Lal and others, who have acted in good faith throughout and have paid full consideration.

The grounds of appeal as regards the *dera* (collection house) and the grove have, in our opinion, no force. The Court below has found that there is no satisfactory evidence to prove that the collection house and the grove allotted to Hoshyar Singh were the same which had been specifically purchased by the plaintiff's father. Furthermore, they were the subject-matter of partition proceedings. Collection houses and groves frequently pass with the *zemin-dari*, and there can be no doubt that both the collection house and the grove were the subject-matter of allotment by the Revenue Court. Both these have been transferred to Mohan Lal and others. They would be equally protected. In a partition case even property belonging exclusively to one co-sharer may, under certain circumstances, be allotted to another and compensation paid to the owner. We are, therefore, of

opinion that the contesting defendants are protected with regard to their purchases of the collection house and the grove.

We accordingly dismiss the appeal with costs.

N. H.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 913

OF 1926.

May 2, 1927.

Present :—Mr. Justice Devadoss.
JANA MUHAMMAD SULEMAN AND
OTHERS—DEFENDANTS—PETITIONERS

versus

KADIRSA LEVVAI AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Muhammadan Law—Suit by rival Imams to officiate at mosque and at marriages in houses of Muhammadans—Injunction to restrain defendant from officiating in houses, legality of.

Under the Muhammadan Law the presence of the Kazi is not of absolute necessity for the validity of a marriage.

Pending a suit respecting the right to officiate at a mosque and at marriages of the Muhammadans of the locality, it is open to the Court to grant an interim injunction restraining the defendants from officiating at the mosque; but it is beyond the powers of Court to issue an injunction restraining them from performing ceremonies in the houses of the Muhammadans inasmuch as even if the plaintiffs have the right as against the defendants, the Muhammadan public could not be compelled to take the services of particular persons as *Imams*.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the order, dated the 1st May, 1927, of the District Court, East Tanjore at Negapatam, in C. M. A. No. 68 of 1926, preferred against that of the Court of the District Munsif, Tiruturaipundi, dated the 12th April, 1926, and made in I. A. No. 113 of 1926 in O. S. No. 48 of 1926.

Mr. S. Ramaswami Iyer, for the Petitioners.

Mr. K. Balasubramania Iyer, for the Respondents.

JUDGMENT.—This is an application under s. 115 of the Civil Procedure Code to revise an order of the District Judge of Tanjore East granting a temporary injunction in a suit pending before the District Munsif of Tiruturaipundi. The question relates to the office of *Imam* in

a mosque. The plaintiffs claim to be the *Imams* of the mosque and the right to officiate in all religious ceremonies in the houses of the Muhammadans of the locality. The defendants' case is that they are the *Peish Imams* and they have got the right to officiate in the mosque and also at the religious ceremonies in the houses of the Muhammadans. With regard to the office of *Imam*, it is a well-recognised office and when there is a dispute about it, it is open to the Court to issue a temporary injunction in the interests of the people as well as of the disputants, and in order to avoid breach of any peace. But the injunction that has been issued is too wide in its terms. Even granting that the plaintiffs have a right to be the *Imams* of the mosque the Muhammadans of the locality cannot be compelled to engage their services at the marriages, and other ceremonies in their houses. In the case of Muhammadan marriages the presence of the *Imam* or *Kazi* is not absolutely necessary; the marriage being a civil contract. In order to evidence the contract a *Kazi* is present but the presence of the *Kazi* is not of absolute necessity for the validity of a Muhammadan marriage and, therefore, the people of the locality are not bound to call in any man obnoxious to them. Therefore, the injunction restraining the defendants from officiating at the marriage and other ceremonies in the houses of the Muhammadans is clearly illegal and has been passed without jurisdiction. *Katil Sheik Ummar Saheb v. Khazi Budan Khan Saheb* (1) is an authority for the position that the *Kazi* has not the exclusive privilege or the right to officiate at the marriage of Muhammadans.

The next question is whether this portion of the injunction can be separated from the other portion which relates to the leading of worship in the mosque. If the plaintiffs as *Imams* have the right to lead the congregational services in the mosque no other person has the right to interfere with it. I, therefore, set aside the order of the District Judge so far as it relates to the performance of ceremonies in the houses of the Muhammadans as it was passed without jurisdiction. It is open to the Muhammadans of the locality to engage the services of anybody to be present at the marriages and other religious ceremonies in their houses. With regard to the

other portion it cannot be said that it was passed without jurisdiction though I must say that some of the Judge's observations as regards the right of the plaintiffs are premature. With this modification the Civil Revision Petition is dismissed but in the circumstances without costs.

V. M. V. *Petition allowed in part.*
A. N. A.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 79 OF 1925.

June 28, 1927.

Present :—Mr. Justice Sulaiman and
Mr. Justice Iqbal Ahmed.

MATA DAYAL LAL—PLAINTIFF—

APPELLANT

versus

LALJI SAHAI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Declarations and acts—Mistaken idea of rights—Loss and injury.

Section 115, Evidence Act, does not require that a person who by his declarations or conduct induces a belief in the mind of the other, must of a necessity have been aware of his rights. [p. 528, col. 1.]

The English Law or s. 115, Evidence Act, gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What is required is that the position of the person who was induced to act should have been altered; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. [p. 528, cols. 1 & 2.]

Sarat Chunder Dey v. Gopal Chunder Laha (3) and *Forbes v. Ralli* (4), followed.

First appeal from a decree of the Subordinate Judge, Jaunpur.

Messrs. Kailas Nath Katju, Uma Shankar Bajpai and Gadadhar Prasad, for the Appellant.

Messrs. Haribans Sahai and Shiva Prasad Sinha, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit brought for recovery of possession of a 1 anna *zemin-dari* share and for a declaration that certain *sir* and *khudkasht* lands appertain to that share. The plaintiff's case was that the

property in dispute belonged to his maternal grandfather, Nand Kishor Lal, on whose death it was inherited by his grandmother, Musammat Shitab Kunwar, for her lifetime; that Musammat Shitab Kunwar had two daughters, Musammat Maharani Kunwar and Musammat Daulat Kunwar, the plaintiff being a son of Musammat Maharani and the defendants grandsons of Musammat Daulat Kunwar. The plaintiff alleged that on the death of the two daughters, he was the sole surviving daughter's son and he became the heir to the estate in preference to the grandsons of Musammat Daulat Kunwar. He referred to the fact that he himself had executed a sale-deed in favour of Lalji Sahai, but that he was not at that time aware of the fact of his legal right. The contesting defendants pleaded that the plaintiff was fully aware of all the circumstances and that he agreed to the transfer. It was further pleaded that under an arrangement arrived at in the lifetime of Musammat Shitab Kunwar, the property had been divided between the two branches represented by the two daughters and that the settlement was binding on the plaintiff. It was further pleaded that the present claim, in view of the previous declarations, acts and conduct of the plaintiff, was barred by the principle of estoppel under s. 115 of the Evidence Act as well as by the provisions of s. 41 of the Transfer of Property Act. The learned Subordinate Judge came to the conclusion that although there was no valid surrender of Hindu widow's estate by Musammat Shitab Kunwar, there must have been some settlement of a dispute and a family arrangement about the year 1890, under which the property was divided between the two branches equally and that the plaintiff is bound by such an arrangement. As regards s. 115, he was of opinion that there was no estoppel, but he was inclined to the view that the claim was barred by s. 41 of the Transfer of Property Act. The question of estoppel, however, was dealt with very summarily by the learned Judge.

The facts appear to be as follows. Nand Kishor Lal died some time about 1869 leaving his widow Musammat Shitab Kunwar and two daughters Musammat Maharani Kunwar and Musammat Daulat Kunwar. Undoubtedly Musammat Shitab Kunwar entered into possession of the estate as a Hindu widow and relinquished her life-interest in favour of the next reversioners.

On the 15th May, 1883, she executed a document called "*tamliknama*" (deed of settlement) by which she purported to give $\frac{1}{3}$ rd of the estate to *Musammāt* Dault Kunwar, $\frac{1}{3}$ rd to *Musammāt* Maharani Kunwar and Kauleshar Dayal, the then living son of *Musammāt* Dault Kunwar. At that time, however, the property in question was in the possession of certain mortgagees and a provision was made in the deed that the transferees would be entitled to obtain possession on redemption. *Musammāt* Shitab Kunwar also made provision to retain about 10 *bighas* of land for her own maintenance. The *khewats* up to the year 1890 indicate that the usufructuary mortgagees remained in possession of this property till then, and that the property was not redeemed. In the *khewat* of 1890-91 the entries are as follows:—

"*Musammāt* Dault Kunwar for self and as guardian of her son Jagat Narain Lal, in equal shares—half, and *Musammāt* Maharani Kunwar for self and as guardian of her son Gayatri Prasad, in equal shares—half."

There is, with the exception of the statement of a witness, Lachhmi Sahai, no evidence whatsoever on the record to show the circumstances under which these entries came to be made. As regards the evidence of Lachhmi Sahai the learned Judge has characterized him as a liar and has rejected his evidence completely. He has noted that the evidence of this witness made a very poor impression upon him while he was in the witness-box and the learned Judge thought that he had been "well coached and was stumbling at every place." He accordingly had no faith in his statement. The learned Advocate for the respondent has not relied on the evidence of Lachhmi Sahai and it must, therefore, be altogether ignored.

All that remains on the record then is the fact of the entry in the *khewat* of 1890-91. Obviously that entry was not in pursuance of the provisions of the "*tamliknama*" inasmuch as it did not follow that disposition of the property strictly. The learned Judge has made a conjecture that the entries of 1890-91 would not have come into existence if there had been no dispute and a settlement of that dispute. We are of opinion that such a conjecture, in the absence of any evidence to prove it, was totally unjustified. *Musammāt* Shitab Kunwar,

without there being any dispute, might very well have liked to hand over possession of the estate in her possession to her daughters and their sons. It is difficult to understand that dispute could have arisen between them as the daughters had no *locus standi* to claim the property. If there had been no other circumstances in this case, we would have found great difficulty in accepting the view of the Court below that there was a family arrangement in the year 1890-91 which is binding on the plaintiff and prevents him from succeeding.

There are, however, other circumstances which have to be taken into account before the plaintiff can succeed. There can be no doubt that in the lifetime of *Musammāt* Shitab Kunwar her daughters and daughters' sons obtained possession of the bulk of the property. *Musammāt* Shitab Kunwar remained alive till 1916 and while she was alive the names of her grandsons were entered. We find that in the *khewat* for 1909 the name of *Musammāt* Dault Kunwar was struck off and that of her son Jagat Narain alone entered. Similarly in 1913 the name of *Musammāt* Maharani Kunwar also disappeared from the *khewat* and that of her son, Gayatri Prasad alone remained. The plaintiff, Mata Dayal, must, therefore, have been aware that during the lifetime of *Musammāt* Shitab Kunwar his mother *Musammāt* Maharani Kunwar and after her death his brother, Gayatri Prasad, were in possession of a half share in the estate. As *Musammāt* Shitab Kunwar was the widow originally entitled to possession, the plaintiff must have been aware of some arrangement under which the partition of the family property had taken place. This fact could not have been concealed from the plaintiff when he was joined with his elder brother Gayatri Prasad and must have been appropriating the profits and benefiting from the estate.

There is also the fact that a large number of *sir* and *khudkasht* plots were joint and the names of the two branches were jointly recorded in the revenue papers. *Musammāt* Shitab Kunwar died in 1916. Her death was followed by that of *Musammāt* Dault Kunwar in November, 1916. Later Jagat Narain died in 1917 and then *Musammāt* Maharani Kunwar in 1918. On the death of Maharani Kunwar, the plaintiff, Mata Dayal, was

the sole surviving daughter's son alive, who would be entitled to the estate if there was no other difficulty in his way. The plaintiff, however, admittedly did not assert his right and allowed the names of the sons of Jagat Narain, namely, Shimbhu Nath and Prem Nath, to be entered in the revenue papers as against the share which had been allotted to Musammatt Daulat Kunwar. The plaintiff undoubtedly attained majority some time before 1919. According to the defendant's evidence, in March, 1919, Bhagwan Prasad, who was the husband of Daulat Kunwar and the grandfather of Shimbhu Nath and Prem Nath, approached the vendee's son, Dargahi Lal, with a request that he should purchase the 1-anna share in dispute. Dargahi Lal was shown partition *quras* and *khewats* as well as a copy of a mortgage-deed previously executed in favour of B. Durga Dutt, Vakil. Dargahi Lal states that he raised objections on the ground that the *sir* plots were jointly recorded in the revenue papers and also that there was fear of a claim of pre-emption by co-sharers. According to Dargahi Lal it was at his request and on objections being raised by him that Bhagwan Prasad applied to the District Judge for permission to sell the property belonging to his minor grandsons. It is an undoubted fact that in August, 1919, an application was made to the District Judge for the necessary sanction, which was granted. All this must have taken some time.

We also know as a fact that although in the revenue papers the *sir* and *khudkasht* lands were jointly recorded, there is a detailed specification in the sale-deed in dispute of the plots which were expressly assigned to the vendee, Lalji Sahai. The sale-deed further contains a recital that the division has been accepted by Mata Dayal who in token of acceptance has attested the document. In our opinion it is impossible to believe that if Mata Dayal had not, prior to the execution of the sale-deed, agreed to a division of the plots, it could have been entered in the deed and attested by him. As a matter of fact, the evidence of Dargahi Lal is that Mata Dayal had promised early in the year to get the *sir* lands divided and that later when he came to the village Mata Dayal showed him separate lists of the plots. Under these circumstances, we are utterly unable to accept Mata Dayal's statement

that he was not aware of the contents of the document and that it was brought over to him ready written and he blindly attested it.

The recitals in the sale-deed do indicate that precaution was being taken by the vendee to ensure against a possible claim of inheritance. It contains an admission that the property which was re-transferred had been inherited by the father of the minors from his mother's family, and it contains a covenant that in case any dispute arose relating to the inheritance on behalf of anyone of the mother's house, the vendee shall have power to realise all damages with interest at the rate of one per cent. per mensem from the person and the property of the executants. This covenant has been strongly relied upon on behalf of the plaintiff in order to show that the vendee must have been fully aware that Mata Dayal was a claimant to the estate. The deed further shows that the vendee was very keen on obtaining a relinquishment of the ex-proprietary rights in the *sir* lands which amounted to nearly 12½ *bighas* of land. There was a condition that the vendee shall have the power not to pay Rs. 4,500 unless there was a relinquishment of the *sir* lands. The rights in the *sir* lands could not possibly have passed to the vendee unless there was a relinquishment by the executants as well as a division of the *sir* plots by Mata Dayal. To our minds it is perfectly clear that Mata Dayal must have been aware that the property in question was being sold to Lalji Sahai and that the *sir* plots were divided and it was in token of his consent to this that he attested the document.

The subsequent conduct of Mata Dayal also shows that at that time he raised no objection as regards the title of the vendors and never put forward any claim of his own. When an application for mutation of names was made in the Revenue Court, Mata Dayal was examined as a witness and stated that mutation of names may be effected in accordance with the sale-deed to which he had no objection and that the name of Lalji Sahai should be recorded in accordance with the application. Simultaneously with the application for mutation of names there was an application in which it was expressly prayed that although the names of the vendors and Mata Dayal had stood recorded jointly, the *sir* plots had been divided into two.

lists, A and B, and it was further prayed that the name of Mata Dayal might be expunged from the lands in his name. To this proceeding Mata Dayal was a party and he never objected.

Subsequently, certain tenants executed *kabuliyats* in favour of the vendee in respect of certain specific plots and these *kabuliyats* were also attested by Mata Dayal and in some cases he identified the tenants before the Sub-Registrar.

These circumstances are relied upon on behalf of the plaintiff and it is urged that they indicate precautions taken by Bhagwan Prasad and the vendee to obtain the admission of Mata Dayal in various ways. It has been suggested that he was absolutely ignorant of all the facts and of his legal rights and that a trick was played upon him and he was entrapped into admitting that he had no title to the property.

One may have a suspicion that so far as Bhagwan Prasad was concerned, he might have been aware of the nature of the claim which might be put forward by Mata Dayal. There is, however, no evidence on the record to show that Lalji Sahai was aware of any defect in the title of Shimbhu Nath and Prem Nath.

Although the plaintiff in his plaint alleged that he was not aware of all the facts and that he was made to attest the document without being informed of these facts and that he was also unaware of his legal rights, when he went into the witness-box he did not state more than this that he did not know that he was the owner of the property. The plaintiff did not in the witness-box make clear whether he was not aware of the rule of Hindu Law that a daughter's son succeeds in preference to the sons of another pre-deceased daughter's son or whether he was not aware that he would be entitled to have the arrangement made in the lifetime of *Musammatt Shitab Kunwar*, as regards the division of the property, set aside through a Court of Law. The learned Subordinate Judge has thought that the plaintiff was unaware of the rule of Hindu Law on this point. The plaintiff himself has not said so and we find it very difficult to believe that this was the case. It is a matter of common knowledge, especially among educated Hindus, that a daughter's son succeeds in preference to remoter heirs. There is therefore, no justification for assuming that

the plaintiff was unaware of this elementary rule of Hindu Law. On the other hand, it might very well be that he did not know that it would be open to him to avoid the arrangement which was arrived at in the lifetime of *Musammatt Shitab Kunwar*. Arrangements which have been acted upon for nearly 30 years might well create an impression in the minds of laymen that they are good and cannot be avoided. It is only when the mind of the claimant has been disabused of the false notion by a judgment of a Court that he can feel certain that such an arrangement is not binding upon him. We are, therefore, prepared to assume that the plaintiff did not know that the arrangement which had stood for such a long time, was not binding upon him. Had he known this, he might possibly not have easily agreed to attest the document or agreed to a division of the *sir* lands.

The learned Advocate for the plaintiff-appellant has argued that s. 41 of the Transfer of Property Act can have no application when the plaintiff is not aware of his legal rights and that it cannot be assumed that the position of the vendors was that of ostensible owners with the consent, express or implied, of the plaintiff, when he was not aware of his legal rights. In support of his contention he has relied on the remark of a learned Judge of this Court in the case of *Dungaria v. Nand Lal* (1) that the consent referred to in that section must be an intelligent consent and not a consent based on misapprehension on the part of the person making it as to his legal rights. As regards s. 115 of the Indian Evidence Act, his contention is the same, namely, that there could be no estoppel if the plaintiff was not aware of his legal rights. The learned Advocate relies on a judgment of a Bench of this Court in *Jai Narain v. Jafar Beg* (2), where it was remarked that "the party possessing the legal right must know of the existence of his own right which is inconsistent with the right claimed by the other, and he must know of that other's mistaken belief of his rights and he must have encouraged that other in his expenditure of money or in the other acts done by him, before estoppel arising out of acquiescence can be a bar."

We may also add that there is no doubt that the vendee Lalji Sahai acted in

(1) 3 A. L. J. 534; A. W. N. (1906) 182.

(2) 92 Ind. Cas. 1017; 24 A. L. J. 355; A. I. R. 1929 All. 524; 48 A. 353.

good faith and paid full consideration. We cannot accept the suggestion that he was a party to any trick or fraud having been practised on Mata Dayal. He must, as the Court below has found, be deemed to be an innocent party who has paid full consideration. Even assuming that the plaintiff was ignorant of his legal rights and is in that way innocent, there can be no doubt that he was negligent in not taking steps for ascertaining his legal rights. We would thus have a competition between two innocent parties of whom the plaintiff, who is suing for possession, has been negligent. Under such circumstances he would not be entitled to succeed as against the other innocent party who has been guilty of no laches.

It is not necessary for us to consider the effect of s. 41 of the Transfer of Property Act, because we are satisfied that the plaintiff must, under the circumstances of the case, be estopped under s. 115 of the Indian Evidence Act from disputing the right of the vendee. We need not also consider whether the knowledge of a person's legal right is necessary in the case of mere omissions. As regards declarations and conduct, there can be no doubt that s. 115 does not require that a person who by his declarations or conduct induces a belief in the mind of the other, must of a necessity have been aware of his rights. Their Lordships, in the case of *Sarat Chunder Dey v. Gopal Chunder Laha* (3) remarked that they "think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser, though it clearly appeared that he was under the belief that a certain document was valid; which he could not set aside..... The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequit-

able and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it."

The principle laid down in this case was accorded full concurrence by their Lordships in the case of *Forbes v. Ralli* (4). We have, therefore, to see, whether in spite of the fact that the plaintiff was not fully aware that he had a right to challenge the arrangement which had stood for so many years, he did by his declarations or acts induce a belief in the mind of the vendee that the vendors had good title. The disposition of the property by *Musammam Shitab Kunwar* during her lifetime would at best be a voidable transaction on the same footing as an alienation without any legal necessity. The reversioner would have the option of either accepting the division or repudiating it. Once he accepts it and ratifies it, he loses his option of repudiation. A layman may not be aware that an arrangement of this kind during the lifetime of a Hindu widow between herself and her daughters and acquiesced in by her daughters' sons when after coming of age, and which has stood for nearly 30 years, can still be avoided by other reversioners who have not been parties to the transaction. A layman might well believe that an arrangement which has been acted upon for such a long time, cannot be set aside. This belief might further be strengthened if the person himself has been benefiting out of this arrangement. In the same way the vendee might honestly have believed that an arrangement which stood for nearly 30 years and had been acted upon, would be binding on all the reversioners. In spite of all this there might have been an anxiety in the mind of the vendee to make sure of his title by obtaining consent of the only possible claimant Mata Dayal. There is, therefore, nothing strange if the vendee obtained the consent of Mata Dayal to the mutation of names in his favour. The conduct of Mata

(3) 20 C. 296 at p. 310; 19 I. A. 203; 6 Sar. P. C. J. 221; 10 Ind. Dec. (N. S.) 210 (P. C.).

(4) 87 Ind. Cas. 318; 4 Pat. 707 at p. 718; 23 A. L. J. 548; 6 P. L. T. 404; 27 Bom. L. R. 860; A. I. R. 1925 P. C. 146; 49 M. L. J. 48; 41 C. L. J. 543; L. R. 6 A. (P. C.) 119; (1925) M. W. N. 453; 30 C. W. N. 49; 2 O. W. N. 514; 52 I. A. 178 (P. C.).

Dayal shows that he did not put forward any claim whatever but agreed to the transfer of the property in favour of the vendee. It is, also, clear that if Mata Dayal had not agreed to a division of the *sir* and *khudkasht* plots, there would have been a considerable difficulty in effecting the division and it is probable that the vendee would not have agreed to take the property at all. He paid a high value for the 1-anna share and the reason given for it in the sale-deed is that it was agreed that the ex-proprietary rights in the *sir* lands would be relinquished. The position of the vendee has, therefore, undoubtedly been compromised and it is difficult to believe that he would have agreed to take the property if Mata Dayal had not been a consenting party. It may be a misfortune of Mata Dayal that he was not aware of his legal rights and could not be certain that the arrangement could have been set aside in a Court of Law. Nevertheless his declarations and conduct did induce a belief in the mind of the vendee that he was not claiming any title to the property and that, therefore, there was no defect in the title of the vendors. The pedigree makes it quite clear that there could possibly be no claimant other than Mata Dayal, and if Mata Dayal was willing to abide by the arrangement which had stood for so many years, the vendee would feel sure that there was no defect in his title.

We have, therefore, come to the conclusion that the plaintiff Mata Dayal is estopped by reason of his own previous conduct from denying the title of Shimbu Nath and Prem Nath to the property transferred under the sale-deed of the 26th September, 1919, which he himself attested. The result, therefore, is that this appeal is dismissed with costs.

N. H.

*Appeal dismissed.***PATNA HIGH COURT.**

APPEAL FROM APPELLATE DECREE No. 1065 OF 1925.

November 15, 1927.

Present:—Mr. Justice Kulwant Sahay and Mr. Justice Macpherson.

JANKI DAS AND ANOTHER—APPELLANTS
*versus*EAST INDIAN RAILWAY COMPANY
—RESPONDENTS.*Railway Act (IX of 1900), s. 72—Risk Note Form**B—Loss of goods—Liability of Railway Company—Wilful negligence.*

In a suit for damages for loss of goods consigned under Risk Note in Form B, the Railway Company can only be made liable if it can be shown that the loss was occasioned on account of the wilful negligence on the part of the Railway Administration.

Appeal from a decision of the District Judge, Hazaribagh, dated the 4th April, 1925, reversing that of the Munsif, Giridih, dated the 6th September, 1923.

Mr. S. N. Bose, for the Appellants.

Mr. N. C. Sinha, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This appeal is concluded by findings of fact. The suit was for damages for loss of a certain number of tins out of a consignment of 100 tins of ghee. The trial Court found that the loss was occasioned on account of the wilful negligence of the Railway Company. On appeal the learned Judicial Commissioner has found that the evidence produced on behalf of the plaintiff does not prove wilful negligence on the part of the Railway Company or its servants. This finding is sufficient to dismiss the claim of the plaintiff, because the consignment was made under Risk Note in Form B and the defendants can only be made liable if it can be shown that the loss was occasioned on account of the wilful negligence on the part of the Railway Administration.

This appeal is dismissed with costs.

Macpherson, J.—I agree.B. K. P. *Appeal dismissed.***MADRAS HIGH COURT.**

CIVIL REVISION PETITION No. 70 OF 1926.

October 26, 1927.

Present:—Mr. Justice Devadoss.

MUHAMMAD SHAMSDIN ALIM SAHIB

—PLAINTIFF—PETITIONER

*versus*THE MUNICIPAL COUNCIL OF
TIRUVALUR REPRESENTED BY ITS
CHAIRMAN AT TIRUVALUR—DEFENDANT
—RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 354, cl. (2)—House-tax, assessment of—Absence of service of notice, effect of—Suit for refund of amount collected, whether lies.

Under the Madras District Municipalities Act, before house-tax could be collected, notice of the assessment should be given to the assessee and such notice should be properly served in accordance with the provisions of the Act.

Where the provisions of the Act relating to service of notice upon the assessee have not been complied with, the Municipality has no right to collect tax and s. 354, cl. 2 of the Act does not bar a suit to recover the amount collected.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Tiruvalur, in S. C. S. No. 252 of 1925.

Mr. K. S. Desikan, for the Petitioner.

Mr. R. Sundaralingam, for the Respondent.

JUDGMENT.—This is an application to revise the decree of the District Munsif of Tiruvalur dismissing the plaintiff's suit for a refund of the excess house-tax collected from him. The District Munsif dismissed the suit on the ground that it could not be maintained as no proper appeal was filed and even if it was filed it was not properly conducted. The main question in this case is whether notice of the enhanced assessment was served upon the assessee, the petitioner. Before house tax could be collected, notice of the assessment should be given to the assessee and such notice should be properly served in accordance with the provisions of the Act. In this case the petitioner stated that he did not receive any notice of the enhanced assessment. What were relied upon by the defendant, the Municipal Council, were two notices Exs. B and F which appear to be notices not of the enhancement but of the usual assessment. The respondent's Vakil is not able to show that notice of the enhanced assessment was served upon the petitioner. The District Munsif ought to have addressed himself to this question first before considering any other question for if no notice was served upon the petitioner the Municipality's right to collect tax is taken away and s. 354, cl. 2 is no bar to a suit to recover the amount collected for it says, if the provisions of the Act have been in substance and effect complied with no suit could be brought to recover any sum of money collected under the authority of the Act and it follows that where the provisions of the Act have not been complied with, namely, service of notice upon the assessee, a suit would lie. I set aside the decree of the District Munsif and direct him to restore the suit to file and dispose of it in the light of the remarks made herein. Costs of this petition will abide the result.

V. N. V.

A. N. A.

Order set aside;
Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 628
OF 1924.

November 2, 1927.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Macpherson.

FAKIRA SAHU AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

Babu ANOOP LAL AND ANOTHER—
PLAINTIFFS AND DHAKO SINGH AND OTHERS
—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy tenancy—Custom of transfer—Evidence—Recognition by landlord after his interest has ceased, whether binding on his successor.

In order to prove a custom of transferability of tenancy it is essential for the person setting it up to show that transferees had a right to be recognised by the landlord after purchasing the holdings without the consent of the landlord. Evidence which merely goes to prove that certain purchasers of tenancies were recognised by their landlords is not, therefore, sufficient to establish such a custom in the absence of proof of the circumstances under which the transfers were recognised [p. 531, col. 1.]

Recognition of a transfer by a landlord after he had parted with his interest though not with his possession and during the pendency of a suit against him for possession by his successor-in-interest is not binding on the latter. [p. 531, col. 2.]

Appeal from a decision of the Additional District Judge, Patna, dated the 23rd February, 1924, affirming that of the Subordinate Judge, Patna, dated the 14th May, 1923.

Sir Ali Imam and Mr. Anand Prasad, for the Appellants.

Messrs. L. N. Singh, Noorul Hussain and B. C. Sinha, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—The plaintiffs are co-sharer-landlords to the extent of fourteen annas and odd, their interest being twelve annas as *mukarraridars* and proprietary interest in respect of the rest. The landlords of the remaining share are the *pro forma* defendants in the suit. The suit was instituted to eject the defendants Nos. 1 and 2 who were purchasers of a holding which was originally held by two persons Durgi Singh and Dako Singh on the ground that there was no custom of transferability of occupancy holdings in the village without the consent of the landlord.

The defence was that there was no abandonment by the original tenants, that there was a custom of transferability of occupancy holdings without the consent of the landlord and lastly, that there had been a recognition of the transferees by the landlords.

Both the Courts below have come to a concurrent finding of fact that the original tenants did actually abandon the disputed holding, that there was no custom of transferability of occupancy holdings and that there had been no recognition.

In this second appeal by the transferee-defendants it is contended that the learned District Judge was wrong in holding that there was no evidence to show how the purchasers under certain *kobalas* produced to prove the custom of transferability got themselves recognised. Sir Ali Imam on behalf of the appellants contends that there are documents to show that the purchasers under those *kobalas* did get themselves recognised by the landlords and he refers to certain *khatians* which show the purchasers as the holders of the holdings purchased by them. What the learned Judge, however, meant to say was that the circumstances under which the transferees were recognized had not been shown. It was possible that they might have been recognized on payment of some *salami* or by some other means. In order to prove the custom of transferability it was essential for the defendants to show that they had a right to be recognized by the landlord after purchasing the holdings without the consent of the landlord. This has not been done in the present case.

The next point taken was as regards recognition. It appears that one *Musammam Nem Kueri* was in possession of the twelve-annas share of the village for some time. She instituted suits for rent in the year 1914 against the original tenants *Durgi Singh* and *Dako Singh* and obtained rent-decrees on the 10th February, 1915, and in execution of the decree the holding was sold and purchased by her. It appears, however, that on the 10th November, 1915, *Nem Kueri* filed an application certifying payment of the entire decretal amount by the present defendants-appellants as purchasers of the holding, and it is contended that this amounted to a recognition of the transfer to the present appellants by *Nem Kueri* and that the plaintiffs-respondents are bound by that recognition. It has been found by both the Courts below that before the date of this recognition the interest of *Nem Kueri* had ceased to exist. It is true that the learned Subordinate Judge found that in spite of her interest ceasing she was still in possession; but before the filing of this petition on the 10th November, 1915,

a suit had already been instituted against her by *Audhbehari* on the 15th September, 1915, claiming the twelve-annas as *mukar-rari* right and this suit was ultimately decreed in favour of *Audhbehari*. The present plaintiffs are the purchasers of the interest of *Audhbehari*. Under the circumstances even if the application of the 10th November, 1915, be treated as an application which would amount to a recognition of the appellants, such recognition would not be binding on *Audhbehari* or on the plaintiffs who are the representatives of *Audhbehari*. In any event the plaintiffs are not bound by the recognition in respect of the proprietary interest which they possess over and above the twelve-annas *mukar-rari* interest.

Having regard to the findings of fact arrived by the learned District Judge, it is clear that there is no substance in this appeal. The appeal must, therefore, be dismissed with costs.

Macpherson, J.—I agree.

A. N. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS PETITION No. 48
OF 1927.

October 14, 1927.

Present:—Mr. Findlay, J. C.

V. N. DATAR—APPELLANT—

APPLICANT

versus

S. L. MAHAJAN—RESPONDENT—NON-
APPLICANT.

Civil Procedure Code (Act V of 1908), s. 110—“Substantial question of law”, whether covers question between parties—Probate and Administration Act (V of 1881), s. 24—Probate—Will not proved—Probate of copy, whether can be granted.

The phrase “substantial question of law” in s. 110 of the Civil Procedure Code means a substantial question of law as between the parties to the proceedings and not merely one of general importance. [p. 532, col. 1.]

In the absence of proof that the draft of a Will has been prepared under instructions from the testator, a Court cannot order the Probate of the draft when the execution of the Will has not been proved. [p. 532, col. 2.]

Aulia Bibi v. Ala-ud-din (2), distinguished.

Application for leave to appeal to the Privy Council from the decision of a Bench in Miscellaneous Appeal No. 42 of 1926, dated the 23rd April, 1927, reported as 102 Ind. Cas. 635,

Mr. D. W. Kathalay, for the Appellant.
Mr. R. B. Gadgil, for the Respondent.

ORDER.—This is an application for leave to appeal to their Lordships of the Privy Council against the decision of a Bench of this Court, dated 23rd April, 1927, in Miscellaneous Appeal No. 42 of 1926*.

It is not disputed that the value of the subject-matter or property involved exceeds Rs. 10,000 and the only question is whether, in view of the judgment of this Court being an affirming one, any substantial question of law is involved. We accept the position that the phrase "substantial question of law" in s. 110 of the Civil Procedure Code means a substantial question of law as between the parties to the proceeding and not merely one of general importance. Even so, however, we can find not the slightest reason for supposing that as between the parties to the proceeding any substantial question of law is involved in the present case. As is clear from the judgment of the Bench, that judgment was wholly concerned with a pure finding of fact as to whether the Will in question had been executed or not. The Counsel for the applicant has urged that ground A which he mentions as one of the matters to be agitated before their Lordships of the Privy Council involves a question of law. That ground is to the effect that the Bench of this Court erred in law in starting from the evidence of the Handwriting-Expert. It is true that, in paras. 4 and 5 of the judgment of this Court, the Bench was of opinion that the evidence of Brewster (D. W. No. 11) was to be preferred, but the decision on the question of fact involved rested on many other factors as well and it was indifferent whether the Court considered first the Handwriting-Expert's evidence or any of these factors. We have been referred to certain remarks made by Ayyar, J., in *In re Basrur Venkata Roy* (1) as to the comparatively minor importance of the evidence of Handwriting-Experts, but what that case, in reality, laid down was that an accused should not be convicted of forgery upon the uncorroborated testimony of such an Expert. We have not the slightest hesitation in agreeing with the said *dictum*, but this, in effect, gives

no real help to the applicant in the circumstances of the present case.

It has been suggested that an important question of law is involved as to the exact value which their Lordships would attach to expert evidence of the kind in question, but we are wholly unable to accept such a suggestion and it seems to us impossible to premise of the circumstances of the present case that any question of law is involved in this connection.

It has further been suggested, on the strength of the decision in *Aulia Bibi v. Ala ud din* (2), that this Court should have ordered Probate of the draft of the Will if it was held that the Will itself was not proved. In the case in question there was convincing evidence that the Will had been drawn up in accordance with instructions given by the Muhammadañ lady concerned in the case. The circumstances of this case are wholly different and there has not been any proof that the alleged testator had anything to do with the preparation of the draft in question. On the contrary, it seems to have been prepared by a coterie of the present applicant's party in the hope that the dying man could be induced to execute it. The case is, in short, one in which pure questions of fact are involved and in which we cannot grant leave as craved for.

The application is accordingly dismissed. The applicant must bear the non-applicant's costs. We fix Pleader's fees at Rs. 50.

G. R. D.

Application dismissed.

(2) 28 A. 715; 3 A. L. J. 519; A. W. N. (1906) 210.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 32
OF 1927.

November 14, 1927.

Present:—Mr. Justice Kulwant Sahay
and Mr. Justice Macpherson.

RAMKHELAWAN SINGH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SINGHESHWAR PRASAD SINGH

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Defendants promising to file petition undertaking not to transfer—Failure to file petition, whether sufficient ground to order attachment.

A mortgagee applied for attachment before judgment alleging that the defendants were trying to execute certain transfers of their properties in order to avoid payment and to delay and defraud him. The

(1) 14 Ind. Cas. 418; 36 M. 159 at p. 165; 11 M. L. T. 93; 22 M. L. J. 270; (1912) M. W. N. 125; 13 Cr. L. J. 226.

*See 102 Ind. Cas. 635.—[Ed.]

defendants appeared and undertook to file a petition giving an undertaking not to transfer any property before the disposal of the suit. The said petition not having been filed, the Subordinate Judge at once made an order of attachment before judgment:

Held, that before making an order for attachment before judgment the Court had to consider whether the plaintiff had made out a sufficient case according to law in order to entitle him to get an order for attachment of the other properties of the defendants before judgment, and that the order for attachment made on the mere ground that the defendants had failed to file the petition was illegal.

Appeal from an order of the Subordinate Judge, Patna, dated the 17th January, 1927, Messrs. N. C. Sinha and Sarjoo Prasad, for the Appellants.

Messrs. Rai Guru Saran Prasad and Chaudhury Mathura Prasad, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—The plaintiffs-respondents instituted a suit to enforce a mortgage, dated the 19th October, 1914. The mortgage was of twelve properties; but it appears that four of the properties have passed out of the possession of the mortgagors as a result of certain decisions of the Privy Council.

The plaintiffs instituted a suit on the ground that the remaining properties were not sufficient security for the mortgage. They filed an application on the 24th November, 1926, praying for an attachment before judgment on the allegation that the defendants were trying to execute certain transfers of the properties in order to avoid payment and to delay and defraud the plaintiffs. Their case was that the amount due under the mortgage would not be realised by sale of the mortgaged properties and that the other properties of the mortgagors would have to be proceeded against in order to realise the decree.

The defendants appeared and filed a petition of objection to the attachment before judgment on the 10th January, 1927. In their petition of objection they stated that they had no desire to transfer any property in favour of friends, relatives or strangers and the stamp-paper, which the plaintiffs alleged that the defendants had purchased in order to sell the property, was purchased long before the institution of the suit and the transaction for which it was purchased having fallen through the stamp-paper was returned to the Collector.

The learned Subordinate Judge fixed the 15th January, 1927, for hearing the matter as regards the issue of injunction. The order-sheet of the 15th January runs thus: "Petition not filed. Put upon the 17th January, 1927, for orders." It is explained that the petition referred to in the order of the 15th January was a petition which the defendants' Vakil undertook to file giving an undertaking not to transfer the property before the disposal of the suit. On the 17th January the defendants did not file the petition giving the undertaking and the result was that the learned Subordinate Judge at once made an order of attachment before judgment.

The only ground for making the order, as it appears from the order-sheet, is the failure of the defendants to give an undertaking not to transfer the property before decision of the suit. This, in my opinion is not sufficient. The learned Subordinate Judge has to consider whether the plaintiffs have made out a sufficient case according to law in order to enable them to make an order for attachment of the other properties of the judgment-debtors before judgment. It is stated on behalf of the defendants that a claim for money-decree would be barred inasmuch as the suit was brought more than six years after the due date. The plaintiffs rely on certain payments which they allege save a personal claim for money against the defendants from limitation. These are matters which the Subordinate Judge has to take into consideration before making an order for attachment. Under O. XXXVIII, r. 5 of the Code of Civil Procedure he has to be satisfied that the defendants are about to dispose of the whole or any part of their property or about to remove the whole or any part of their property from the local limits of the jurisdiction of the Court.

There has not been a proper consideration of the case by the learned Subordinate Judge and his order of the 17th January, 1927, must be set aside and the case remanded to him for re-consideration as to whether a sufficient case has been made out for attachment before judgment.

The *ad interim* attachment ordered on the 24th November, 1926, will stand.

We make no order as to costs.

Macpherson, J.—I agree.

A. N. A.

Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

October 18, 1927.

Present:—Lord Darling, Lord Warrington of Clyffe, Mr. Justice Duff and Sir Lancelot Sanderson.

Thakur SHIAM SUNDER SINGH—
DEFENDANT—APPELLANT

versus

Thakur JAGANNATH SINGH—
PLAINTIFF—RESPONDENT.

Succession Act (X of 1865), ss. 54, 71—Oudh Estates Act (I of 1869), s. 19—Will of Oudh taluqdar—Bequest in favour of attesting witnesses—Oral evidence showing that legatees did not sign as attesting witnesses, but signed for some other purpose.

A Will executed by an Oudh taluqdar contained the following clause (para. 8):—"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will may be acted upon fully and they may not quarrel among themselves after my demise". The testator's sons accordingly appended their signatures to the Will:

Held, that although the position of the signatures created a presumption that they had been attached by the sons as attesting witnesses, such presumption was capable of being rebutted by parole evidence narrating what actually occurred at the time of the execution of the Will. [p. 536, col. 1.]

Held, also, (on the evidence, and agreeing with the concurrent findings of the lower Courts) that the sons did not sign the Will as attesting witnesses, and, therefore, the bequests in their favour were not void under s. 54 of the Succession Act, 1865, read with s. 19 of the Oudh Estates Act, 1869. [p. 536, col. 2.]

Consolidated Appeal by special leave from the decree of the Court of the Judicial Commissioner, Oudh (Dalal, J. C. and Wazir Hasan, A. J. C.), dated the 25th November, 1924, reported as 85 Ind. Cas. 558, affirming that* of the Subordinate Judge, Partabgarh, dated the 27th August, 1923.

FACTS of the case appear sufficiently from the judgment of their Lordships, and also from the report in the Court below (see 85 Ind. Cas. 558).

Sections 54 and 71 of the Indian Succession Act, 1865, (now replaced by ss. 67 and 84 of the Succession Act of 1925), are as follows:—

"Section 54: (Effect of gift to attesting witness). A Will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband:

But the bequest or appointment shall

be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

"*Explanation.*—A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.

Section 71: (Which of two possible constructions preferred). Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred."

Under s. 19 of the Oudh Estates Act, 1869, s. 54 of the Indian Succession Act, 1865, is made applicable to all Wills and codicils made by any taluqdar.

The main question for determination in the appeal to the Privy Council was whether a certain Will was valid so far as certain legatees were concerned, and the question depended on the fact whether or not the legatees signed the Will as attesting witnesses.

It was concurrently found as a fact by both Courts in India that the legatees did not sign the Will as attesting witnesses, but that they signed it by way of giving their consent to the act of the testator who was their father, and consequently both Courts held that the gifts to the legatees were not inoperative or void.

The testator was one Thakur Drigbijai Singh, a taluqdar. The Will was signed by eight witnesses including the four sons of the testator, but, on the face of it, it did not appear which of the witnesses signed as attesting witnesses.

Messrs. DeGruyther, K. C., and Dube, for the Appellant.

Messrs. Dunne, K. C., and S. Hyam, for the Respondent.

JUDGMENT.

Duff, J.—This is a consolidated appeal from two decrees, both of the 25th of November, 1924, of the Court of the Judicial Commissioner of Oudh at Lucknow, which were pronounced in an appeal from the Subordinate Judge of Partabgarh. The question raised by the appeal is whether certain legacies in a Will of the late Drigbijai Singh, a taluqdar of Athgawan, in the District of Partabgarh, are valid, and the answer to this question must be governed by the determination of the issue, which was the real issue in the Courts below, whether or not the

legatees entitled to the benefit of these legacies, if valid, signed the Will as attesting witnesses. The Court of the Judicial Commissioner held, affirming the decision of the Subordinate Judge, that this issue must be determined in favour of the respondents.

The testator, by his Will, appointed his eldest son, Lal Bahadur Singh, as *taluqdar* after him, and gave to each of his three younger sons, Jagannath Singh, Ran Bahadur Singh, and Jang Bahadur Singh, certain villages out of the *taluqa*, to be held absolutely with heritable and transferable rights as under-proprietors if and when they or any of them wished to separate from their eldest brother; but "so long as they live in union among themselves with the *taluqdar*" the *taluqa* was to remain undivided, and the income therefrom was to be "spent on the whole family," after paying Government and village dues.

The testator also directed the division of his moveable property in case of a separation, and by para. 8 he declared.

"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will may be acted upon fully and they may not quarrel among themselves after my demise."

As to the genuineness of the Will there is no dispute. Admittedly, also, disregarding the signatures of the testator's four sons, the execution of the Will is attested by a sufficient number of attesting witnesses, in conformity with the law in force in the Province of Oudh.

As would appear from an inspection of the translation of the Will, which is the plaintiff's Ex. 1, as reproduced in the record, it was signed by the testator as "executant," and below the testator's signature, after the signature of one of the witnesses, who, it is not disputed, was an attesting witness, there are the signatures of his four sons, and, below them, the signatures of three other persons who also admittedly signed as attesting witnesses. In the margin on the left of these signatures, and just above the signature of the first attesting witness, appears the word "Witnesses." The appellant, who is the son of the eldest son of the testator, on the strength of a passage in the judgment of the Subordinate Judge, contended that in the original Will the word "Witness" appears opposite each of the signatures

below the testator's, including those of the sons. As in their Lordships' opinion it is immaterial, for the purpose of deciding the question before them, whether or not this was the form of the original document, it may be assumed that the appellant's contention upon this point is well-founded.

The Will is dated the 17th of December, 1886, and the testator died in February, 1889. In May, 1889, the name of the eldest son, Lal Bahadur Singh, was, pursuant to the dispositions of the Will, inserted in the Mutation Register, in place of that of the testator. The eldest son having died in May, 1912, a joint application was made in the following July by the appellant and his three uncles (including the two respondents) in the Tahsildar's Court for mutation of names and the substitution of the appellant's name for that of his father. Mutation was duly effected in conformity with this application.

Down to the death of Lal Bahadur Singh his three younger brothers had lived in union with him, and after his death these three brothers, uncles of the appellant, continued to live with the appellant in joint family until the year 1914. In July of that year the youngest son of the testator decided to separate from the joint family, and an application by him to the Tahsildar's Court for the substitution in the Register of his name in lieu of that of the appellant, in respect of the villages bequeathed to him under the Will, was not contested by the appellant, and accordingly was granted.

In June, 1921, the respondents having decided to separate from the joint family, applications were filed by them, requesting mutation of their names in respect of the villages to which they were severally entitled under the terms of the Will. The appellant having raised the objection that the applicants ought first to establish their title by a decree of the Civil Court, the applications were dismissed; and the respondents then, in May, 1922, instituted the suits out of which this appeal arises.

The Subordinate Judge held that the testimony of the three surviving sons of the testator as to the circumstances connected with the execution of the Will must be accepted as credible testimony. The effect of this testimony, as the learned Judge states it, was that the testator, their father, had summoned his four sons to his

presence, and, having explained that he had made a Will leaving his property to them, asked them to attach their signatures to the Will, not as attesting witnesses, but in token of their consent, with a view to avoiding disputes after his death; and that they attached their signatures, pursuant to this request. The Subordinate Judge accordingly found, and with him the Appeal Court agreed, that the sons did not sign the Will as attesting witnesses.

Before their Lordships' Board, Counsel for the appellant admitted that the oral testimony narrating what occurred at the time of the execution of the Will was admissible in point of law, and, indeed, as will be seen, upon it his substantive contention was founded; nor did he argue that there was any ground upon which the appellant could ask for a reversal of the concurrent findings of the Indian Courts as to the credibility of that testimony. His contention was that, although the position of the signatures created only a presumption that they had been attached by the legatees as attesting witnesses, which presumption might be rebutted by parole evidence as to what actually occurred, still, since the signatures were by reason of their position *ex facie* signatures of attesting witnesses, that fact, when coupled with the fact disclosed by the oral evidence that they were placed there in compliance with the testator's request, was sufficient to constitute the attaching of the signatures an attestation in point of law; and that consequently all questions of intention, whether of the testator, or of the persons who signed their names, were without relevancy.

As touching the effect of the evidence adduced on behalf of the respondents concerning what actually occurred at the execution of the Will, their Lordships have no hesitation in concurring in the view of all the Courts in India; nor can there be, in their opinion, any doubt as to the character of the acts of the testator's sons in placing their signatures upon the document, when the terms of the Will itself and the facts disclosed by that evidence are taken into account. The testator himself, by para. 8, which is quoted above, had declared his intention; that paragraph, it is true, is not worded with the precision that might have been desired, but it would be a strange thing to give effect to it

in such a way as to frustrate the obvious purpose of the testator in making it part of his Will.

Its manifest object was to secure the co-operation of his sons in carrying out the dispositions of the Will, and to do that by inserting in the Will a formal declaration that his sons, by appending their signatures thereto, had concurred in those dispositions. By reading the clause as declaring that the sons had signed the Will as attesting witnesses, one would ascribe to it a meaning according to which it would not only defeat the object of the clause itself, but nullify the distribution of his property which the testator was seeking to bring about in making his Will. The more reasonable and natural reading would appear to be that the sons had attached their signatures as concurring in the declaration contained in the paragraph; and this latter construction (under which this particular declaration would take effect, together with the Will as a whole) seems to be enjoined upon the Courts by s. 71 of the Succession Act.

The issue as to the character of the acts of the respondents does not for its determination depend upon any conclusion touching the nature of an undisclosed purpose or intention. The witnesses agree that while the testator invited others to sign as attesting witnesses, he addressed no such invitation to the sons, but asked them explicitly to sign for the special purpose of expressing their consent, with the view of avoiding dissensions in the future. The evidence, once it is accepted, shows that the act of each of them was, openly and palpably, with the knowledge of all present, the act of expressing consent, and nothing else. Their Lordships concur in the view of all the Courts below that in such circumstances the signers were not attesting witnesses within the meaning of s. 54 of the Succession Act.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Mr. H. S. L. Polak.

Solicitors for the Respondent:—Messrs. Barrow, Rogers and Nevill.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1500 OF 1927.

November 2, 1927.

Present:—Mr. Justice Coldstream.

RAM NATH—PLAINTIFF—

APPELLANT

versus

BADRI NATH—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106, application of, in Punjab—Monthly tenant—Notice of ejectment—Notice not expiring with end of tenancy month, validity of.

There is no authority for the strict application in the Punjab of the technicalities required by s. 106 of the Transfer of Property Act and unless specifically provided for by the contract, a notice for ejectment of a lessee holding on a monthly rent need not expire with the end of a month of the tenancy. [p. 537, col. 2.]

A lease was executed on the 9th October, 1923, for 11 months on a monthly rent terminable at any time by two months' previous notice. Two months' notice was given on the 21st July, 1924. In a suit for ejectment it was contended that the notice was not valid inasmuch as it did not expire with the end of the month of the tenancy :

Held, that the notice was a valid one. [p. 538, col. 1.]

Saik Kasam v. Haji Yusuf Karim Abu (2) and *Rure Khan v. Ghulam Muhammad* (5), followed.

Chuni Lal v. Chuni Lal (1), not followed.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 5th May, 1927, affirming that of the Subordinate Judge, Fourth Class, Lahore, dated the 31st January, 1927.

Mr. A. R. Kapur, for the Appellant.

Mr. Bishen Nath, for the Respondent.

JUDGMENT.—Badri Nath, the defendant in the suit from which this appeal arises, took on lease from Ram Nath the plaintiff, a house, a *kothri* and a vacant site with effect from the 9th of October, 1923. He executed a deed providing that the rent, Rs. 9 per mensem, would be paid monthly and that if the landlord wished to have the house vacated he should give two months' previous notice. The deed of lease ended with a statement that the lessee had executed the deed of rent for 11 months.

On the 21st of July, 1924, the plaintiff served a notice on the defendant asking the latter to vacate the house within two months from the date of the receipt of notice at the risk of being charged double rent. The defendant did not vacate the premises.

In May, 1925, the plaintiff sued the defendant for ejectment and arrear of rent. The defendant contested the suit on the grounds, *inter alia*, that he had never been

given possession of the vacant plot and that the notice was invalid because it did not mention the *kothri* and the vacant site and because it did not expire with the end of the month of the tenancy.

The trial Court decreed the rent but refused a decree for ejectment holding that the notice was invalid because it did not expire with the end of the month of the tenancy. On appeal the Additional District Judge, Lahore, confirmed this order agreeing with the trial Court's view regarding the invalidity of the notice. The plaintiff has preferred a second appeal contesting the correctness of the lower Court's decision on this point.

The Courts below have based their decisions on the Single Bench judgment of this Court in *Chuni Lal v. Chuni Lal* (1). Mr. Kapur for the appellant questioned the correctness of this judgment and relies on the Nagpur judgment in *Saik Kasam v. Haji Yusuf Karim Abu* (2) which dealt with a case on all fours so far as the point at issue here is concerned, with the present case.

The Transfer of Property Act has not been extended to this Province and neither in *Pirbhu Dial v. Ram Chand* (3) nor in *Radha Kishen v. Ratan Lal* (4) referred to in *Chuni Lal v. Chuni Lal* (1) do I find authority for the strict application in the Punjab of the technicalities required by s. 106 of the Act. Assuming, however, that s. 106 of the Act did govern the matter of notice here, the present case appears to me to be one in which the matter of notice is provided for by the contract itself and, therefore, one to be decided according to the agreement between the parties. Read as a whole the lease is terminable at any time on two months' notice, that is to say, similar so far as the point at issue is concerned, to the lease in the Punjab case, *Rure Khan v. Ghulam Muhammad* (5) decided by Campbell, J. In that case, as here, the lease was for 11 months, a provision in the present case obviously intended to avoid the necessity of registration (the rent in the present case being Rs. 99 for 11 months) and the lessor had given the lessee notice of a fixed period. In that case the period

(1) 79 Ind. Cas. 957; A. I. R. 1923 Lah. 659.

(2) 78 Ind. Cas. 445; A. I. R. 1924 Nag. 220.

(3) 5 P. R. 1904; 42 P. L. R. 1904.

(4) 56 Ind. Cas. 7.

(5) 75 Ind. Cas. 1034; A. I. R. 1924 Lah. 643.

was one week. There too the rent was payable monthly and the lessor had asked the lessee to vacate the property within one week. It was held that the stipulation for the monthly payment of rent had no effect upon the condition by which the lessor could serve the lessee with notice at any time and that a week's notice to vacate on the 3rd June, 1921, (the 11 months of tenancy having begun on the 8th of August, 1920) was not invalid merely because it did not expire on the 7th of any Calendar month. Following this ruling and the Nagpur ruling cited above, I accept this appeal holding that the notice given by the plaintiff-appellant was not invalid, because it did not expire with the end of a month of the tenancy and on this finding remand the appeal to the lower Appellate Court for disposal after decision of the point left undetermined. The suit and appeal remained pending in the lower Court for two years and the appeal should be disposed of as soon as possible. The appellant will get his costs of appeal in this Court.

R. L.

*Appeal allowed;
Case remanded.*

PATNA HIGH COURT.

PRIVY COUNCIL APPEALS NOS. 2 AND 3 OF 1927.

October 31, 1927.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

Musammam DULHIN SHYAM SUNDER KUER AND OTHERS—APPELLANTS

versus

Musammam BIBI QASIMAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Riparian owners, dispute between, as to right to water—Question of mixed law and fact—Valuation of claim for appeal to Privy Council—Principles.

As a rule the majority of cases between riparian owners as to the right to water in a channel give rise to questions of law or at all events to mixed questions of law and fact. [p. 538, col. 2.]

The second paragraph of s. 110 of the Civil Procedure Code relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount and that part of the section was introduced to cover claims relating to property of considerable value where the actual value of the relief claimed can only with difficulty be assessed, for instance, in cases

where an injunction is sought regarding dealings with certain valuable property or in a case where the rights of irrigation are sought by one side and denied by the other in the case of a village of very considerable area. [p. 539, col. 1.]

Messrs. P. K. Sen, M. Lal, G. S. Prasad, R. C. Bhaduri and C. P. Sinha, for the Appellants.

Messrs. H. Imam, Bashiruddin and Nooruddin, for the Respondents.

JUDGMENT.

Miller, C. J.—Two questions arise for decision in this application. One is as to the value of the subject-matter on appeal to His Majesty in Council and the other whether there is substantial question of law for determination in the appeal to His Majesty in Council.

The dispute between the parties arises from a claim to the rights of water running through an artificial channel on the plaintiffs' land from one point to another and thence on to the defendants' land. On the plaintiffs' land there appears to be an *ahar* along the northern limit of which the artificial water-course runs. They claim that in order to fill the *ahar* during the rainy season they are entitled to block up the channel at a point to the north of the *ahar* on their own land until the *ahar* is flooded and only after that must they remove the obstruction and allow the water to flow through the rest of their land and eventually to that of the defendants.

The defendants, on the other hand, contend that the plaintiffs are not entitled to block up that channel for the purpose of filling their *ahar*, or reservoir, on their own land but only in the event of the water in any season rising high enough to overflow the embankment can the plaintiffs expect to have their *ahar* filled.

The plaintiffs, the petitioners before us to-day, contend that the questions involved in this decision are questions of law or at all events mixed questions of law and of fact. The facts although perhaps somewhat meagre upon which to arrive at a decision in a case of this sort have been found by the lower Court and the law applying to such facts has been applied by the High Court on appeal. As a rule, I think, it may be said that the majority of cases between riparian owners as to the right to water in a channel give rise to questions of law or at all events to mixed questions of law and fact. There are, no doubt, exceptions but in the present case it seems to me that it is sufficient to say

that we consider the questions are such that it is impossible to avoid the conclusion that they are at least mixed questions of law and fact. In so far as that part of the application is concerned I think we ought so to decide.

With regard to the other point, namely, the value of the subject-matter on appeal it is quite true that the plaintiffs in their plaint valued the relief claimed at Rs. 2,500. At the same time they are claiming damages from year to year varying in amount and we are informed that from the year 1328 to the year 1335 the damages claimed amount to Rs. 9,600 but the question for determination in a case of this sort is whether this is a case within the second paragraph of s. 110 of the Civil Procedure Code. The second paragraph of that section relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount and there is no doubt that that part of the section was introduced to cover claims relating to property of considerable value where the actual value of the relief claimed can only with difficulty be assessed, for instance, in cases where an injunction is sought regarding dealing with certain valuable property or in a case like the present where the rights of irrigation are sought by one side and denied by the other in the case of a village of very considerable area. In the present case the value of the village is said to be Rs. 80,000 and I have no hesitation in arriving at the conclusion that the value of this important claim to the rights of irrigation ought to be considered as at least of the value of Rs. 10,000.

The usual certificate will issue that the case complies with the provisions of s. 110 of the Code of Civil Procedure. The appellants are entitled to the costs of this application which has been opposed. Hearing fee five gold mohurs.

Adami, J.—I agree.

Certificate granted.

B. K. P.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 404 of 1927.

September 12, 1927.

Present:—Sir Louis Stuart, Kt.,
Chief Judge, and Mr. Justice Raza.

MANSUR ALI AND ANOTHER—PLAINTIFFS—

APPELLANTS

versus

SULTAN AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Pre-emption—Benami sale—Sale to co-sharer in stranger's name—Right of other co-sharers to pre-empt—Oudh Laws Act (XVIII of 1876), ss. 10, 13.

A co-sharer is entitled to exercise his right of pre-emption where a sale-deed is executed ostensibly in the name of a stranger even though the real beneficiary under the sale is another co-sharer. In the case of a *benami* sale, for purposes of pre-emption, the Court has only to see who the transferee is according to the proper construction of the deed. [p. 540, cols. 1 & 2.]

The *benamidar* may have no beneficial interest in the property or business standing in his name but he represents in fact the real owner, and is in the legal position of such representative. [p. 540, col. 1.]

Appeal against the decree of the Subordinate Judge, Barabanki, in Regular Civil Appeal No. 27 of 1926, dated the 24th of August, 1926, reversing that of the Munsif, Fatehpur, in Regular Suit No. 180 of 1925, dated the 25th of May, 1926.

Mr. Ali Zaheer, for the Appellants.

Messrs. Haider Husain and Naim Ullah, for the Respondents.

JUDGMENT.—The facts of the suit out of which this second appeal arises, as found by the learned Subordinate Judge, who heard the appeal, are as follows:—Moharram Ali and Farzind Ali are brothers holding jointly a small under-proprietary share in a certain village. On the 10th of May, 1924, Moharram Ali sold the moiety which belonged to him to Sultan Ali and Mohammad Wahab sons of his brother Farzind Ali for Rs. 368. It has been found by the lower Appellate Court that Farzind Ali himself supplied the money with which the purchase was made and that the transaction was a *benami* transaction under which Farzind Ali was to become the real owner of the property. It, therefore, decided that Mansur Ali and Newazish Ali, who would have had a right of pre-emption as against Sultan Ali and Mohammad Wahab, had no right to exercise the right of pre-emption in respect of this transaction inasmuch as they had no right to pre-emption against Farzind Ali. We do not agree with the learned Subordinate Judge in the view which he has taken. It is necessary to go back to the provisions of

Chap. II, Act XVIII of 1876. When Moharam Ali proposed to sell the property ostensibly to Sultan Ali and Mohammad Wahab he was under the obligation, in accordance with the provisions of s. 10 of the Act, to give notice to Mansur Ali and Newazish Ali. He did not do so. Thus after the sale had been completed Mansur Ali and Newazish Ali became entitled to bring a suit to enforce a right of pre-emption under the provisions of s. 13. We find that not only were Sultan Ali and Mohammad Wahab mentioned as the vendees in the deed but that vendor has stated that he had received the sale consideration from them and their names were entered in the revenue registers as the persons entitled to engage for the revenue of the property. In our opinion in these circumstances Mansur Ali and Newazish Ali had a right to exercise the right of pre-emption in respect of the property. Their right of pre-emption is against the persons who are the transferees mentioned in the deed. The principles, which should govern the rights and liabilities of parties to a *benami* transaction, are laid down to some extent in the decision of their Lordships of the Judicial Committee in *Gur Narayan v. Sheo Lal Singh* (1). The *benamidar* may have no beneficial interest in the property or business standing in his name but he represents in facts the real owner, and is in the legal position of such representative. If the sale had been made to Farzind Ali as ostensible vendee no right of pre-emption may have arisen, but when the deed of sale was executed at his own will and with his own connivance in favour of his sons, a right of pre-emption did come into existence. The plea of Sultan Ali and Mohammad Wahab is something of this nature: "In order to deceive the world our father concealed his share in the transaction and we were falsely stated to be the actual vendees when, as a matter of fact, we were not so, but now that we have discovered that this act of deception on our part has created a right of pre-emption in favour of a third party we demand that we should be allowed to state the truth to defeat the right of pre-emption but we do not propose to give up possession of the property." We do not say that they are estopped from taking

this plea but we do say that they must fail on it. In our opinion in a case such as this the Court has only to look as to who is the transferee according to the proper construction of the deed and the suit for pre-emption lies accordingly. We, therefore, set aside the decision of the lower Appellate Court and restore the decision of the learned Munsif. Under that decision the plaintiff appellants were directed to deposit the full amount Rs. 368 within one month. We are informed that they have already deposited this amount. They will now be given a decree for possession of the property. The defendants-respondents Sultan Ali and Mohammad Wahab will pay their own costs and those of the plaintiff-appellants in all three Courts.

A. N. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 804
OF 1925.

November 15, 1927.

Present:—Mr. Justice Kulwant Sahay
and Mr. Justice Macpherson.

JAGER NATH AND OTHERS—APPELLANTS
versus

EAST INDIAN RAILWAY Co., AND

ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 10, 11—Appeal—Minor respondent—Death of guardian—Fresh guardian not appointed—Appeal, whether abates—Procedure.

Where the guardian of one of the minor respondents to an appeal died during the pendency of the appeal and the appeal was disposed of without any steps being taken to appoint another guardian:

Held, that there was no abatement, but that the decree could not stand as it was made in the absence of a guardian of one of the minor respondents and must, consequently, be vacated and the parties restored to the position in which they were at the time when the appeal was still pending. [p. 541, col. 1.]

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 16th March, 1925, reversing that of the Munsif, Giridih, dated the 28th July, 1923.

Messrs. S. M. Mullick and S. N. Bose, for the Appellants.

Messrs. N. C. Sinha, N. C. Ghosh and B. B. Ghosh, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—There were three plaintiffs in the suit out of which the present appeal arises. The first plaintiff was Jagernath who was *sui juris*. The second plaintiff was Mahabir Prasad, minor

(1) 49 Ind. Cas. 1; 46 I. A. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 O. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566; 12 Bur. L. T. 122 (P. C.).

son of one Dalsukh Rai and was represented by his father. The third plaintiff was Jhawar Mal, minor son of Mangtu Ram and he was also represented by his father. The suit was against the East Indian Railway Co., and B. B. and C. I. Railway Co., and another person for compensation for the loss of certain tins of ghee consigned to the Railway Companies for carriage to Giridih. The Munsif gave a modified decree to the plaintiffs. The East Indian Railway Co., one of the defendants in the suit, preferred an appeal before the Judicial Commissioner of Chota Nagpur. During the pendency of the appeal Mangtu Ram the guardian of the minor respondent in the lower Court, Jhawar Mal died, but no steps were taken to appoint another guardian to represent the minor. It is stated in an affidavit filed in this Court that Mangtu Ram died in September or October, 1924. The appeal, was decided by the learned Judicial Commissioner on the 16th March, 1925, whereby the decree of the Munsif was set aside and the suit was dismissed.

It is now contended on behalf of the plaintiff appellants that as no guardian was appointed for Jhawar Mal after the death of his father and guardian Mangtu Ram the appeal became incompetent and the decision of the learned Judicial Commissioner cannot stand. There is no denial of the fact that Mangtu Ram died in September or October, 1924. The contention of the appellants is that the appeal abated because there was no appointment of a fresh guardian. On the other hand, it is contended that none of the respondents was dead, only the guardian of one of the minor respondents had died and the appeal did not abate and that all that was necessary under the law was to appoint a fresh guardian and that under O. XXXII, rr. 10 and 11 the effect of not bringing on the record a fresh guardian of one of the minor respondents would be to stay the hearing of the appeal until such appointment was made. I am of opinion that there was no abatement in the present case, but the decree of the learned Judicial Commissioner cannot stand as it was made in the absence of a guardian of one of the minor respondents. The decree of the Judicial Commissioner must, therefore, be vacated and the parties restored to the position in which they were at the time when the appeal was still pending and had not been disposed of by the learned Judicial

Commissioner, that is, on the date of the hearing of the appeal by the Judicial Commissioner. Under O. XXXII, r. 11, the Court could not dispose of the appeal without the appointment of a new guardian. The result is that the decree of the learned Judicial Commissioner is set aside and the case is sent back to him for proceeding according to law. Costs will abide the result.

Macpherson, J.—I agree.

B. K. P.

Case remanded.

ODDH CHIEF COURT.

SECOND CIVIL APPEAL No. 194 OF 1927.

November 1, 1927.

Present :—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

FIRM DANAJI JASRAJ THROUGH JIVA DANAJI, MANAGER OF THE FIRM—
DEFENDANT—APPELLANT

versus

FIRM PURAN LAL-BOBIND PRASAD—
THROUGH BOBIND PRASAD VAISH—
PLAINTIFF—RESPONDENT.

Jurisdiction—Decree obtained by fraud outside Oudh—Execution of decree in Oudh—Jurisdiction of Oudh Court to entertain suit for declaring decree null and void.

Where a decree passed by a Court outside Oudh is put into execution in Oudh, a suit by the defendant for a declaration that the decree is null and void as having been obtained by fraud is cognisable by a Court in Oudh. [p. 542, col. 1.]

Jawahir v. Neki Ram (1), followed.

Second appeal against the judgment of the District Judge, Hardoi, in Appeal No. 80 of 1926, dated the 3rd March, 1927.

Mr. *Ishri Prasad*, for the Appellant.

Messrs. A. P. Sen and Sundar Lal Gupta, for the Respondent.

JUDGMENT.—There is little to be said on this appeal. The case was tried with great care and great intelligence by the trial Court, and the appeal before the learned District Judge was decided as well as the original case was decided. There is a ground of appeal which has not been pressed to the effect that the Hardoi Court had no jurisdiction. The facts of this case are simple. The plaintiffs are members of a firm carrying on business as grain dealers in Hardoi. Both the Courts have arrived on the facts at the same conclusions. The defendants who are a firm carrying on grain business in Poona ordered 151 bags of *bajra* from the plaintiffs at Hardoi and remitted a sum of Rs. 1,000 in part-payment of the consignment. The plaint

iffs obtained the grain and on the defendants' instructions caused the consignment to be booked to Poona and remitted the Railway receipt with a *hundi* for the balance due to the defendants' agents in Bombay. The defendants' agents honoured the *hundi* and lost the Railway receipt and owing to this latter fact the consignment was taken possession of by a firm of Poona other than the defendants' firm. The defendants' firm received full information as to how the mistake arose. Nevertheless, they filed a suit in the Small Cause Court at Poona against the plaintiffs in which they made absolutely false allegations to the effect that after they had remitted to the plaintiffs' firm a sum of Rs. 1,000 and honoured the *hundi* the plaintiffs' firm had sent no consignment to them. The allegations in this plaint were untrue and untrue to the defendants' knowledge. This is a finding of both the Courts and it is difficult to see how any other finding could have been arrived at upon the evidence. The defendants' firm then proceeded to misdescribe the plaintiffs in the summons issued and as a result of this misdescription two summonses were sent to the plaintiffs and returned unserved. Finally, substituted service was effected upon the plaintiffs, the same misdescription continuing and an *ex parte* decree was passed by the Poona Small Cause Court in favour of the defendants against the plaintiffs which was based upon an affidavit sworn on behalf of the defendants. The suit with which we are concerned was a suit for a declaration that the decree so passed was null and void on the ground that it had been obtained by fraud.

It was suggested in the grounds of appeal that such a suit as this, in which a Court in Oudh is asked for a declaration that a decree passed by a Court outside Oudh is null and void because it has been obtained by fraud, was a suit which no Oudh Court has jurisdiction to try. We consider it sufficient in repelling this contention to refer to a decision of a Bench of the Allahabad High Court in *Jawahir v. Neki Ram* (1) in which it was laid down that when, as here, an attempt has been made to execute such a decree within the jurisdiction of the local Court, the local Court has jurisdiction to hear the case. The question has been discussed

very elaborately by the learned Judges who decided that appeal and we have nothing to add to their remarks. The learned Counsel who has appeared before us had argued that on the facts there was no fraud committed upon the Poona Court. Upon the facts we find that a very grave fraud was committed upon the Poona Court. We find that there was wilful mis-statement and wilful suppression of material facts in the plaint put in before the Poona Court and that the defendants deliberately mis-described the plaintiffs in order to prevent their being in a position to defend the case. We, therefore, dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 342
OF 1925.

April 14, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Roy.

GNANENDRA MOHAN BHADURY
AND ANOTHER—PLAINTIFFS—APPELLANTS
versus

PRAFULLANANDA GOSWAMI AND
OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 18, O. XLI, r. 23—Ex parte decree—Appeal—Cause for non-appearance—Remand—Inherent powers.

When a suit has been decided *ex parte* the remedy by way of appeal from the *ex parte* decree as well as the remedy by way of application under O. IX, r. 13 of the Civil Procedure Code are both open to the person against whom the decision was passed. [p. 543, col. 2.]

As a broad proposition it is not correct to say that in a case in which an *ex parte* decree has been passed and the aggrieved party has not availed of the remedy by way of an application under O. IX, r. 13, Civil Procedure Code, he is precluded from raising the question of propriety of the refusal to adjourn his case in the appeal which he prefers from the *ex parte* decree itself. [p. 544, col. 1.]

Sadhu Krishna Ayyar v. Kuppan Ayyangar (4), followed.

Hummi v. Aziz-ud-din (2) and *Raj Chandra Dhar v. K. D. O. C. Ray* (3), dissented from.

An Appellate Court has general powers of remand under s. 151, Civil Procedure Code, and its powers are not restricted to the cases specified in O. XLI, r. 23 of the Code. [p. 544, col. 2.]

Appeal against an order of the Subordinate Judge, Second Court, Hooghly, dated the 5th and 28th of May, 1925, reversing that of the Munsif, Second Court, Hooghly, dated the 26th of February, 1924.

Dr. Bijan Kumar Mukherjee, Babus Kali Sankar Sarkar and Sarasija Kanta Palit, for the Appellants.

(1) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190,

Babus Haradhan Chatterjee and Biraj Mohan Majumdar, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal is directed against an order passed by the Second Subordinate Judge of Hooghly, on the 5th and 28th of May, 1925. By this order the learned Subordinate Judge allowed an appeal that had been preferred to his Court by a defendant in a suit which had been decreed *ex parte* and after setting aside the judgment and decree of the trial Court remanded the suit for further trial upon certain terms and conditions. The plaintiffs have now preferred this appeal. It appears that after several adjournments granted to the defendant on applications made by him for that purpose and upon the conditions that he would pay the costs of those dates the case was eventually fixed for the 26th February, 1924. On that day the plaintiffs were ready but the defendant again put in an application asking for an adjournment on the ground that he had been attacked with small pox and that, therefore, he was unable to appear in Court on that day. An order for adjournment was made on condition that the defendant would pay adjournment costs Rs. 15, but on the said costs not being paid the case was taken up, certain witnesses for the plaintiffs were examined and the learned Munsif decreed the suit *ex parte* on the evidence that was before him. From this decree an appeal was preferred on behalf of the defendant and in this appeal the learned Subordinate Judge, being of opinion that on the 26th February, 1924, the defendant was prevented by sufficient cause from appearing in Court inasmuch as he had been attacked with small pox and in that view holding that the adjournment asked for on behalf of the defendant should have been granted, passed the order to which I have referred. The plaintiffs, as I have already stated, have thereupon preferred the present appeal to this Court.

In support of this appeal two grounds have been urged on behalf of the appellants. The first ground is to the effect that on an appeal preferred from the *ex parte* decree that was passed in this case the Subordinate Judge was not entitled to go into the question as to whether the defendant was prevented by sufficient cause from appearing in Court on the day the case was taken up. His argument in substance is that this is a matter which properly comes within the purview of pro-

ceedings taken under O. IX, r. 13 of the Code of Civil Procedure and inasmuch as the defendant did not resort to that remedy it was not open to him to urge at the hearing of the appeal that he had preferred that he was prevented by some sufficient cause from appearing when the suit was called on for hearing and that, therefore, the learned Subordinate Judge was wrong in passing the order that he did in the present case. In support of this contention reliance has been placed on behalf of the appellants upon a passage which is to be found in the case of *Jonardhan Dobey v. Ram Dhone Singh* (1). That passage occurs in the Order of Reference made by Banerjee and Rampini, JJ., referring certain questions for consideration to a Full Bench of this Court and the passage runs in these words: "Upon the record, as it stands, the *ex parte* decree may be wholly unassailable, but, if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing on the record evidence which he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal which must ordinarily proceed upon the record as it stands. The proper remedy must be the one provided by s. 108 of the Code of Civil Procedure." In my opinion, the passage relied upon by the learned Vakil on behalf of the appellant is *obiter*. Apart from authorities it seems to me to be perfectly clear that when a suit has been decided *ex parte* the remedy by way of appeal from the *ex parte* decree as well as the remedy by way of application under O. IX, r. 13 are both open to the person against whom the decision was passed. It is true that if he avails himself of the remedy by way of application under O. IX, r. 13 he is in a position of greater advantage than he would be if he preferred an appeal from the *ex parte* decree itself. This would be by reason of the fact that he would be able to establish by adducing evidence that he was unable to appear owing to circumstances over which he had no control whereas if he prefers an appeal from the *ex parte* decree itself the Court would have to proceed upon the record as it stands and to determine upon the materials that are on the record whether the application for adjournment was rightly granted or not. The question

(1) 23 C. 738 at p. 743; 12 Ind. Dec. (N. S.) 491

as to whether the order refusing the application for adjournment was rightly passed or not is, in my opinion, somewhat different from the question as to whether the absenting party was prevented by sufficient cause for not appearing in the course of the proceedings. The two, no doubt, are inter-related but the considerations are not quite the same. Reliance has in the next place been placed upon the decision of the Allahabad High Court in the case of *Hummi v. Aziz-ud-din* (2). The decision taken as a whole, no doubt, does support the contention which the appellants have put forward but the facts of that case are entirely different from those of the present case, one distinguishing feature being that in that case an application under O. IX, r. 13, to set aside the *ex parte* decree and to have a re-hearing was, as a matter of fact, dismissed and it was after that that the question against arose at the hearing of the appeal. A decision of the Burma High Court has also been referred to, namely, the case of *Raj Chandra Dhar v. K. D. O. C. Ray* (3). Now, with the utmost respect for the learned Judges who decided the case of *Hummi v. Aziz-ud-din* (2) and the case of *Raj Chandra Dhar v. K. D. O. C. Ray* (3), I must say that if they intended to lay down as a broad proposition that in a case in which an *ex parte* decree has been passed and the aggrieved party has not availed of the remedy by way of an application under O. IX, r. 13 he is precluded from raising the question of propriety of the refusal to adjourn his case in the appeal which he prefers from the *ex parte* decree itself, I am unable to agree in the view which the learned Judges had taken in the case. There is a decision of the Madras High Court in the case of *Sadhu Krishna Ayyar v. Kuppan Ayyangar* (4), where the contrary view has been taken. There is, therefore, in my opinion, no substance in the first contention that has been urged on behalf of the appellants.

The appellants' second contention is that inasmuch as evidence had been taken and a decision on the merits had been passed it was not open to the learned Subordinate Judge to make an order of remand in the form that he did. It is said that the remand has been made in the form prescribed under O. XLI, r. 23 of the Code of Civil Procedure

(2) 36 Ind. Cas. 277; 39 A. 143; 14 A. L. J. 1226.
(3) 79 Ind. Cas. 506; 2 R. 108; 2 Bur. L. J. 232; A. I. R. 1924 Rang. 137.
(4) 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479,

and that the said rule has no application to the circumstances of the case before us. This undoubtedly is so but as has been pointed out in the case of *Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Ltd.* (5) and *Jeihalal Girdhar v. Varajlal Bhaishankar* (6), the Court is entitled to make an order of remand of this description under the provisions of s. 151 of the Code of Civil Procedure. It is now too late to contend that the powers of an Appellate Court as regards remand are restricted to the cases specified in O. XLI, r. 23 of the Civil Procedure Code. It has been argued that inasmuch as the aggrieved party could have availed of the remedy under O. IX, r. 13, it was not open to the Court to make an order under s. 151 because the inherent power of the Court has got to be exercised subject to the provisions of the Code and only in such case with regard to which no provision has been made by the Code itself. Now s. 151 says: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." If the defendant was entitled to raise the question of the propriety of the adjournment in the appeal that he preferred from the *ex parte* decree and if that Court came to be of opinion that the adjournment should have been granted then, in my opinion, the only sort of order that could properly be passed by that Court would be an order setting aside the decree passed by the trial Court and remanding the case for re-trial. This is the order which the lower Appellate Court has passed. The Code does not appear to have made any express provision for a case of this nature. I am of opinion that no grounds have been made out why we should interfere with it.

In this view of the matter the order passed by the learned Subordinate Judge seems to be right and this appeal should be dismissed. Having regard, however, to the dilatoriness on the part of the respondents in the conduct of the proceedings in the Court below I am of opinion that no order should be made for the costs of this appeal in their favour.

Roy, J.—I agree.

N. H. *Appeal dismissed.*
(5) 41 Ind. Cas. 528; 44 O. 929; 26 O. L. J. 49; 21 O. W. N. 877.
(6) 63 Ind. Cas. 478; 46 B. 186; 23 Bom. L. R. 769; A. I. R. 1922 Bom. 267.

CALCUTTA HIGH COURT.CRIMINAL APPEALS NOS. 89 TO 91 AND 99
OF 1926.

January 5, 18, 1927.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Cammiade.*On difference of opinion**Present*:—Justice Sir Philip Lindsay
Buckland, Kt.,**HARI NARAYAN CHANDRA AND OTHERS**

—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 103, 360 (1)—Deposition of witness, reading of—Accused not present—Presence of Pleader, whether sufficient—House search—Witness brought from distance—Witnesses, all whether must be produced—Penal Code (Act XLV of 1860), s. 120-B—Explosive Substances Act (IV of 1884), s. 5—Arms Act (XI of 1878), s. 19—Conspiracy, person found at place of—Appearances against accused—Presumption—Possession of explosives—Temporary residence.

The words "appear by Pleader", as used in s. 360 (1), Criminal Procedure Code, are nowhere defined. In ordinary acceptance these words mean "represented by Pleader" that is to say, having a Pleader to act and plead. [p. 549, col. 2]

There is nothing in the provisions of s. 360 (1), Criminal Procedure Code to indicate that the Legislature intended that the reading over in the presence of the Pleader should be a compliance with the provisions of that section only in cases where the personal appearance of the accused is dispensed with by the Court. The natural meaning of the words is that if an accused person has engaged a Pleader, who is in attendance, the reading over of the deposition in the presence of the Pleader will be a full compliance with the provisions of the section, if the accused himself does not happen to be present at the time the deposition is read over. [*ibid.*]

The mere fact that one of the search-witnesses is brought by the Police from a distance of about half a mile from the place of search is not sufficient to discredit that witness, unless it is shown that he was in any way connected with the Police. [p. 552, col. 2.]

The word "permitted" in s. 103 (3), Criminal Procedure Code, cannot be taken to mean that the person whose premises are searched shall be present and that he must be given the option of being present. [*ibid.*]

No duty is cast on the prosecution to put every search witness into the witness-box. [p. 553, col. 1.]
Munni Sonar v. Emperor (3), dissented from.

Where there is no means of discriminating between the cases of various persons found at a place of a criminal conspiracy, and the circumstances point to the conclusion that every person found in the house was a member of the conspiracy, absence of proof that a particular person was there innocently leads to the conclusion that no one's presence was innocent. [p. 555, col. 1.]

Obiter.—Section 360 (3) is not an additional provision, requiring that the deposition recorded in English should be translated into the vernacular to

a witness who has deposed in the vernacular, after having first been read over to him in English [p. 548, col. 2.]

Per Suhrawardy, J.—When appearances are against the accused in a case, and the prosecution has established *prima facie* the existence of incriminating circumstances, it is the duty of the defence to rebut the presumption arising from them by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock. The idea that the defence is not bound to adduce any evidence is dangerous. In Jury trials the last word may have some value but in a trial before three experienced Judges the prosecution and the defence stand on the same footing. [p. 556, col. 2.]

It cannot be said that temporary residence in a house containing explosive articles, even with the knowledge of their existence there, is possession within the meaning of s. 5 of the Explosive Substances Act. Conspiracy to possess connotes some act of possession or attempted possession. [p. 557, cols. 1 & 2]

Criminal appeals against the decision of the Commissioners appointed under ss. 4 (1) and (2) of the Bengal Criminal Law Amendment Act, 1925, dated the 9th January, 1926.

Babu Mrityunjoy Chattopadhyaya, for the Appellants.

Mr. B. L. Mitter (Advocate-General), for the Crown.

JUDGMENT.

Cammiade, J.—(January 5, 1927)—These four appeals are against a judgment of Commissioners appointed under sub-ss. (1) and (2) of s. 4 of the Bengal Criminal Law Amendment Act, 1925. Nine persons were convicted by this judgment; and out of these one has undergone sentence of death passed on him in connexion with the Alipore Jail murder. There remain eight persons. Five of them, namely, Hari Narayan Chandra, Rajendra Lal Lahiri, Birendra Kumar Banerjee, Dhrubesh Chandra Chatterjee and Rakhal Chandra De are the appellants in Appeal No. 89; Nikhil Bandhu Banerjee is the appellant in Appeal No. 90; Debi Prasad Chatterjee is the appellant in Appeal No. 91; and Shibaram Chatterjee is the appellant in Appeal No. 99. Two of the appellants in the first of these appeals, namely, Dhrubesh Chandra Chatterjee and Rakhal Chandra De, have been sentenced to transportation for life in connection with the Alipore Jail murder; and the learned Vakil who appears for them has moved us to exercise the powers vested in us by s. 397 of the Code of Criminal Procedure, and make the sentence passed in the case before us run concurrently with the other

sentence, in the event of our finding these appellants guilty in the present case also. The learned Advocate-General has supported this request. The appeal in other respects, as far as these appellants are concerned, may be treated as sentimental.

All the appellants have been found guilty of the following offences, namely, conspiracy, under s. 120-B of the Indian Penal Code, to commit the offences specified in s. 4 (b) of the Explosive Substances Act and s. 19 (f) of the Arms Act and also substantive offences under both the last mentioned sections. Hari Narayan Chandra and Rajendra Lal Lahiri have been sentenced to transportation for ten years under s. 4 (b) of the Explosive Substances Act and to rigorous imprisonment for two years under s. 19 (f) of the Arms Act. Birendra Kumar Banerjee, Nikhil Bandhu Banerjee, Dhrubesh Chandra Chatterjee and Rakhal Chandra De have been sentenced to rigorous imprisonment for 5 years under the former section and rigorous imprisonment for two years under the latter. Shibaram Chatterjee and Debi Prasad Chatterjee have been sentenced to rigorous imprisonment for 3 years and 18 months respectively under the above two sections. The separate sentences passed on each of the appellants are to run concurrently.

The story of the case is to the following effect :—

The Police had been keeping watch over the house, No. 4 Sova Bazar Street; and instructions had been given to shadow Ananta Hari Mitra. On the 6th of November, 1925, a watcher named Nilini Kanta Roy, who was standing at the junction of Sova Bazar Street and Chitpore Road, saw Ananta Hari Mitra engage a taxi at about 1.45 p. m. and drive into Sova Bazar Street. After a few minutes, he saw the same taxi returning with Ananta Hari Mitra, Dhrubesh Chandra Chatterjee and another man inside. The taxi turned into Chitpore Road and went northwards. The watcher took down the number of the taxi.

That evening, at about 6 o'clock, the watcher came across the taxi and asked the driver where he had taken the three young men. The driver, whose name was Hiru, replied that he had driven them as far as Baranagore Bazar where they had alighted and engaged a *ticca gharri*. On being asked if he could point out the *ticca*

gharri, he said he might, and also that his friend, Shamser Ali, who had been with him, might also help in the matter. The watcher went with Hiru to Shamser Ali's house. They took Shamser with them in the taxi to Baranagore Bazar. There Hiru and Shamser made enquiries among the *ticca gharri* drivers and returned and said that the man who had driven the young men was one Mona, who was not there at the moment. Next morning, the watcher went to Baranagore and found Mona, from whom he learnt that he had driven the three young men to Bachaspatipara in Dakhineswar. The watcher made Mona drive him to the place where the young men had alighted. There, Mona pointed out the house to which one of the young men had gone to get change for a rupee, while the other two had remained in the carriage. That house is the one referred to in the evidence as Dwaraka's house. Early on the morning of the 10th of November, Mr. Duckfield, Additional Superintendent of Police, 24-Parganas, went with a posse of Police to make a search. He was taken by Nilini Kanta Roy, the watcher, to Dwaraka's house. That house is in two parts. The house was surrounded; and at each of the parts of the house one of the inmates was questioned. It was ascertained from them that the next house, separated from this one by a tank, was occupied by strangers, who kept very much to themselves. Mr. Duckfield inferred that that was the house he wanted; and he had it surrounded. One search witness was taken on the way to the place, at a distance of about half a mile from the house that was searched; and three neighbours were also summoned and made to attend as witnesses to the search. All the nine persons who have been convicted were found at the house that was searched. The Police found the door closed, and they knocked for admittance. Rakhal Chandra De opened the door and stood in the doorway and Mr. Duckfield asked him his name; and he gave the name of Nimaj Chandra Deb. Rakhal was put under arrest. As the rooms on the ground floor were unoccupied, Mr. Duckfield went up the stairs, followed by some of the members of his force. He found the door at the head of the stairs closed and fastened. As no one complied with the request that that door should be opened, a pick-axe was procured, and the door was broken open. On the

first floor of the house there are three rooms and an enclosed verandah. The house faces south; and the enclosed verandah is on the south side. As one goes up the stairs, one finds to the left a door leading off the enclosed verandah into the room that is referred to as the eastern room. On the right-hand side as one goes up, there is the enclosed verandah, out of which two doors open northwards into the rooms which are referred to as the middle room and the western room.

When Mr. Duckfield entered the enclosed verandah he found Rajendra Lal Lahiri at the foot of the flight of stairs leading to the roof, which lie between the stairs that lead to the ground floor and the eastern room. Mr. Duckfield arrested Rajendra Lal Lahiri, and sent him downstairs.

Mr. Duckfield then went into the middle room. There he found Dhrubesh Chatterjee and Shibaram Chatterjee lying ill, with Ananta Hari Mitra attending to them. The last named was put under arrest.

Mr. Duckfield then went to the eastern room. On the way there, he found Debi Prosad Chatterjee under arrest in the enclosed verandah. The latter had been in attendance on the three persons who were lying ill in the eastern room. Those three persons were Birendra Kumar Banerjee, Hari Narayan Chandra and Nikhil Bandhu Banerjee. None of the persons found upstairs gave his name, with the exception of Debi Prosad who also gave his father's name and address.

The eastern room was searched first. The articles found there were items Nos. 1 to 46 of search list Ex. B. The search of that room lasted till about 9-30 A. M.

At about 9 o'clock, the five persons who were ill were sent in an ambulance and in a taxi to Alipore, to be produced before the District Magistrate.

The search of the middle room was taken up after that of the eastern room was concluded. In the middle room, amongst other things, there was an *almirah* which was padlocked. Those of the arrested persons who had been brought up and were present were called upon to produce the key. As the key was not produced, the padlock was forced open. In that *almirah* were found most of the remaining articles specified in search list Ex. B including, among other things, a live bomb. The Chief Inspector of Explosives was sent for, and he placed

the bomb in a bucket of water and took it away.

The search of the premises was continued till 7-30 P. M. on that day and was continued on the next two days. Nothing of any importance was found in the western room upstairs, in the room on the roof, in the ground floor rooms or in the outhouses.

The four accused persons in good health were present throughout the search of the middle and western room and were there for the rest of the day. They were produced before the Magistrate next morning.

Before proceeding to discuss the case on the merits, it is necessary to dispose of a preliminary objection to the validity of the trial, taken on behalf of all the appellants. It is contended that the provisions of s. 360 of the Code of Criminal Procedure have not been complied with. Our attention is drawn to the fact that the certificates given by the Commissioners at the foot of the depositions are in four different forms:—

(1) "Read over to witness in the presence of the accused or their lawyers, and admitted to be correct."

(2) "Read over in the presence of the accused and admitted to be correct."

(3) "Explained to the witness in the presence of the accused or their lawyers and admitted to be correct."

(4) "Explained to the witness in the presence of the accused and admitted to be correct."

It is contended that only the second of these forms of certificates shows compliance with the provisions of s. 360. As regards the reading over of the depositions in the presence of the lawyers representing accused persons, who were temporarily absent from the Court room for necessary purposes at the time the depositions were read over (Certificate form No. 1 above) it is urged that such reading over is not a compliance with the provisions of the section, the object of which is to enable both the witness and the accused to see whether or not the depositions have been correctly recorded.

As regards the certificates in forms Nos. (3) and (4) set forth above, it is contended that, in order to comply with the provisions of s. 360, it is the duty of the Court first to read over the recorded deposition in English, as provided in sub-s. (1) and then to have it interpreted to the witness as provided in sub-s. (3), and that as the certificate does not show that the

deposition, where certificate in form No. 3 or No. 4 has been given, was read over in English, there was no compliance with the requirements of the section.

Before proceeding to discuss this matter it should be stated that all the accused persons under trial were represented by lawyers. Throughout the trial, all the accused persons were represented by a Solicitor named Delip Kumar Chakrabarti, witness No. 74 for the prosecution. Besides this, for the first five days of the trial, the appellant Nikhil was represented by Mr. Mukherji and certain other legal gentlemen who appeared also for other accused persons. On the sixth day of the trial, Mr. Mukherji and these other legal gentlemen made known to the Court that from that day forward they ceased to appear for Nikhil. All the accused persons admittedly knew English.

Two affidavits have been filed on behalf of the appellants, one by one Krishna Charan Chandra, brother of the appellant Hari Narayan Chandra, and the other by one Akhil Bandhu Banerjee, brother of the appellant Nikhil Bandhu Banerjee. On the side of the Crown, a statement signed by one of the Commissioners, contradicting the allegations made in these affidavits, has been filed. In the first of these affidavits the Commissioners are charged with having merely told some of the witnesses what purported to be the substance of the depositions that had been recorded; and it is further stated that all the accused persons were not present in the Court room at the time that some of the depositions were read over. The other affidavit states that Nikhil was not present in the Court room when some of the depositions were either read over or explained to the witnesses. The deponent states that he particularly remembers that Nikhil was absent from the Court room when the deposition given by Jugal Kishore was explained to that witness. He further repeats the charge that in the case of some of the witnesses only the substance of their depositions was given to them in Bengali.

The Commissioners' statement is to the effect that, whenever a witness deposed in English the deposition was read over to him in English, that, whenever a witness deposed in the vernacular, the deposition was read over sentence by sentence and then explained to the witness in the vernacular, and that if any accused person not repre-

sented by a lawyer was absent from the Court room, the Court invariably waited for his return before proceeding to read out the deposition to the witness.

The learned Vakils appearing for the appellants were none of them present at the trial, and are not in a position to support the allegations made in the affidavits. None of the legal gentlemen who did appear for the appellants at the trial has sworn an affidavit to support the allegations that have been made. The persons who have sworn the affidavits are the brothers of two of the appellants who have nothing to lose by swearing falsely. The allegations made by them are amply refuted by the statement signed by one of the Commissioners. The very record shows with what care and scruple the Commissioners did their work. The Commissioners have been at pains to record in each instance whether or not all the accused persons were themselves present in the Court room at the time a deposition was read over, showing that they made a point of ascertaining each time whether or not all the accused persons were present in the room when depositions were read over. There can, therefore, be no doubt that whenever Nikhil, who was considered unrepresented, was out of the room, the Court did, as the Commissioner has stated, await his return before reading over a deposition.

We are not prepared to accept the contention that sub-s. (3) to s. 360 is an additional provision, requiring that the deposition recorded in English should be translated into the vernacular to a witness who has deposed in the vernacular, after having first been read over to him in English. It would be a grave insult to the Court to question its integrity in giving a true rendering in the vernacular of the deposition it has recorded. There is nothing in the wording of the section to indicate that it requires that the deposition shall first be read over as recorded in English and shall then be translated into the language in which the witness has deposed. If such had been the intention of the Legislature, we should have expected the word "also" to stand between the words "shall" and "be interpreted" in sub-s. (3). It is, however, not necessary for us on this occasion to decide whether or not the interpretation sought to be put upon the section is correct, as the Commissioner who has made a statement has placed on record

that whenever a witness deposed in the vernacular, the deposition recorded in English was first read out sentence by sentence and then interpreted to the witness.

As regards the objection that the reading over of a deposition in the presence of a Pleader, during the temporary absence of the prisoner represented by such Pleader, is not a compliance with the provisions of s. 360, we have been referred to the case of *Kasim Ali v. Sarada Kripa Laha* (1) and also to the wording of ss. 360 and 361 of the Code. It is true that in the case referred to we find that a Bench of this Court laid down as follows:—"It is clear from the wording of the section that if the accused is in attendance the evidence must be read over in his presence, and it is only when the accused appears by Pleader that the reading over of the evidence in the presence of the accused's Pleader is sufficient." But the facts of the case do not appear from the report. It may be inferred that in that case the deposition had been read over before a Pleader and that is all. There may have been more than one accused person in the case; and possibly the person in whose absence the deposition in that case was read over had no Pleader appearing for him. We, therefore, cannot consider the case as an authority for the proposition set up by the appellants.

As regards the argument based on the wording of these sections, we are unable to accept the contentions of the appellants. The contentions are as follows:—

Firstly that the words in sub-s. (1) of s. 360 "or of his Pleader, if he appears by Pleader" relate to cases where the personal attendance of an accused person is dispensed with under the provisions of s. 205 of the Code in which the words "permit him to appear by Pleader" are to be found and secondly that such interpretation is borne out by the provisions of s. 361, of which the first two sub-sections read:—Sub-section (1) "Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him." Sub-section (2) "If he appears by Pleader and the evidence is given in a language other than the language of the Court, and not understood by the

Pleader, it shall be interpreted to such Pleader in that language."

Now, the words "appear by Pleader" are nowhere defined. In ordinary acceptance, these words mean "represented by Pleader" that is to say, having a Pleader to act and plead. In s. 205 the word "appear" seems to convey a double meaning, seemingly connoting, not merely authority to act and plead but also authority to personate the accused, but there is nothing to show that double meaning was intended by the Legislature. It is necessary that someone should be present at the trial to look after the interests of the accused; and all that s. 205 provides is that, when the Magistrate sees fit, a person against whom a summons has issued may be exempted from personal appearance, provided he engages a Pleader to attend and see that the proceedings are properly and legally conducted. The law considers that the interests of the accused will be completely safeguarded if his Pleader is in attendance. This is all that can be gathered from the provisions of that section. A similar intention is to be gathered from the provisions of s. 361.

But even if the double meaning of the word "appear" in s. 205 were intentional, there is nothing in the provisions of sub-s. (1) of s. 360 to indicate that the Legislature intended that the reading over in the presence of the Pleader should be a compliance with the provisions of that section only in cases where the personal appearance of the accused is dispensed with by the Court. The words used are "it shall be read over to him (the witness) in the presence of the accused, if in attendance, or of his Pleader if he appears by Pleader." The natural meaning of these words is, that if an accused person has engaged a Pleader, who is in attendance, the reading over of the deposition in the presence of the Pleader will be a full compliance with the provisions of the section, if the accused himself does not happen to be present at the time the deposition is read over.

We, therefore, hold that the provisions of s. 360 have been complied with.

Turning to the facts of the case we find a number of young men, not all of one caste, hailing from different places, none of them with any ostensible means of livelihood, and only one of them apparently possessing some money, living together in what is practically a village on the outskirts of

(1) 93 Ind. Cas. 973; 30 O. W. N. 336; 3A I. R. 1928 Cal. 528; 27 Cr. L. J. 509.

Calcutta, a place which is admittedly malarious. These young men keep very much to themselves. They hardly go abroad and even will not make use of the privy standing within the compound of the house, using instead a rain water pipe leading from the roof of the house. They have no intercourse with neighbours. They keep their door closed all the time. When one of them visits the grocer's shop to buy groceries, he does so late in the evening and tells the grocer to make haste and hand over the goods. They live under assumed names. Even when some of them are ill, rather than call local medical men, they go to the expense of bringing one from a distance, paying him a high fee and the expenses of conveying him to Dakshineswar and back. At the search of the house they occupy, the Police find a stolen revolver, a muzzle loading pistol, cartridges for revolvers, for an automatic pistol and for a shot gun, a live bomb, a large quantity of chemicals used in the preparation of explosives, handwritten and type-written instructions for the preparation of explosives of various kinds, cloth masks, written instructions about disguises, inflammatory literature and have hand-drawn maps of the neighbourhood.

All these young men profess to have no connection with the incriminating articles found at the search. Every one of them, except Nikhil, who made no statement, gives some excuse for being in that house. Hari Narayan says, that he is an ex-internee, and that as the Police were always on his tracks he decided to live in a quiet place outside Calcutta. He came to hear of the house at Dakshineswar through his friend Dhrubesh, and took it at the beginning of August, and went to live there with Birendra and Shibaram. Birendra says that the people of the house where he had worked as a private tutor in Howrah had calumniated him, and that he had to leave Howrah on that account. His friend, Hari Narayan, suggested living at Dakshineswar; and he went there to live with his friend, who also promised to take him into partnership in a business he was going to start. Birendra, however, was ill most of the time.

Shibaram says he had quarrelled with a Professor of Ashutosh College and had gone to St. Xavier's College, against his father's wishes. He failed in his annual examination; and his father expressed

annoyance at this. He, therefore, left home. His friend, Hari Narayan, took him to live at Dakshineswar to save him expense and also promised to have him instructed in short hand. Dhrubesh says he had a quarrel with his uncle over money matters and left home and lived at one or two places and then went to the Dakshineswar house, where his friends had started a cheap mess. Rakhal had a quarrel with the manager of a business called the Chittagong Chemical Industries, for which he had been working. He was on the look out for other employment and wrote to his friend, Ananta Hari Mitra, who invited him from Chittagong to Krishnagar and then took him to live at Dakshineswar early in November.

Rajendra Lahiri, Debi Prosad and Ananta Hari say they went to the house on the 8th of November, two days before their arrest and found several people lying ill. They were asked to stay and help; and that is how they happened to be present at the time of the search. Rajendra claims to have come to know of the place through his friend Dhrubesh, whom he had met near the Dakshineswar temple, and had been invited to go and visit the mess whenever he could. Debi Prosad also had quarrels. He had formerly lived at the house in Dakshineswar in which he has a share. As he had quarrelled with his co-sharers, he had gone to live at Bally, on the other side of the river. The letting of the house to Hari Narayan and his friends was arranged through him, but his relatives tried to deprive him of his share of the rent. He, therefore, went to the house on the 8th of November to collect his share of the rent direct.

That the incriminating articles were found in the house and that all the appellants were arrested there on the 10th of November, 1925, are not questioned. The case sought to be set up for all the appellants is that they had no connection with the incriminating articles, and that those articles must have been introduced into the house by the Police; and if that theory is not accepted, it has not been proved which of the appellants was in possession of the incriminating articles.

As regards individual appellants, it is urged that, in the absence of evidence to the contrary, it should be believed that Rajendra and Debi did not go to th-

house till the 8th of November, and that their purpose in staying there was merely to help in nursing people who were ill. For Shibaram it is said that he was too ill to know what was taking place in the house.

Touching the first part of the general defence set up in argument before us, it has been urged that firstly the search was not conducted in accordance with law, and secondly that, as Mr. Duckfield has said that the appellants who were in good health were brought up from downstairs when the middle room was searched, that is to say at 9-30, and the men who were ill were removed at 9 o'clock, the Police had had half an hour in which to "plant" the incriminating articles in the middle-room. At the time of the trial, the suggestion that was thrown out was that the things had been carried into the house before the arrival of the local search witnesses. This suggestion will appear only from the following passage in the deposition of the friendly search witness Makhan Lal Chatterji, prosecution witness No. 5, who is related to the appellant Debi Prosad. The question put to this witness was:—"Had you any conversation with the accused there." (There refers to the door of the house, where according to the witness he found Rajendra and Debi under arrest). I shall re-call it to you. Did the accused say this:—"Mahashay, why have you come so late? They have done what they wanted to do." And the answer was "yes."

From this it is argued that the suggestion then was that the incriminating articles were carried into the house by the Police before Makhan's arrival. Yet neither Rajendra nor Debi said anything about this in his statement on examination before the Commissioners. The learned Vakil appearing for the appellants naively states that these persons could not make such statements in their answers to the Commissioners, because they were downstairs and could not see the things being put into the *almirah* upstairs. They may or may not have been in a position to say that they saw things put into the *almirah*: but they must have been in a position to see things being taken upstairs. Considering the enormous number of articles taken at the search and the bulk of several of these articles, it certainly would have been impossible for the Police to have taken

these things upstairs without being seen. This matter will have to be referred to further in connection with the comments that have been made about the searching of the persons of the Police and of the search witnesses before they entered the house. The failure of the appellants to state that they saw articles in the hands of the Police or indications that they were carrying articles concealed in their uniforms is a complete refutation of the suggestion that anything was carried into the house by the Police at any time.

The enclosed verandah upstairs is only about 5 feet wide. According to the search witness, Makhan, the contents of a tin box found in the eastern room were examined on that verandah. The officers conducting the search, some constables and the search witnesses were present. In such circumstances, it is difficult to understand how it could have been possible for the Police to carry to the middle room the large number of articles that were found there. If aspersions are made on the Police, it should be shown that such aspersions are justifiable. It is not sufficient to say that on certain occasions the Police have been known to fabricate circumstances. It must be shown that in the present case there are at least indications that the Police put the incriminating articles into the house. The indications point the other way. When the key of the padlock to the *almirah* in the middle room was asked for had those of the appellants who were present been innocent, one would have expected them to say "How should we know where the key is? You have yourselves put the padlock on the *almirah*." They would have made similar remarks when the incriminating articles were taken out of the *almirah*. Instead of which we find that when the bomb was found, the appellant Rajendra Lahiri offered to remove the fuse and make the bomb harmless.

Further the nature of at least two of the articles makes it extremely improbable that the Police had any connection with them. The first is the bomb, which, as Dr. Robson has deposed, was in a sensitive condition. He describes the mixture of chemicals contained in the bomb as a dangerous mixture and says that there is considerable probability of Ammonium Chlorate being formed from such a mixture, which might lead to a premature

explosion. It is not reasonably probable that, in order to gain promotion or reward, the Police would carry about on their persons such an extremely dangerous article as this bomb. The other item is the revolver. This weapon was unlicensed. Whenever that weapon might have been discovered by the Police, the person with whom it was found would have been prosecuted. The weapon, moreover, is an expensive one; and it is unreasonable to suggest that subordinate members of the Police establishment keep expensive weapons of this description by them for the purpose of "planting" them on persons whom they intend charging with possession of unlicensed arms.

The suggestion that the Police smuggled the incriminating articles into the house does not bear investigation.

In the same connection, the learned Vakils for the appellants have drawn attention to certain discrepancies in the evidence on the subject of the searching of the persons of the Police and of the search witnesses; they have characterised the search of the eastern room as illegal, because, according to Mr. Duckfield's evidence, the four men who were not ill were not present at that search; and they have asked us to disbelieve the evidence of the search on the ground that two of the search witnesses were not examined.

The witnesses agree in saying that the Police were searched, although there are discrepancies concerning the manner in which they were searched. Some say hands were not laid on their persons; others say that the clothes were felt; and one Police Officer says that his pockets were searched. Mr. Duckfield offered himself for search and asked the search witnesses to search his force before he entered the house. As regards the search witnesses, they were four in number. Makhan was well disposed towards the appellants; and there is no suggestion that he took anything into the house. The other two witnesses to the search must also have been free from suspicion, since complaint is made that those persons were not placed in the witness-box. The suggestion, therefore, is that the remaining search witness, Jugal, must have smuggled things into the house. This is nothing but a suggestion. Suspicion is sought to be cast on Jugal because he was brought by the Police from a distance of about half a mile from the place. This

circumstance is not calculated to create any suspicion unless it can be shown that Jugal was in any way connected with the Police. There is absolutely nothing to show this. The place where the house stands is more or less a village, well away from the Barrackpur Trunk Road. The house at which the Police went to make the search was one near which it must be more or less difficult to secure persons to attend a search. It is not every one who is willing to be dragged into a Police case. Therefore, the mere fact that Jugal was found nearly half a mile away from the house, that was searched is no ground for suspicion. There is also nothing reasonable about the suggestion. As already stated, the articles found were bulky. There were a great many bottles of acid, glycerine and other chemicals; there was glass apparatus of various kinds; and a large number of small phials, packets containing different substances and papers, besides the bomb, the revolver, the pistol and the cartridges. It cannot be seriously suggested that Jugal Kishore could have smuggled any appreciable portion of this bulk. We are not told what clothes the man was wearing; and there is nothing to show that he wore any more clothing than Makhan, who says he had on nothing more than a *dhoti* and a *chadar*. There is no force whatever in the suggestion that anything was smuggled into the house.

Nothing turns on the other two objections made concerning the search. With regard to the absence of Ananta Hari, Rajendra, Debi Prosad and Rakhal, the four persons who were in good health, at the time of the search of the eastern room, Mr. Duckfield may or may not be mistaken; but assuming that he is right in saying that all the four persons were downstairs when that room was searched, their absence can make no difference to the case. Our attention has been drawn to the remarks of Mr. Justice Beachcroft in the case of *Romesh Chandra Banerjee v. Emperor* (2), where the learned Judge observes that in his opinion the spirit of s. 103 of the Code of Criminal Procedure requires that the person whose premises are searched shall be present and that he must be given the option of being present. This view of the meaning of the word "permitted" in sub-s. (3), s. 103 was

(2) 23 Ind. Obs. 985; 41 C. 350 at p. 376; 18 C. W. N. 498; 15 Cr. L. J. 385.

not accepted by Mr. Justice Woodroffe, the other learned Judge who decided that case. We are not prepared to agree with the interpretation put on the word "permitted" by Mr. Justice Beachcroft.

As regards the failure of the prosecution to put the other two search witnesses into the witness-box, our attention has been drawn to the case of *Munni Sonar v. Emperor* (3) where it was laid down that every search witness should be put into the witness-box, unless the prosecution are of opinion that such persons would misrepresent facts and would misstate what had happened. With all the respect to the opinion of the learned Judges who decided that case, we must hold that no such duty is cast on the prosecution. Sub-section (2), s. 103 expressly lays down that "no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it." The reason of this provision is obvious. Many persons would be unwilling to attend searches if, as a matter of course, they had to attend Court at the trial of the case, possibly two Courts, if the case is committed to the Sessions. The discretion is, therefore, left to the Court to require or not the attendance of such witnesses. It does not even appear that the appellants moved the Commissioner to have those witnesses produced; and they certainly did not call them as witnesses for the defence, which it was open to them to do, and which they should have done, since they profess to have a high regard for the truthfulness of these persons. There is no substance in the grievance sought to be made out.

Be those things as they may, the important question is whether or not the incriminating articles were in the house when the Police went to search it. If this is so, as we must find it to be so, it would not matter in the least, whatever irregularities might have been committed in the conduct of the search.

The other important question in the case is the question of possession of the incriminating articles. At the trial, an attempt was made in cross examination to suggest that the chemicals and the chemical apparatus were the property of a medical practitioner who had previously lived in the house. This suggestion has not been seriously pressed

before us; and it is entirely negatived by the evidence. It appears that the medical practitioner who had occupied the house was one Govinda Gopal Mukherjee, Debi's maternal uncle. He had lived in the house for about twelve months and had been in the service of a neighbouring mill. He was away at his work the greater part of the day and had no private practice. He kept no chemicals in his house and had no laboratory. These facts are deposed to by Debi's relations, who are witnesses in the case. One of them, Nabin Kali, Debi's aunt, states that after the house had been let to the young men she had cleaned out the almirah in the middle room and left it open.

As far as concerns the bomb, there can be no question about its manufacture within a few days of the date of the search. There is unimpeachable proof that it was manufactured after the 23rd of October, 1925, because the circular slips of paper found within it, serving as a covering to the explosive powder, have been proved conclusively to have been cut out of the *Amrita Bazar Patrika* of that date.

A cash memo was also found among the papers in the house, showing purchase of extra pure nitric acid of the gravity of 1.42 on the 3rd of November, 1925, and among the bottles of acid found in the almirah was one of such acid. The cash memo has been proved by the chemist who sold the acid. The purchaser had given the name of Asok Chandra Roy—Asok being one of the names that one of the appellants had assumed. The address given to the chemist by the purchaser was 70 Balaram Ghose Street, totally fictitious address.

There is no room for the suggestion that the incriminating articles had belonged to the medical practitioner who had occupied the house. Possession of these articles can only be attributed to the occupants of the house at the time of the search. The only question is whether any of the persons found in the house can claim the benefit of the doubt in regard to this matter.

All the circumstances of the case leave no room for doubt that the occupants of the house were members of a conspiracy with anarchical designs. The persons found in the house belonged to different places. Hari Narayan belonged to Chinsurah; Biren to Salika; Dhrubesh to Nandigram in the District of Hooghly; Nikhil to Joypur in the District of Jessore; Rakhal to Chitta-

gong; Rajendra to Pabna; Ananta Hari to Krishnagar in the District of Nadia; Debi Prosad to Bally in the District of Howrah; and Shibaram to Bhowanipore, Calcutta. Some explanation is necessary for the presence of such persons in the same house, several of them admittedly living together. The absence of explanation, which would be forthcoming if the appellants were innocent, undoubtedly corroborates the case for the prosecution. These youngmen, moreover, were doing nothing; and, according to their own account of themselves, the majority of them had quarrelled with their relations. They have, none of them, even stated that they had been making efforts to find employment. Only Birendra has said that he had had it in his mind to re-join his appointment in the office of the E. I. Railway. The fact that these youngmen were living in a place which is admittedly a hotbed of malaria does not suggest that they chose the place for the sake of their health. If they had been living honestly, there was no occasion for the extreme secrecy observed by them—secrecy carried to the point of making their lives disgusting. As already stated, these youngmen actually used a rain water pipe leading from the roof of the house as a latrine, when they had a privy outside. It is idle to say that people who do such a thing as this can have any but nefarious ways. Their only object in doing anything so disgusting could be to escape observation from neighbours. The inmates of the house went under false names. We have nothing but the statements of the majority of them that for one reason or another they had fallen out with their relatives and guardians and that they did not wish to be traced by them. This story is not consistent with the story that Rajendra who is supposed to have become stranger to the bulk of the occupants of the house, was invited to visit the house as often as he could go, or that Ananta Hari, a person who is said to have had no sort of connection with the establishment, took Rakhal to live there as a matter of course. We have nothing but the word of the appellants about the reasons for their being where they were found, with all the incriminating articles. People living in the house were collecting materials for the manufacture of explosives, had in their possession directions for the preparation of explosives of various kinds and at least one live bomb and also unlicensed arms. That

persons who were engaged in doing such things would have as their mess mates any but fellow conspirators is utterly inconceivable. It cannot be believed that any person could have been admitted within the house unless he was a safe person. Since the occupiers of the house would not even associate with neighbours in the street and were so careful about avoiding even being seen by their neighbours, it is utterly unlikely that they would admit people within the house, least of all have people to stay with them, unless such people were co-conspirators. Of the co-owners of the house Hari Sadhan Chatterjee, Satish Chandra Chatterjee and Nabin Kali, each was admitted upstairs once. On the occasion of their visits, they found the door of the house closed and had to knock for admittance. Satish visited the house in the first part of August, and Hari Sadhan visited it in the first week of September. They went there to collect the rent. Nabin Kali went to the house on four or five occasions. She used to go to the garden to collect Bel leaves for worship. She used to find even the door of the outer wall of the house fastened and had to shout for admittance. She went upstairs once. That was at the time of the *Ananta Chaturdashi* in the month of *Bhadra* (end of August). That was the occasion on which she cleaned out the almirah in the middle room. It does not appear that any of the co-owners of the house went there after the first week in September; and we find that Debi paid the rent to Hari Sadhan at the beginning of November. Whether or not chemicals for the manufacture of explosives had been introduced into the house before the end of the first week of September, it is impossible to say. There is one circumstance that seems to indicate that they had not, namely, that apparently the house was not occupied during the *durga puja* festivities, which occurred in that year between 24th and the 27th of September. Nabin Kali states that the boys told her they were going home for the *puja* and would lock up the house. During the *puja* festivities she noticed that the door of the house was padlocked. Three days after the *puja* she noticed that the door was still padlocked, and it seemed to her that there was no one in the house. The real activities of the conspirators seem to have started after the *pujas*. There is no definite evidence

this. The only circumstances that seem to indicate this are the one stated above, the manufacture of the bomb subsequent to the 23rd of October, the apparent purchase of nitric acid on the 3rd of November, as evidenced by the voucher found in the house, and the increase in the number of the house.

Over and above the grave improbability that any persons other than fellow conspirators would have been admitted into the house when the conspirators had become active, there is the want of plausible explanation of the presence of the persons who were admitted there after the *pujas*, and there is the further fact that the prosecution has established a connection between the house at Dakshineswar and 4 Sova Bazar Street, the house that Ananta Hari Mitra used to frequent. That house also was searched on the 10th. of November, and amongst the things found there were a five-chambered revolver with cartridges, six large bottles of nitric acid and inflammatory literature. A bicycle was found at that house; and the bill for repairs done to that bicycle was found in the almirah in the middle room of the Dakshineswar house, and has been proved by owner of the shop where the repairs were done. The established connection with 4 Sova Bazar Street and the repeated appearance in the accounts found in the almirah of mysterious names, including the assumed names of some of the persons found in the Dakshineswar house, prove that the establishment at Dakshineswar was a branch of a larger organization; and this fact makes it all the more impossible to believe that the conspirators at work at Dakshineswar would admit within their house any but persons who were members of the conspiracy. As we have no means of discriminating between the cases of the various persons found in the house, and as the circumstances point to the conclusion that every person found in the house was a member of the conspiracy, absence of proof that a particular person was there innocently leads to the conclusion that no one's presence was innocent. The explanation offered on behalf of Rajendra is palpably false. The improbability of persons who kept themselves so very much concealed as the inmates of the house inviting people to go and visit them has already been noticed. But, apart from this, we have clear indications that

Rajendra had been in the house for some time and had not, as he says, only gone there on the 8th of November. He stated that, because he knew he could have to stay with the sick persons for a day or two, he went away and fetched a cloth, a *chadar* and Bryce's Democracy. At the search of the house at Dakshineswar, various articles were found which he claimed as his own—shaving materials, a blanket, a Panjabi and other things. His admitted belongings were found in various parts of the house. Over and above this, we find that his Panjabi bore the arrow mark, which the *dhobi*, who had washed the clothing of the inmates of that house, had been putting on those clothes. The *dhobi* has also identified Rajendra as one of the persons whom he saw at the house when he went there in connection with the washing of clothes. The *dhobi* says he was not allowed to enter the house, and that the clothes used to be thrown to him from upstairs.

The only appellants besides Rajendra who claim to have been recent arrivals are Rakhai and Debi Prosad. The former, as already stated, had come from Chittagong. The fact that according to his own case he was introduced to the establishment by Ananta Hari Mitra, who was connected both with this establishment and the one at 4 Sova Bazar Street, makes it all the more necessary that he should prove his statements. There is nothing but his own uncorroborated statement to show that he was a recent arrival. But, even if he was a recent arrival, the inferences arising from the facts of the case have to be rebutted; and there is absolutely nothing to rebut them.

As regards Debi Prosad, it may be said that he was a co-owner of the house and had occasion to go there to collect rent. There really appears to have been no reason why he should have collected his share of the rent for himself as his uncle Hari Sadhan, and his cousin, Satish, who lived close by could have collected it. Both these men have said that there was no quarrel between them and Debi Prosad. They admit that they wished to have the family properties partitioned, and that Hari Sadhan had caused notice to be served on Debi to that effect through a Pleader. Nabin Kali states that Hari Sadhan had wished to apply the rent of the house towards repairs.

It is possible that if there was a difference of opinion between Debi and his uncle on that matter, Debi might have decided to realise his share of the rent for himself. If Debi had merely gone to the house to collect the rent once a month, some sort of doubt might have arisen in his favour; but it appears from the evidence of the neighbours that he was seen going to and from the house fairly frequently. The excuse for his staying in the house from the 8th of November onwards is anything but satisfactory. According to his own story there were already three persons in the house to look after five persons who were ill. The story that he was asked to stay and help would have been an improbable one even if the inmates of the house were not involved in a criminal conspiracy. As matters stand, his story is incredible. There is no excuse whatever for Debi's failing to produce witnesses to prove that he had come from his house at Bally, on the other side of the river, only two days before the search of the house. The fact that he is a co-owner of the house is not sufficient to rebut the conclusions to be drawn against him from the circumstances of the case. On the contrary, the fact that he was a co-owner tells against him. He could not help being aware of the filthy use to which the rain pipe was put; and, had he been innocent, he would have strongly objected to such misuse of the premises. As part owner of the house he would have sought an explanation of the extreme secrecy observed by the persons who were his tenants. He offers no explanation in regard to these matters; and his silence clearly indicates guilty knowledge. Having such knowledge it is incredible that he should have consented to stay in the house when asked to do so, unless he was himself a member of the conspiracy.

The appellants were all of them in possession of the explosive and the unlicensed arms and were members of the conspiracy to possess them. They have been rightly convicted.

As regards the sentence, the Commissioners have not stated why they classed Rajendra Lahiri with Hari Narayan and not with Birendra and the other three who were sentenced to rigorous imprisonment for five years. We have nothing before us to show who were the leaders of the conspiracy except the statements of the appel-

lants themselves. Hari Narayan admits that he was the prime mover in the starting of the establishment at Dakshineswar; and he fully deserves the sentence passed upon him. As regards Rajendra there is no evidence to prove that he was a leader; and we do not find anything on the record to justify his being punished more severely than Birendra, Dhrubesh or Nikhil. The only thing that suggests itself is that the Commissioners have punished him more severely because he offered to take the fuse out of the bomb, but this in itself does not make his case more serious than that of Birendra and the others. His sentence is, therefore, reduced to that imposed upon those three persons, namely, rigorous imprisonment for five years under s. 4 (b) of the Explosive Substances Act and rigorous imprisonment for two years under s. 19 (f) of the Arms Act, the sentences to run concurrently.

Considering the nature of the conspiracy, the sentences passed on the other appellants do not seem to be severe.

The sentences passed in the present case on Dhrubesh and Rakhal shall run concurrently with the sentences passed on them in the Alipore Jail murder case.

In other respects except the above the appeals are dismissed.

Suhrawardy, J.—I fully agree with my learned brother in his decision on questions of law and in the observations on the evidence made by him in his lucid judgment. There is one matter on which I should like to lay some stress. When appearances are against the accused in a case, and the prosecution has established *prima facie* the existence of incriminating circumstances, it is the duty of the defence to rebut the presumption arising from them by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock. The idea that the defence is not bound to adduce any evidence is dangerous. In Jury trials the last word may have some value but in a trial before three experienced Judges the prosecution and the defence stand on the same footing. In this case there are matters that are within the special knowledge of the prisoners which if they want the Court to accept they must substantiate them by evidence. For instance, the prisoners alleged that some of them were students, gone to the house at Dakshineswar to prosecute their studies.

and that some others were either looking for work or making arrangements to start a business. These are matters which only the defence could prove and the absence of such proof lends strength to the case for the prosecution.

While I concur generally with my learned brother, I am unable to persuade myself that the evidence against the accused Debi Prosad Chatterjee is sufficient for conviction for possessing and conspiring to possess explosive articles which offences, my learned brother holds, have been proved against him. I am not sure that the facts proved against him are not at all consistent with his innocence though they also make it probable that he was one of the conspirators. To my mind, the most the evidence against him proves is that he was friendly with the inmates of the house and possibly was aware of their nefarious designs and practice. He may even have attempted to shield his friends from suspicion. But to convict him of possessing, manufacturing or conspiring to possess explosive articles within s. 5 of the Explosive Act something more need be proved than his occasional visits to the house or his statement about the inmates of the house to Satis, P. W. No. 22 which is not true. There is another fact which apparently tells against him but it is not enough to prove his possession of the articles found in the house. It is proved that he made a certain statement to Mr. Duckfield, Superintendent of Police, which he subsequently tore up. We do not know how far that statement incriminated him, and though it was of such a nature that it could not be legally proved, we cannot presume that it contained confession of the guilt of possessing the articles found. If such presumption can be made, it will frustrate the very object of the law which keeps out statements made to a Police Officer. Such a presumption may be more damaging than the statement itself. This incident, therefore, cannot be used as evidence against him. The very fact of his occasionally visiting the house proves that he was not in possession of the things inside the house. It is probable that his statement that he was in the house for two days previous to the raid to help nursing the people who were admittedly very ill is true for no article belonging to him was found in the house at the search. I am not convinced that temporary residence in a house containing explosive articles, even

with the knowledge of their existence there, is possession within the meaning of s. 5 of the Explosives Act. Conspiracy to possess, I take it, connotes some act of possession or attempted possession. On all these grounds I hold that the evidence for the prosecution falls short of bringing home to the accused Debi Prosad Chatterjee the charges under which he has been convicted and, in my opinion, he should be given the benefit of doubt and acquitted.

As my learned brother has taken a different view let the case of the accused Debi Prosad Chatterjee be placed before the Chief Justice for proper orders under s. 429, Criminal Procedure Code.

Let copies of our judgments be given to Babu Mrityunjoy Chatterjee, the Vakil for the accused Debi Prosad Chatterjee.

Owing to the difference of opinion, Appeal No. 91 was heard by Mr. Justice Buckland who delivered the following judgment:

Buckland, J.—(*January 18, 1927*)—The appellant Debi Prosad Chatterjee has been convicted by the Commissioners appointed under sub ss. (1) and (2) of s. 4 of the Bengal Criminal Law Amendment Act, 1925, of offences under ss. 120-B of the Indian Penal Code, 4 (b) of the Explosive Substances Act and 19 (f) of the Indian Arms Act and sentenced to three years' rigorous imprisonment under s. 4 (b) of the Explosive Substances Act and to eighteen months' rigorous imprisonment under s. 19 (f) of the Indian Arms Act, the sentences to run concurrently. Nine persons in all of whom the present appellant was one were convicted. They all appealed. One of them was executed upon conviction in another case and the appeals of the others have been dismissed and the convictions and sentences have been affirmed except as regards Rajendra Nath Lahiri whose sentence has been reduced. But as regards Debi Prosad Chatterjee, owing to a difference of opinion between the learned Judges who heard the appeal, the matter has been referred to me under s. 429 of the Code of Criminal Procedure. In these circumstances, it is unnecessary that I should state all the facts at length. They are to be found fully stated in the judgment of the Commissioners and again in the judgment of my learned brother Mr. Justice Cammiade. The question is whether the evidence supports the conviction of the particular appellant. The test

is, I think, as the learned Vakil who appears for him has put it, whether there is evidence upon the record of the Commissioners upon which the conviction and the sentence can be supported. The point depends upon whether the evidence as to the appellant's association with the other persons convicted shows that he was at Dakshineswar at the times stated for a legitimate purpose or that he was there for the purposes which the prosecution alleges. There is evidence referring to instances more or less isolated when he was seen at Dakshineswar. But, without going into all the evidence in detail, there is in addition a considerable body of evidence of some 5 or 6 witnesses which, if believed, in my opinion, establishes the case for the prosecution. We first of all have the evidence of Nabin Kali Debi who describes how the house was taken for these persons and how it was arranged by the present appellant. The matter is narrated at some length and Debi Prosad answered various questions by her as to whether the women-folk would come and so forth. The story is not, in my opinion, one which one would expect to hear, if it was a simple matter of Debi letting the house in which he had an interest to his friends for a legitimate purpose. The evidence is not very strong but there is indication that in letting the house there was something that he wished to conceal. This is carried further by the evidence of Satish Chunder Chatterjee, a cousin of this appellant. To him the appellant made disingenuous statements, for, he said that he had got tenants for the house and that they were boys who messed together, that they were cousins and two of them had business and the others were students. He said that they were five—three brothers and two cousins, and they were acquaintances of his. On that evidence, I should say, he was endeavouring to keep Satish Chunder Chatterjee in the dark and to make it appear that there was nothing which would give rise to any suspicion on the part of his relatives as to the persons to whom he was letting the house and at the same time endeavouring to conceal their identity; for his case is that he did not know all these persons and that they were not all his acquaintances before he let the house in August. Then, when we come to the time when the house was occupied by these persons, we find that

there is evidence by the witness Narendra Nath Chatterjee who lived at Dakshineswar that he saw young men washing their faces in the tank and among them was the appellant whom he saw entering and leaving the house but never going to the houses of the neighbours. Then, we have the evidence of Sumira; Mahato Koiri who says that he saw Debi Prosad taking his bath in the tank in front of the house which was afterwards searched. These facts show that Debi Prosad must have been on terms of some degree of intimacy with the occupants of the house; and the frequency with which he went there appears from the evidence of Suresh Chunder Chatterjee who said that he had seen Debi Prosad passing his house with other boys, that Debi Prosad had been seen there about two or three times a month and that the occupants of the house did not associate with the neighbours. If this evidence is believed, it is quite clear that the appellant was not frequenting the house at Dakshineswar for any of the purposes for which it is contended his object was in going there. It is suggested that he visited a sister living at Dakshineswar. There is no evidence that he went to her house and, even if he did so, it is quite consistent with the evidence to which I have referred. A stronger argument has been based upon the fact that he was a co-sharer in the premises and went there to collect rent. But it is obvious that the evidence, if it is believed, proves that he went there or in excess of what would be expected of a co-sharer landlord who simply went to collect rent. As regards the collection of rent, the evidence is that until the month of November various other parties who were interested—and not only the appellant—went to collect rent. The point, in my opinion, does not bear close investigation having regard to the rest of the evidence. It is further suggested that he simply went to see his former acquaintance; but there is also evidence showing that he was seen about with persons other than the one with whom, he says, he was formerly acquainted. He endeavours to account for his presence on the day of the search—10th of November and two days earlier by stating that some of the inmates of the home were ill and he was asked to stay and help to watch them. That statement might possibly have been accepted had there been no such evidence against him; for, it ap-

appears that some of the inmates of the house were actually ill and it is conceivably possible that the appellant having gone there on the 8th of November to collect rent was asked to stay and watch the sick and in his kindness of purpose did so. But it is difficult to believe that that wholly explains his staying there in the face of the other evidence as regards his association with these persons. If the evidence to which I have referred be believed, there can be no question as to the guilt of the appellant. In my judgment, no sufficient reasons have been advanced for showing that the view taken by the Commissioners who tried the case was wrong or that I should take a different view of the evidence on appeal. In my judgment, the appeal must be dismissed and the conviction and sentence must be affirmed.

N. H.

*Appeal dismissed.***MADRAS HIGH COURT.**

CRIMINAL APPEAL No. 374 OF 1927.

October 4, 1927.

Present:—Mr. Justice Madhavan Nair and
Mr. Justice Cornish.

THE PUBLIC PROSECUTOR

—APPELLANT

*versus***BUDIPITI DEVASIKAMANI—****ACCUSED.**

Penal Code (Act XLV of 1860), s. 84—Plea of insanity—Burden of proof—Criminal intent—Question of fact—Presumption from knowledge—Inveterate ganja-smoker, setting fire to school—Criminal intent, proof of.

The onus of proving the defence of insanity afforded by s. 84 of the Penal Code rests upon the accused. [p. 560, col. 1.]

Though ordinarily intention is to be inferred from knowledge, there may be cases where intent must be found as a fact and cannot be assumed. It is a question of fact in each case whether having regard to the mental condition of the prisoner, the general inference of intention from knowledge can reasonably be drawn. [p. 560, col. 2.]

An inveterate ganja smoker set fire to the thatched building of a school, by taking a torch from a kitchen and putting it to the thatch, and after throwing the torch on the roof of the kitchen ran away. It was found that as a result of the vicious habit of ganja smoking he was in the habit of beating his wife and children and refusing to take food, but the Medical Officer pronounced that the case was not one of insanity. It also appeared that the accused who was a teacher in the school had some ground for annoyance in connection with his service:

Held, (1) that the facts of the case were not strong enough to give him exemption from the criminality

of his conduct under s. 84 of the Penal Code; [p. 560, col. 1.]

(2) that the requisite criminal intent could be presumed from his knowledge that his act was wrongful. [p. 560, col. 2.]

Appeal under s. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Agency Sessions Judge, East Godavari, in Sessions Case No. 5 of 1927 on his file.

Mr. K. S. Vadarachari, for the Accused.

JUDGMENT.—The accused in this case was charged before the learned Agency Sessions Judge, East Godavari, that he, on the 19th of June, 1926, committed mischief by setting fire to the thatched building of the Board Elementary School at Gurtedu, with intent to destroy the same, an offence punishable under s. 436 of the Indian Penal Code. The prosecution case is that the accused took a torch from the kitchen, ran to the building, put it to the thatch and then threw it on the roof of the kitchen and ran away. The thatch caught fire and the school building was completely destroyed. The learned Sessions Judge found that the accused set fire to the school building but acquitted him on the ground that he was insane at the time when he did it and was, therefore, incapable of forming the intention or of having the knowledge which forms an essential ingredient of the offence. Against this acquittal the Crown has presented this appeal.

The accused is a smoker of ganja. There is evidence to show that, as a result of this vicious habit he used to threaten to beat his father and children, and used to beat his wife and run away into the forest; he would not take his food properly and when he was given it he would throw it away. The evidence also shows that he used to tear his clothes and wander about in the forest. He was kept under observation in the Central Jail at Rajahmundry for a fortnight. The Medical Officer who examined him found no reason to pronounce him insane at that time.

The learned Public Prosecutor contends that the plea of insanity is not borne out by these facts, that at the most the evidence would only show that the accused used to get voluntarily intoxicated by smoking ganja off and on and that voluntary intoxication is no defence to a criminal act.

The learned Vakil for the accused argues, that the evidence is to the effect that ganja smoking has induced in the accused incapacity

city to understand the quality or nature of his wrongful act, and has produced in him a condition akin to that of *delirium tremens* in the case of a drunken man and that, even if this is not the case, under s. 86 of the Indian Penal Code the accused can rely upon voluntary intoxication in defence when he is charged as in this case with an offence of which 'intent' is a necessary ingredient.

The onus of proving the defence afforded by s. 84 of the Indian Penal Code clearly rests upon the accused [See *Queen-Empress v. Irappa* (1)]. As regards the first contention, we have no doubts that the evidence does not warrant a finding that the accused's habit of smoking *ganja* had induced in him a diseased state of mind so as to make him incapable of understanding the wrongfulness of his act. The Civil Surgeon found 'no cause to pronounce him insane'; but according to his evidence the accused looked 'more sad than insane.' Though smoking *ganja* might account for the queer things which the accused used to do, we do not think that the facts in this case, viewed in the light of well known judicial decisions such as *Queen-Empress v. Venkatasami* (2), *Queen-Empress v. Lakshman Dagdu* (3) and *Queen-Empress v. Saktharam* (4), are strong enough to give him exemption from the criminality of his conduct under s. 84 of the Indian Penal Code. The fact that he ran away after putting the torch to the thatch shows that at the time he committed the offence he was conscious that what he was doing was wrongful.

As regards the second contention, the wording of s. 86 of the Indian Penal Code lends some support to the argument advanced before us. That section lays down that, in certain classes of cases, the intoxicated person shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated; but it does not provide that an intoxicated person shall be dealt with as if he had the same intent. The second part of the section speaks of knowledge only and omits any reference to intent. Whether this omission is intentional or not, as pointed out by Mr. Mayne, it may be due to the fact that in the majority of cases the question of intention is mere-

ly the question of knowledge. If the accused knew what the natural consequences of his act were, ordinarily he must be deemed to have intended to cause them [See *In re Mandru Gadaba* (5) per Ayling, J.]. Though ordinarily intention is to be inferred from knowledge, there may be cases where intent must be found as a fact and cannot be assumed, in which cases voluntary drunkenness may be relied on to show that the required 'intent' is absent. In England it will be a question in such cases for the Jury to decide whether having regard to the mental condition of the prisoner, the general inference of intention from knowledge can reasonably be drawn. This we think is the utmost that could be said in favour of this contention. Even according to this restricted interpretation, in this case, the evidence makes it clear that, in spite of the *ganja* smoking the accused had the requisite criminal intent, because as soon as he put the torch to the thatch he ran away. He knew that the act he was doing was a wrongful one and from this knowledge we can assume that he must have had the criminal 'intent' requisite for the offence. Further, the evidence shows that the accused himself was a school master in the same school for about a year and that, when his father who had retired from the school found that his son was behaving badly, he (the father) made a report asking for his son six months' leave. The accused must have apprehended that the result of the report would be the termination of his connection with the school and, therefore, he must have deliberately set fire to the building to show his annoyance.

In view of the evidence, the gist of which we have set forth above, we do not think that the plea of insanity has been established in this case.

We must, therefore, set aside the acquittal of the accused and convict him of the offence under s. 436 of the Indian Penal Code with which he was charged and sentence him to undergo one year's rigorous imprisonment. We order accordingly

V. N. V.

Acquittal set aside.

A. N. A.

(5) 30 Ind. Cas. 451; 38 M. 479; 16 Cr. L. J. 627.

(1) Rat. Un. Cr. O. 818; Cr. Rg. No. 64 of 1895.

(2) 12 M. 459; 1 Weir 42; 4 Ind. Dec. (N. S.) 669.

(3) 10 B. 512; 5 Ind. Dec. (N. S.) 731.

(4) 14 B. 564; 7 Ind. Dec. (N. S.) 841.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE ORDER No. 278
OF 1925.

March 30, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Roy.TAMIRANNESSA BIBI AND ANOTHER
AUCTION-PURCHASERS—APPELLANTS*versus*

KACHHIMAN BEWA AND OTHERS—

APPLICANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 173 (3)—Civil Procedure Code (Act V of 1908), s. 47—Rent sale set aside—Auction-purchaser, appeal by, whether competent.

No appeal lies at the instance of an auction-purchaser whose sale has been set aside under s. 173, cl. (3) of the Bengal Tenancy Act. [p. 563, col. 1.]

[Case-law referred to.]

No appeal is allowed against an order under s. 173, cl. (3), Bengal Tenancy Act, by any provision of the Act itself and this section is not included in the list of orders made appealable as such by the Code of Civil Procedure. The only way in which an order under s. 173, cl. (3), Bengal Tenancy Act, may be regarded as an appealable one is by treating it as one made under s. 47 of the Civil Procedure Code and thus satisfying the definition of a "decree" under that Code and being thus appealable as such. [p. 562, col. 1.]

Appeal against an order of the District Judge, Dinajpur, dated the 17th March, 1925, reversing that of the Subordinate Judge of that District, dated the 21st June, 1924.

Mr. J. N. Roy and Babu Bansori Lal Sarkar, for the Appellants.

Messrs. S. C. Maity and M. A. Quasem, for the Respondents.

JUDGMENT.**Mukerji, J.**—This appeal arises out of certain proceedings taken at the instance of some of the judgment-debtors to set aside a rent sale. The Subordinate Judge refused to set aside the sale. The District Judge, on appeal, set it aside. The auction-purchasers have preferred this appeal.

The application to set aside the sale was under O. XXI, r. 90, Civil Procedure Code, as well as under s. 173, cl. (3), Bengal Tenancy Act. Under O. XXI, r. 90, Civil Procedure Code, it was alleged that the sale-processes were not duly served, and that there was material irregularity in publishing and conducting the sale and that substantial injury in the shape of gross inadequacy of price resulted therefrom. As resting on s. 173, cl. (3), Bengal Tenancy Act, it was alleged that one of the judgment-debtors Taher Mahmud

Mandal, in collusion with the decree-holders, managed to purchase the properties in the *benami* of his daughters.

The sale was held on the 5th October, 1923. The present application was originally filed on the date the Courts re-opened after the Dusserah Vacation and so within time. When so filed the auction-purchasers were not made parties therein. On the 12th January, 1924, the auction-purchasers were added as parties.

The Subordinate Judge held that the application must be treated as having been filed beyond time. He held that the sale-processes were not proved to have been served, but that there was no reliable evidence to prove that the property was under-sold. He held further that the evidence fell far short of proving that the purchase was made by Taher Mahmud in the *benami* of his daughters, though there were reasons to suspect that it was the case of a *benami* purchase.

The District Judge, on appeal, reversed the decision of the Subordinate Judge by an order which is not very remarkable for its lucidity. He found that Taher Mahmud had made the purchase in the names of his daughters. He held that there was material irregularity and that the price fetched was inadequate. The question of limitation he appears to have left undecided. He expressed himself somewhat loosely on this question—confusing an appeal with an application under O. XXI, r. 90, Civil Procedure Code—in these words: "As regards the appeal under O. XXI, r. 90 the auction-purchasers were not made parties till after the 30 days' time allowed by the Limitation Act. The petitioners themselves alleged that they were necessary parties and it is difficult, therefore, to accept this contention that O. XXI, r. 90 merely demands that the auction-purchasers should have notice before the orders are passed, without making them parties, but it appears to be a perfectly possible interpretation of O. XXI, r. 92. If correct, the appeal is not time-barred."

The respondents have urged that no second appeal lies in this matter. The appellants seek to justify the appeal firstly on the ground that fraud was alleged by the judgment-debtors in their application for setting aside the sale and that, therefore, the question that was decided by the Subordinate Judge and the District Judge fell within s. 47 of the Code. This

justification is not possible as, though a general allegation of fraud was made in the petition, the evidence that was adduced and the order that the Subordinate Judge passed dealt only with fraud in publishing or conducting the sale within the meaning of O. XII, r. 90, Civil Procedure Code—for which only one appeal is allowed by the law. It is next urged on behalf of appellants that the question raised under s. 173, cl. (3), Bengal Tenancy Act, involves a question under s. 47 of the Code and that, therefore, a second appeal is competent.

The authorities bearing upon this question are not quite uniform. It should be observed at the outset that no appeal is allowed against an order under s. 173, cl. (3), Bengal Tenancy Act, by any provision of the Act itself and this section is not included in the list of orders made appealable as such by the Code of Civil Procedure. The only way in which an order under s. 173, cl. (3), Bengal Tenancy Act, may be regarded as an appealable one is by treating it as one made under s. 47 of the Civil Procedure Code and thus satisfying the definition of a "decree" under that Code and being thus appealable as such. Mookerjee, J., discussed this question very fully in the case of *Joytara v. Ram Krishna Seal* (1) and observed thus:—"Our attention was invited to a number of judicial decisions which are, perhaps, not easy to reconcile. A detailed examination of these cases is unnecessary, as, in our opinion, an inflexible rule cannot be formulated that an order under s. 173 is or is not appealable as a decree. The test to be applied in the circumstances of each case is, what is the true nature of the question raised, and who are the parties between whom it arises. The answer must depend largely upon the position of the applicant and the title he claims. We may observe, however, that there are expressions used in some of the cases in the books which may be open to criticism." The tests which the learned Judge laid down in that case were two, viz.: (1) whether the question raised in the application under s. 173 is one between the parties to the suit in which the decree was passed or their representatives, and (2) whether the question relates to the execution of the decree. The second test is obviously satisfied as, if the

objection prevails, the sale must be reversed and the decree-holder must proceed to execute the decree again for its satisfaction. The first test is also satisfied because if the question arises between the parties to the suit or their representatives, and relates to the execution, discharge or satisfaction of the decree within the meaning of s. 47 of the Code, it does not cease to be a question within that section merely because the auction-purchaser, who was not a party to the suit, is a party to these proceedings. Judged by these two tests alone, the order appealed from would fall within s. 47 of the Code and the appeal before us would be competent. Were the question *res integra* I should have felt great difficulty in holding that the appeal before us is not maintainable.

But the authorities, which I have already said are not uniform, that have clustered round this point, have laid down certain restrictions in the matter of appeals that may be preferred from an order passed under s. 173, cl. (3), of the Bengal Tenancy Act. The cases of *Raghu Singh v. Misri Singh* (2), *Chand Monee Dasya v. Santo Monee Dasya* (3), *Harabhandhu Adhikari v. Harish Chandra Dey Pal* (4), *Hira Lal Ghose v. Chundra Kanto Ghose* (5), *Amir Rai v. Basdeo Singh* (6), *Sriram Chandra Sen v. Guru Das Kundu* (7) and *Mohima Chandra Neogy v. Jogendro Kumar Ghosh* (8) have been discussed in the judgment of Mookerjee, J., in *Joytara v. Ram Krishna Seal* (1). Of these the more important ones and bearing directly upon the case before us are *Chand Monee Dasya v. Santo Monee Dasya* (3), *Sriram Chandra Sen v. Guru Das Kundu* (7), *Mohima Chandra Neogy v. Jogendro Kumar Ghosh* (8) and *Hira Lal Ghose v. Chundra Kanto Ghose* (5). In the first of these cases the application was made by one of the judgment-debtors and the heirs of a deceased judgment-debtor on the allegation that a third judgment-debtor had purchased the property in the name of his wife; it was held that from an order setting aside the sale under s. 173, Bengal Tenancy Act no appeal

(2) 21 O. 825; 10 Ind. Dec. (N. S.) 1181.

(3) 24 O. 707; 1 O. W. N. 534; 12 Ind. Dec. (N. S.) 1140.

(4) 3 O. W. N. 184.

(5) 26 O. 539; 3 O. W. N. 403; 13 Ind. Dec. (N. S.) 946.

(6) 5 O. L. J. 204.

(7) 3 O. W. N. civ. (notes).

(8) 3 O. W. N. xiv (notes).

(1) 7 Ind. Cas. 769; 13 O. L. J. 257; 15 O. W. N. 512.

lay at the instance of the auction-purchaser. In the second case the application was by the judgment-debtors and the appeal also was by them; it was held that the appeal lay on behalf of the judgment-debtors, though it would not lie on behalf of a third party. In the third case, the application was by a judgment-debtor and it was held that when there was an order under s. 173, Bengal Tenancy Act, an appeal would not lie at the instance of the auction-purchaser. In the fourth case it was pointed out that the question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s. 244 of the Code. This last mentioned principle has evidently been ignored so far as the present question is concerned in the first three cases. There are other cases of this Court in which an appeal at the instance of the auction-purchaser has been held to be incompetent, e. g., *Durlav Pradhaina v. Mahomed Mainuddi Bepari* (9) and *Jadab Chandra Mukherjee v. Joy Gopal Bhattacharya* (10) in the latter of which cases Cox, J., on a review of the authorities said that the matter is no longer *res integra*, but the point must now be regarded as settled.

Whatever may be my own opinion on the propriety or correctness of the proposition that no appeal would lie at the instance of the auction-purchaser I feel bound to follow the long series of decisions to which I have referred and following them I must hold that the appeal before us is not maintainable. The appeal accordingly is dismissed.

We have been then asked to deal with the order of the District Judge in revision. The ground on which we are asked to do so is that his decision on the question of limitation is wrong. My own view of this question I have had occasion to express in Civil Rule No. 1048 of 1926 which I decided on the 26th January, 1927, but assuming that I am not right in the view that I entertain, I am not prepared, upon the findings of fact which the learned Judge has recorded, to interfere with his decision merely because he may have taken an erroneous view of law on the question of limitation. This application accordingly must be rejected.

(9) 13 G. W. N. c (notes).

(10) 20 Ind. Cas. 121; 19 C. L. J.

As regards the appeal, in view of the unsatisfactory character of the order appealed from each party will bear its own costs.

Roy, J.—I agree.

N. H.

Appeal rejected.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 671 OF 1925.

November 14, 1927.

Present:—Mr. Justice Kulwant Sahay and Mr. Justice Macpherson.

DWARIKA NATH KARMAKAR—
DEFENDANT—APPELLANT

versus

JASODA DEVI—PLAINTIFF AND
NANDU GOPE AND OTHERS—

RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), s. 208—Sale under rent-decree—Rights of purchaser—Usufructuary mortgage and lease to mortgagor—Decree for rent—Execution sale—Equity of redemption, whether passes to purchaser.

A sale under s. 208 of the Chota Nagpur Tenancy Act can only pass the interest of the judgment-debtor in the tenancy in respect of which the rent decree is passed. [p. 564, col. 2.]

A executed a usufructuary mortgage to B and on the same date executed a *kabuliyat* to B for a period of five years in respect of the property covered by the mortgage. A did not pay the rent fixed in the *kabuliyat*. B sued for the rent and purchased in execution of his decree the right of A to remain in *khas* possession of the land. A sold his rights subsequently to C who sued for redemption. B contended that he had acquired the equity of redemption by his purchase:

Held, that what was sold and intended to be sold in execution of the decree for rent obtained by B was only A's right to remain in possession for the remaining period of the term under the *kabuliyat*, and that C was entitled to redeem B. [p. 561, col. 1.]

Appeal from a decision of the District Judge, Manbhum-Sambalpur, dated the 21st March, 1925, confirming that of the Subordinate Judge, Purulia, dated the 8th July, 1924.

Messrs. A. B. Mukherji and Upendra Nath Banerji, for the Appellant.

Mr. Atul Krishna Ray, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant No. 1 and it arises under the following circumstances. The defendants Nos. 3 to 7 executed a usufructuary mortgage in favour of defendant No. 1 on the 26th January, 1914, for

a sum of Rs. 500. On the same date the defendant No. 1 took a *kabuliyat* from the defendants Nos. 3 to 7 in respect of the property covered by the mortgage-bond for a period of five years on the promise that the defendants Nos. 3 to 7 would pay him 45 maunds of paddy per year. The result was that although the defendant No. 1 took the usufructuary mortgage of the property in dispute, he did not obtain actual possession thereof; but the mortgagors continued in possession under the *kabuliyat* executed on the same date as the mortgage. The defendants, however, did not pay the rent fixed under the *kabuliyat* and the defendant No. 1 had to bring a suit against the defendants Nos. 3 to 7 for realisation of the rent. This suit was instituted sometime in 1915 and a rent decree was passed and in execution of the decree the interest of the defendants Nos. 3 to 7 was sold and purchased by the defendant No. 1 on the 13th November, 1915, and the defendant No. 1 obtained possession in December, 1915.

The important question to be decided in the present appeal is as to what was the interest which was sold in execution of this decree. Subsequently the defendants Nos. 3 to 7 instituted a suit against the defendant No. 1 to set aside the mortgage on the ground that the property mortgaged was the right of a *raiya* in a holding and that such a mortgage was invalid under the provisions of the Chota Nagpur Tenancy Act. This suit was dismissed on the ground that the property mortgaged was not a *raiya* holding but a tenure. The defendants Nos. 3 to 7 then sold their equity of redemption to the present plaintiff who instituted the present suit for redemption of the mortgage of the 26th January, 1914.

The defence of the defendant No. 1 was that the equity of redemption had already been sold in execution of the decree obtained by him in 1915 and that the plaintiff's purchase of the equity of redemption did not pass any interest to him as nothing was left to the defendant No. 3 after the sale of November 1915.

Both the Courts below have held that what was sold was the right of the defendants Nos. 3 to 7 to remain in possession under the *kabuliyat* of the 26th January, 1914, and the equity of redemption was not sold in execution of the decree obtained by the defendant No. 1.

The plaintiff's suit for redemption was, therefore, decreed.

In this second appeal on behalf of the defendant No. 1 it is contended that the relationship created by the *kabuliyat* was not that of a landlord and tenant but the relationship between the parties was that of a mortgagor and mortgagee and that the decree obtained by the defendant No. 1 was not a rent decree and what was sold was not a *raiya* interest which the defendants Nos. 3 to 7 never had, but, what was actually sold was the equity of redemption which the defendants Nos. 3 to 7 had under the mortgage of 26th January, 1914. It is, therefore, contended that what was purchased by the defendant No. 1 was the equity of redemption. It is conceded that the sale, if it was a sale of the equity of redemption, was irregular. It was a voidable sale and it is contended that the remedy of the plaintiff or his predecessor-in-title was to bring a suit to set aside the sale and that such a suit was barred, and, therefore, the present suit is also barred. Now, in order to decide whether the suit is barred by limitation, the question to be decided is as to what was sold in November, 1915. The best evidence as regards the nature of the title which was acquired by the defendant No. 1 by virtue of his purchase of November 1915 is the sale certificate. The sale certificate describes the property as "the right to possess *khas*." It is contended that this was not a *raiya* interest; but the right which the defendants Nos. 3 to 7 had was to redeem the mortgage. I am of opinion that such a construction cannot be placed upon the sale certificate. The sale purported to be effected in execution of a rent decree under the provisions of s. 208 of the Chota Nagpur Tenancy Act and a sale under s. 208 of the Chota Nagpur Tenancy Act can only pass the interest of the judgment-debtor in the tenancy in respect of which the rent decree was passed. It may be that the position of the defendants Nos. 3 to 7 was not that of an under-tenure-holder or an under-*raiya* under the defendant No. 1; but as between the defendant No. 1 and the defendants Nos. 3 to 7 the relationship, which the defendant No. 1 himself asserted did exist, was that of landlord and tenant and he purported to bring a suit for rent

in the Revenue Court under the rent law and purported to sell the interest of the defendants Nos. 3 to 7 as tenants under him. The sale certificate goes to show that what was sold was the right of the defendants Nos. 3 to 7 to remain in possession of the land. This evidently referred to the right which the defendants Nos. 3 to 7 acquired under the *kabuliyat* of the 26th January, 1914. The defendant No. 1 never purported to sell the equity of redemption and he did not by his purchase acquire the equity of redemption. What he acquired was the right to remain in possession for the remaining period of the term under the *kabuliyat* of the 26th January, 1914. This is the finding of both the Courts below, and in my opinion this is the correct finding. Having regard to this finding it is not necessary to discuss the cases referred to by the learned Advocate for the appellant as those are cases in which it was the equity of redemption which the decree-holder purported to sell, and the question arose as to whether the relationship between the parties was that of a mortgagor and mortgagee or that of a landlord and tenant. In the present case the equity of redemption was not intended to be sold and was not, as a matter of fact, sold.

The appeal is dismissed with costs.

Macpherson, J.—I agree.

A. N. A.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS CASE No. 28
OF 1927.

August 23, 1927.

Present:—Mr. DeSouza, A. J. C.
FIRM OF KHEMOHAND RAMDAS—
APPLICANTS

versus

UDHAVDAS VARANDMAL—OPPONENT.

Arbitration Act (IX of 1899), s. 19—Contract note referring to agreement containing submission clause—Signatory of such contract note, whether party to submission—Threat of legal proceedings by defendant prior to suit, effect of—Readiness and willingness to refer, what is—“At the time the proceedings commence” and “taking any steps in proceedings”, meanings of—Intimation to Court of intended application for stay, if amounts to taking step.

Where a contract note contained a printed clause at the end to the following effect: “Subject to the terms

of our printed agreement which you have read and accepted. Even if you have not signed the agreement you shall be bound by the terms, and this printed agreement contained a submission clause:

Held, that there was a valid and subsisting submission to refer the disputes between the parties to arbitration even though the said printed agreement which contained the submission clause had not been signed or read by the executant of the contract. [p. 566, col. 2.]

Henderson v. Stevenson (1) and *Richardson v. Rowntree* (2), distinguished.

The time with reference to which the readiness and willingness to refer disputes to arbitration within the meaning of s. 19 of the Arbitration Act is to be determined is the time when the other party brings a suit and the applicant for stay is called upon to appear and answer and though he has previously threatened legal proceedings, he has a *locus pœnitentiæ* till the time comes for him to appear and answer the summons in a suit brought against him. [p. 567, col. 1.]

Anglo Persian Oil Co. Ltd. v. Panchapakesa Ayyar (3), relied upon.

An intimation to the Court that the defendant wants to apply for stay of the suit brought against him under s. 19, Arbitration Act, is not taking any steps in the proceedings so as to debar such party from applying for stay. [p. 568, col. 1.]

Bhowanidas Ramgobind v. Pannachand Luchmipat (5), relied upon.

Fleming Shaw & Co. v. Haji Yusif Ellias (4), distinguished.

Mr. Kodumal Lekhraj, for the Applicants.

Mr. P. S. Shahani, for the Opponent.

ORDER.—This is an application under s. 19 of the Indian Arbitration Act, IX of 1899, to stay proceedings in Suit No. 523 of 1926 on the file of the Court of Small Causes, Karachi.

It appears that the applicant and the opponent entered into certain forward contracts for the purchase and sale of wheat, cotton, etc. These contracts were negotiated by a broker and signed in foil by the opponent and in counter-foil by the broker, the counter-foil being delivered to the opponent and the foil being retained by the broker to be handed over to the principal.

The several headings in the contract note in foil and in counter foil are printed in English; but the details are written up in Sindhi in the Bania Sindhi characters. There is a clause printed at the end of the contract note to the following effect.

“Subject to the terms of our printed agreement which you have read and accepted. Even if you have not signed the agreement you shall be bound by the terms.”

It appears that differences arose between the applicant and the opponent on the account on the several contracts entered into between them, each party claiming that the other was indebted to him. The applicant claimed that a sum of Rs. 150-11-0

was due to him and on the 23rd July, 1926, gave a notice to the opponent demanding payment of the money within 24 hours failing which, a suit would be filed against him. The opponent replied in his letter dated the 28th July, 1926, that a considerable amount on the contrary was due to him from the applicant and if the applicant failed to pay within 48 hours a suit would be filed against him. Accordingly the present suit was filed by the opponent to recover a sum of Rs. 376-10-3 from the applicant in the Small Causes Court on 13th September, 1926.

Summons was served upon the applicant to appear and answer on the 10th January, 1927. On that day it appears from the diary of the case that the applicant appeared in the Small Causes Court by Mr. Manghanmal, Pleader, who intimated that he wished to apply for stay. The case was accordingly adjourned to the 26th January, 1927. On that day and on a later adjourned date of hearing the case could not be reached. Meanwhile, on the 2nd February, 1927, the applicant filed in this Court the present application for stay under s. 19 of the Indian Arbitration Act on the ground that the contracts were entered into subject to a submission clause and that the matter should, therefore, be referred to arbitration.

The application has been vigorously opposed by Mr. Shahani on three grounds. In the first place, he contended that there was no valid and subsisting submission clause appearing in the agreement form and if there was one the opponent was never made aware of it. Mr. Shahani argued that the submission clause forms part of a printed agreement to which no doubt, a reference is made in the English portion of the contract note which opponent has signed, but as he is ignorant of English, neither the knowledge of the proviso written in English in the contract note nor of the submission clause embodied in the printed agreement to which the proviso makes reference can be imputed to the opponent.

Whatever may have been in the mind of one of the contracting parties the other party was not made aware of it. There was no *consensus ad idem* in the mind of both the contracting parties and hence Mr. Shahani argues there was no binding submission clause by which the opponent can be held to be bound.

In support of his contention Mr. Shahani cited a number of rulings from the English Courts of which I need only mention *Henderson v. Stevenson* (1) and *Richardson v. Rowntree* (2). I venture to think that those cases are clearly distinguishable. It is not a case here of a note made in very small print in a corner of a passenger's ticket which could only be seen when the ticket is unfolded. The reference to the printed agreement is in the most prominent part of the contract note. It is no answer to say that as the opponent was ignorant of the English language and as the details of the contract filed in Sindhi in the Hindu Sindhi characters formed a complete contract by themselves he remained in ignorance of the terms printed in English. Mr. Kodumal on behalf of the applicant relies upon the circumstance that in another similar contract with a different principal the matter was referred to arbitration as disproving the allegation of the opponent that he remained in complete ignorance about the submission clause. No doubt the fact, that this was one of a series of similar contracts which the opponent has negotiated with several brokers on terms well known to the bazaar would throw strong suspicion on the air of innocence about the submission clause which the opponent assumes, but supposing that he did remain ignorant it was through his own fault. By the fact that he affixed his signature to a document written in English of which the clause now disputed was an important clause obviously he was put up on his enquiry as to the meaning of the printed matter. And if he did not take steps to ascertain the meaning he cannot claim to be exempt from liability he incurred through his own negligence.

The next point taken by Mr. Shahani was that the applicant is not entitled to a stay under s. 19 of the Indian Arbitration Act because at the time when the proceedings were commenced he was not ready and willing to do all things necessary to the proper conduct of the arbitration. This argument is based upon the fact that in the notices given by the applicant to the opponent on 23rd July, 1926, the demand for payment within 24 hours is

(1) (1875) 2 H. L. (Sc.) 470; 32 L. T. 709.

(2) (1894) A. C. 217; 63 L. J. Q. B. 283; 6 R. 95; 70 L. T. 817; 58 J. P. 493; 7 Asp. M. C. 482.

accompanied by a threat that failing payment a suit will be filed against you. Mr. Shahani argued that a threat to take the opponent to the Law Courts was an implied refusal to have the matter settled by arbitration.

In my opinion there are two fallacies underlying this argument. A threat to file a suit does not necessarily mean that the party giving the threat is unwilling to have the matter referred to arbitration. A threat to resort to a Civil Court might have some effect upon the debtor to compel payment. But an intimation that the matter will be referred to arbitration would have no such effect. What the applicant evidently intended to do was to hold out a threat which might induce the opponent to comply with his demand.

He did not thereby indicate any unwillingness to submit to arbitration. In the second place there is nothing to show that the applicant was not ready and willing to have the matter referred to arbitration at the time the proceedings commenced. In the case of *Anglo Persian Oil Co. Ltd. v. Panchapakesa Ayyar* (3) Schwabe, C. J., states the law as follows:

"The law provides that if there is a submission for a reference to arbitration, and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration."

If this is the correct statement of the law there is no doubt that the time with reference to which the readiness and willingness of the applicant to refer to arbitration is to be determined is the time when the opponent brought the suit and the applicant was called upon to appear and answer. So that even if the earlier threat of the applicant may be adversely construed against him as Mr. Shahani asks me to do, he had under this ruling a *locus poenitentiae* till the time came for him to appear and answer the summons in the suit brought against him by the opponent. I think, therefore, that there is no substance in the second contention urged by Mr. Shahani.

(3) 76 Ind. Cas. 1011; 47 M. 164; (1923) M. W. N. 772; 18 L. W. 732; 45 M. L. J. 653; A. I. R. 1924 Mad. 336; 33 M. L. T. 103.

Lastly, Mr. Shahani argued that this application for stay does not lie because the applicant had after his appearance in the Small Cause Court in answer to the summons taken some step in the proceedings, the step being that he applied for an adjournment to enable him to file this application for stay. Mr. Shahani relied upon the ruling of Pratt, J. C., in *Fleming Shaw & Co. v. Haji Yusif Ellias* (4) where he distinctly laid down that an application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of s. 19 of the Indian Arbitration Act irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statement or to raise as a bar to the suit the agreement to refer to arbitration, in either event his application is an application to invite the Court to do something which would enable him to establish his defence. The learned Judicial Commissioner based his decision on the summary of the law on the subject as stated in Halsbury's Laws of England Vol. I para 956 which is to the following effect:

"A party who makes any application whatsoever to the Court even though it be merely an application for time, takes a step in the proceedings."

Mr. Kodumal argued that the law thus broadly laid down has been doubted in more recent decisions and referred to the general sense of the bar. He was, however, unable to cite any authority or any ruling of a Bench of this Court or of a Single Judge where this statement of the law has either been doubted or dissented from. The bar when appealed to did not assent to the view propounded by Mr. Kodumal and I do not think that there is any reason to doubt that the law as laid down by Pratt, J. C., in the ruling above cited is a sound law.

There is, however, a very important distinction between the facts of this case and the facts in *Fleming Shaw & Co. v. Haji Yusif Ellias* (4). In that case the Pleader for the applicant had appeared in the Small Causes Court and applied for a postponement on the ground that the documents relating to the suit had to be discovered and that time allowed had been too short to permit of this being done.

(4) 40 Ind. Cas. 81; 10 S. L. R. 190.

The Pleader, therefore, made an application to the Court asking for an adjournment with a view to study the documents; thereby impliedly admitting that he submitted to the jurisdiction of the Court. As was said by Page, J., in *Bhowanidas Ramgobind v. Panachand Luchmipat* (5):

"Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within s. 19 of the Indian Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if, having regard to the form of the application, the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration."

In the present case, however, as would appear from the diary there was no application for an adjournment of any kind. There was merely an intimation by the Pleader to the Court that an application for stay will be made to this Court. Far from submitting for a moment to the jurisdiction of the Court, the Pleader for the applicant at the very first opportunity intimated his desire to disown that jurisdiction. I do not think that by any straining of language an intimation given to this effect can be construed to be a step taken in the suit or proceedings. It would be far more correct to describe it as a step in bar of the suit or the proceedings.

For these reasons I am of opinion that there is no substance in any of the contentions argued with very great ingenuity by Mr. Shahani on behalf of the opponent.

The application is accordingly granted with costs.

P. B. A.

Application granted.

A. N. A.

(5) 88 Ind. Cas. 929; 52 O 453 at p. 461; A. I. R. 1925 Cal. 801.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 186 of 1927.

October 10, 1927.

Present:—Mr. Findlay, J. C.

SADASHEO KARTATKAR—PURCHASER—
APPLICANT
versus

NARAYAN—JUDGMENT-DEBTOR AND ANOTHER
DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Auction-sale—Application to set aside sale—Deposit not made within 30 days—Order, whether open to revision—Provisions of O. XXI, r. 89, construction of.

The provisions of O. XXI, r. 89, Civil Procedure Code, are to be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor, and an auction-sale cannot be set aside under the section unless the necessary amount is deposited within thirty days from the date of the sale.

If a Court accepts a deposit and sets aside a sale, even though the applicant did not conform strictly to the provisions of O. XXI, r. 89, it exercises a jurisdiction which is not vested in it by law and its order is liable to be set aside in revision under s. 115 of the Civil Procedure Code.

Nilkanth v. Yeshwant (1) and *Yad Ram v. Sunder Singh* (2), distinguished.

Civil revision against an order of the District Judge, Nagpur, dated the 23rd March, 1927, in Miscellaneous Appeal No. 32 of 1926.

Mr. M. R. Bobde, for the Applicant.

Mr. D. R. Buxy, for the Respondents.

ORDER.—The facts of this case are sufficiently clear from the lower Courts' orders. I do not think the learned District Judge was correct in applying the decision in *Nilkanth v. Yeshwant* (1) to the facts of the present case. In the first place, it is perfectly clear that the total amount liable to be deposited under r. 89 of O. XXI, Civil Procedure Code, was not deposited within 30 days of the sale. I do not think there is any ground for supposing that in this connection the judgment-debtor, non-applicant No. 1, was misled by the mistake in the proclamation of the sale. The provisions of r. 89 of O. XXI are to be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor. Here, there was no strict compliance with the rule in question. Still further, there was no unequivocal acceptance by the decree-holder of the deposit so made. On the contrary, the orders of 26th April, 1926, and 26th July, 1926, show that the judgment-debtor was only allowed to deposit the amount at his (1) 65 Ind. Cas. 331; 18 N. L. R. 134; A. I. R. 1922 Nag. 248.

own risk and the money, so to speak, was only provisionally received. I cannot, therefore, regard the decree as having been satisfied, and even were one to adopt the somewhat wide principle laid down by Kotwal, A. J. C., in *Nilkanth v. Yeshwant* (1) above quoted, I do not think it can be predicated of the present case that the Court's power to execute the decree had ceased. Macnair, A. J. C., in his judgment in *Miscellaneous Appeal No. 43 of 1925*, decided on 13th September, 1927, has seen cause to differ from the decisions of Kotwal, A. J. C., which is an officially reported case, but I do not think it necessary in the present case to go into the further questions involved for the simple reason that, in my opinion, r. 8J must be strictly construed, and in this case there was no complete compliance with the provisions contained therein.

I do not further think that the case was one in which the Court could rightly have had recourse to the provisions contained in s. 151 of the Civil Procedure Code, nor did, in my opinion, the equities of the case call for any such resort to the provisions mentioned, even were this course permissible. In my opinion, therefore, the case was one in which the Court was bound to confirm the sale. In supposing that it had authority not to do so and instead, to accept the deposit made by the judgment-debtor, it exercised a jurisdiction which was not vested in it and it is, in my opinion, the duty of this Court to interfere. The facts of the decision in *Yad Ram v. Sunder Singh* (2) which has been quoted on behalf of the non-applicant No. 1, were highly peculiar and I am unable to accept the contention offered by the latter that the present application for revision does not lie.

In my opinion, therefore, the present revision application must succeed. The order of the lower Appellate Court is set aside and the order of the first Court, dated 30th October, 1926, confirming the sale is restored. The non-applicant No. 1 (judgment-debtor) must bear the applicant's costs both in this Court and in the lower Appellate Court. I fix Rs. 20 as Pleader's fees.

G. R. P.

Application allowed.

• (2) 74 Ind. Cas. 778; 45 A. 425; 21 A. L. J. 313; A. I. R. 1923 All. 392 (F.B.).

ODDH CHIEF COURT.

SECOND RENT APPEAL No. 21 of 1927.

September 14, 1927.

Present:—Mr. Justice Hasan.

JAGANNATH—PLAINTIFF—APPELLANT
versusUMRAI SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108, cls. (15), (16)
—Suit by Lambardar for share of revenue under cl. (16)—Plea of agreement to collect from joint estate, whether available—Absence of prejudice, effect of.

In a suit by a Lambardar under s. 108, cl. (16) of the Oudh Rent Act for arrears of revenue due for the defendant's share, the defendant pleaded that there was an agreement between the parties that the Lambardar would make collections from a certain portion of the joint estate to recoup himself for the defendant's share of revenue and that this arrangement had been acted upon for a number of years. The agreement was upheld by the Courts below. In appeal it was contended that the conclusion which the Courts below had arrived at could be reached only in a suit under cl. (15) of s. 108 of the Act:

Held, that the decision of the lower Courts was not liable to be set aside on this ground inasmuch as the method of trial of the broad issue of the defendants' liability adopted by the lower Courts had not prejudiced the plaintiff.

Second rent appeal from the judgment of the Third Additional District Judge, Lucknow, dated the 9th April, 1927, confirming that of the Honorary Assistant Collector, First Class, Unao, dated the 5th March, 1926.

Mr. D. K. Seth, for the Appellant.

Mr. H. Husain, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Third Additional District Judge of Lucknow dated the 9th of April, 1927, affirming the decree of an Assistant Collector of the First Class of Unao, dated the 5th of March, 1926.

The suit, out of which this appeal arises, was brought by the plaintiff, who is the Lambardar, for the recovery of Rs. 240 as arrears of revenue for the defendants' share in village Bichia Kori, District Unao, under cl. (16), s. 108 of the Oudh Rent Act, 1886. The claim was resisted by the defendants as untenable.

The lower Appellate Court in agreement with the Court of first instance has come to the conclusion that there was an arrangement between the parties that the Lambardar would make collections from a certain portion of the joint estate to recoup himself for the defendants' share of revenue and that this arrangement has been in force for the last 18 years. It was not disputed that

the *Lambardar* had realized the profits of the portion of the estate.

It would appear from what has been stated above that the matter has now been concluded by the finding recorded by the lower Court but the argument in second appeal is that the conclusion at which the Courts below have arrived could only be reached in a suit for accounts under cl. (15) of s. 108 of the Oudh Rent Act, 1886, and not in a suit under cl. (16) as the present suit was. The lower Appellate Court has fully considered this argument and has come to the conclusion that the method of trial of the broad issue of the defendants' liability followed by the trial Court has not in any manner prejudiced the appellant and I agree with the opinion of the Court below.

It was further argued in support of the appeal that a decision between the parties in the year 1917 (Ex. A-1) was conclusive as to the amount of rent of certain *sir* lands. I agree with the Courts below that the judgment relied upon is not conclusive as to what the amount of rent of certain portion of the joint estate shall be for all times to come. These were the only two points argued.

I dismiss the appeal with costs.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1980 OF 1923.

September 22, 1927.

Present:—Mr. Justice Harrison and Mr. Justice Tek Chand.

(Chaudhri MASHUQ ALI) ASHAQ ALI KHAN AND OTHERS—DEFENDANTS—
—APPELLANTS

versus

MOHAMMAD SHAFI ALI KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Assignee of portion of equity of redemption—Suit for redemption of whole property—Mortgagor entitled to redemption at date of decree—Subsequent disability, effect of—Costs of suit.

An assignee of a portion of the equity of redemption is entitled to redeem the entire mortgage.

A person who had a right to redeem at the time of the passing of a decree for redemption in his favour and who had executed the decree and obtained possession cannot be deprived of the fruits of such a decree merely because he lost his right to redeem after the conclusion of the trial in the first Court.

A mortgagor who resists a suit for redemption on frivolous grounds is not entitled to recover his costs of the case. But where the opposite party also has been careless in not claiming redemption at the proper hour, the mortgagor should not be made to pay the mortgagor's costs.

Second appeal against an order of the District Judge, Karnal, dated the 4th August, 1923, affirming that of the Senior Sub-Judge, Rohtak, dated the 23rd May, 1922.

Mr. Balwant Rai, for Mr. Abdul Ghani, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—The first point raised in this second appeal is that the plaintiff, who is the assignee of one half of the equity of redemption of certain land mortgaged to the defendants, was not entitled to redeem the whole. Counsel cannot seriously support this contention. The second point is that inasmuch as the plaintiff in consequence of other litigation lost his right to redeem at all after the conclusion of the case in the trial Court, the suit should now be dismissed, the change in his position being somehow treated as having retrospective effect. He was entitled to bring the suit when he did so. He was entitled to redeem when the decree was passed by the trial Court and this subsequent disability cannot deprive him of the result of his victory. He has, moreover, as the record shows, executed his decree and obtained possession and it appears quite clear that this settles the matter so far as the present litigation is concerned.

The third and the only remaining point is the question of costs. In accordance with the terms of the mortgage the plaintiff undertook to redeem in one or two months. He admittedly made a demand, but the demand was not made in either of these months, nor did he offer to redeem when the proper time should arrive. The suit was contested on many grounds by the defendant, and the trial Court and also the Appellate Court have penalised them not only by depriving them of their own costs, which such mortgagees ordinarily receive, but have also compelled them to pay the costs to the plaintiff whose carelessness has been condoned and in a sense rewarded. While agreeing that the defendants' conduct debars them from realising their own costs, we can see no reason for allowing the plaintiff to recover his costs, inasmuch as he has admittedly not performed his duties in their entirety.

We, therefore, accept the appeal in so far only as to order that the parties shall bear their own costs throughout the litigation. For the rest the appeal is dismissed.

R. L.

Appeal accepted in part.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

October 18, 1927.

Present:—Viscount Dunedin, Lord Shaw, Lord Sinha and Sir Lancelot Sanderson.

Sri Rani CHATTRA KUMARI DEVI

—APPELLANT

versus

W. W. BROUCKE—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 74—Abwabs—'Actual rent' and 'malguzari', meanings of.

The object of the whole series of enactments from the Regulations of 1791 to the Bengal Tenancy Act of 1885 was to prevent exactions from tenants beyond the rent specified in their *patta*, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom. [p. 572, col. 2; p. 573, col. 1.]

It must depend on the circumstances of each particular case whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease. [p. 573, col. 2.]

The words *actual rent* in the above section of the Bengal Tenancy Act cannot be taken to mean either a *fair and equitable rent* or rent at *customary* or *Pargana* rates. [*ibid.*]

The word '*malguzari*' cannot be rendered as *rent*, much less as *actual rent*. It ordinarily means *revenue*. [p. 573, col. 1.]

Quere.—Whether the words *actual rent* in s. 74, Bengal Tenancy Act, 1885, are equivalent to the *assul jama* of the old Regulations. [p. 573, col. 2.]

Long use or custom cannot validate *abwabs* as an addition to the rent. [*ibid.*]

Appeal from the judgment and decree of the Patna High Court (Dawson Miller, O. J., and Foster, J.), dated the 5th January, 1925, reported as 86 Ind. Cas. 597, modifying that of the Subordinate Judge, Muzaferpore, dated the 20th July, 1920.

FACTS.—The appellant as the executrix of her late husband, Raja Mohan Bikram Singh, the former proprietor of the Ramnagar Estate, sued the respondent for

possession of thirty-six villages which her husband had let to him, with arrears of rent, compensation for use and occupation, and damages for breaches of covenants contained in the lease.

The main question in the appeal was whether any, and what, portion of the money which the respondent had agreed by the lease to pay to the appellant's husband as consideration for the lease was irrecoverable as being an *abwab* imposed in addition to the actual rent within the meaning of the Bengal Tenancy Act of 1885.

The trial Judge gave judgment and passed a decree in favour of the appellant. He held that the question whether the part of the rent attributed to the disputed items was in the nature of *abwab* depended primarily on the construction of the lease, and decided that the lease clearly showed that the whole of the payments reserved were rent.

From that decree the respondent appealed to the High Court of Judicature at Patna. The learned Judges of the High Court differed from the trial Judge on the construction of the lease. The principal judgment was delivered by the learned Chief Justice, who summed up his conclusion in the following words:—

"Whatever difficulty may have arisen in the interpretation of the Regulations, the law as it now stands under s. 74 of the Bengal Tenancy Act appears to me to present no ambiguity. All impositions upon the tenants under the denomination of *abwab*, *mathat*, or other-like appellations in addition to the actual rent, are illegal, and all stipulations and reservations for the payment of such are void. They cannot legally be exacted nor can the tenant legally bind himself by contract to pay them....In my opinion, it is clear beyond any reasonable doubt that *abwabs*, such as those mentioned in the lease, had been collected from the tenants long before the lease was executed, and were regarded as having the sanction of custom. I am also of opinion that on the proper construction of the lease the defendant undertook to pay them under the different denominations of *abwabs*, as set out in the Schedule, and as indicated in the body of the lease, and not as part of the rent which is described as *malguzari*....I hold that the only items recoverable under this lease, apart from the produce rent, are the first two named in the Schedule, namely, rent and road-cess,

and that the decree should be varied by disallowing the other items."

Messrs. Lowndes, K. C., and Raikes, for the Appellant.

Messrs. De Gruyther, K. C., and Dube, for the Respondent.

In the course of the argument before their Lordships, most of the cases referred to in the judgments of the High Court [and reported as *Broucke v. Chhatrar Kumari Devi* (1)] were cited and commented on. Learned Counsel also referred to the "Fifth Report on East India Affairs, 1812", and to the definition of *abwab* therein given, namely, "Items of taxation, cesses, imports, taxes." This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *assul*, or original standard rent, in the nature of additions thereto.

Mr. De Gruyther, K. C., cited *Radha Prosad Singh v. Bal Kowar Koeri* (2), where the history of *abwabs* is traced.

JUDGMENT.

Lord Sinha.—The question in this case turns on the construction of a lease dated the 22nd May, 1911, of 36 villages of the Ramnagar Raj in the province of Behar and Orissa, granted by the Rajah to a Mr. Broucke.

The material part of the lease is stated in the judgment of the Chief Justice of Patna as follows :—

"I have let out 16-annas of the following 36 villages as per boundaries given below . . . at a consolidated annual *jama* of Rs. 15,581-5-0, being the rent (*malguzari*), road and embankment cesses, dues of priests (Mahal Uprohiti) and expenses for obtaining acquittance receipt (*Farag Kharach*), etc., in addition to 515 maunds of paddy specified below, payable annually at a uniform rate under a *thika patta*, the term whereof is given below, and on receipt of a *kabuliyat*, to Mr. W. J. Broucke."

At the end of the document is a schedule giving a list of the 36 *mouzas* and stating in the case of each *mauza* the total annual "*jama*" and details of how it is made up. One instance will suffice. The first *mauza* is Thath Mitia. The particulars thereunder show, first of all, that the term is for 15 years from 1319 to 1333 *F.* Then follows

a list of payments in respect of that *mauza* as follows :—

	Rs.	as.	p.
Malguzari	673	2	0
Road cess	40	8	0
Embankment cess	10	2	0
Costs of acquittance	24	4	0
Dasahara and Chait Nawmi			
Farmaish	12	0	0
Tika, Bheti, Guru Bheti	5	0	0
Batchhapi, Jangla-i-si m-			
navisi	7	0	0
Katiari	4	0	0
Dewani Dastur	24	14	0
Mahal Uprohiti	5	0	0
Total	805	14	0

Paddy 35 maunds.

The total of Rs. 805-14-0 thus arrived at is then treated as the *jama eksala* (annual rent), and is divided into four *kists* of Rs. 201-7-6 payable in *Asin*, *Pous*, *Chait* and *Jeyth*.

The word "*malguzari*" translated as rent in the High Court record, ordinarily means revenue, and is so rendered in Wilson's Glossary.

The Chief Justice of Patna was of opinion that the last eight items of the list above had been collected as *abwabs* from the *raiyats* long before the lease was executed and were regarded as having the sanction of custom, and he held (Foster, J., concurring) that on a proper construction of the lease Broucke undertook to pay them as *abwabs* under the different denominations as set out in the said schedule and as indicated in the body of the lease, and not as part of the rent, which the Chief Justice took to be the meaning of "*malguzari*" (the first item). In that view the High Court held that under s. 74 of the Bengal Tenancy Act, the lessor was not entitled to recover the amounts covered by the items 3 to 10 of the list, as being *abwabs* in addition to the rent payable under the lease.

Section 74 of the Bengal Tenancy Act, 1885, enacts that "all impositions upon tenants under the denomination of *abwab*, *mathat* or other like appellations, in addition to the actual rent shall be illegal, and all stipulations and reservations for the payment of such shall be void."

That section has a long legislative history behind it from 1791 to 1885, which was referred to at the Bar, but to which it is

(1) 86 Ind. Cas. 597; 4 Pat. 404; (1925) Pat. 89; 6 P. L. T. 331; A. I. R. 1925 Pat. 421.

(2) 17 C. 726; 8 Ind. Dec. (N. S.) 1026 (F. B.).

unnecessary to refer further than to state that the object of the whole series of enactments from the Regulations of 1791 to Act VIII of 1885 was to prevent exactions from tenants beyond the rent specified in their *patta*, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom.

There being a written engagement or lease in this case (the *patta* and *kabuliyat*) the only question is whether the *actual* rent payable by Broucke as tenant to the Rajah as his landlord is what that lease calls the "consolidated annual *jama*" of Rs. 15,581-5-0 plus 515 maunds of paddy, as the Subordinate Judge held, or only a portion thereof, as the High Court held.

Their Lordships are unable to endorse the view taken by the High Court.

Malguzari, which is the first of the items composing the total yearly *jama* for each village, cannot be rendered as *rent*, much less as *actual rent*; nor is there any evidence to show that the amount of the *malguzari* was the *actual rent*, as distinguished from *abwabs*, paid by the cultivating *raiyyats* of the village. The only distinction apparent on the face of the lease is between *cash rent* and *produce rent*. So far as the former is concerned, it is impossible to take the first item as being *actual rent* and the rest as *abwabs* when they are all included in the total, which is expressly stated to be the annual rental payable in four equal *kists*, or instalments, specified in figures. It is also to be noticed that the execution-clause of the *patta*, signed by the Rajah, is as follows:—

"Executed this *jika-patta* for a term of 15 years in respect of 34 villages and of 17 years in respect of 2 villages in all 36 villages at an annual *jama* of Rs. 15,581-5-0 and 515 maunds of fine paddy to be realised from year to year."

Similarly the execution-clause of the *kabuliyat*, signed by Broucke is as follows:—

"*Kabuliyat* given by me on *jama* rupees fifteen thousand and five hundred and eighty-one and five annas only."

Their Lordships agree with the Subordinate Judge that Broucke was bound under his engagement to pay the rent mentioned therein as the annual rental, and cannot evade this liability because the *raiyyats* may not or do not pay him what they used to pay to the Rajah. The question as to what

each *raiyyat* was or is liable to pay as his *rent* is not before their Lordships, and they do not express any opinion upon it.

A large number of cases decided by the Calcutta and Patna High Courts were referred to in the judgments and cited at the Bar. Their Lordships do not consider it necessary to refer to them beyond expressing their agreement in the view that in each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The case of *Tilukhdari Singh v. Chulhan Mahton* (3) was also referred to. In that case there was an old tenancy without any written contract. But the money claimed was described in the plaint itself as old usual *abwabs*, and the *zemindar's* books of account produced in the case showed that on the face of those documents the payments made by the tenant were distinguished as (1) *rent* and (2) *abwabs*, i.e., so much for rent, and so much for *abwabs*. The latter were claimed on the ground that they were payable by custom and had been, in fact, paid for a long time without objection. It was held that long use or custom could not validate *abwabs* as an addition to the rent.

A somewhat novel argument was advanced on behalf of the respondent, viz., that the words *actual rent* in s. 74 of the Bengal Tenancy Act were equivalent to the *assul jama* of the old Regulations, and that any stipulation to pay a rent which, in fact, exceeded what was the *assul jama* would be illegal to the extent of such excess. This would raise an issue of fact as to what was the *assul jama* of the 36 villages—the subject-matter of the lease. No such issue was raised in the Courts of India, and, indeed, in no reported case does any such question appear ever to have been raised.

Their Lordships would, moreover, point out that the words *actual rent* in s. 74 cannot be taken to mean, either a *fair and equitable rent* or rent at *customary* or *Per-gana* rates.

In their Lordships' opinion Broucke's *actual rent* under his lease is the sum of Rs. 15,581-5-0 in cash and 515 maunds of fine paddy, as found by the first Court, and their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be reversed and the

(3) 16 I. A. 152; 17 C. 131; 13 Ind. Jur. 251; 5 Sar. P. C. J. 408; 8 Ind. Dec. (N. S.) 625 (P. C.).

judgment of the Subordinate Judge restored, with costs of this appeal and of both Courts in India.

K. J. R.

Appeal allowed.

Solicitors for the Appellant:—Messrs. *Watkins and Hunter*.

Solicitors for the Respondent:—Messrs. *W. W. Box & Co.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1242 of 1927.

November 4, 1927.

Present:—Mr. Justice Dalip Singh.

THAKAR SINGH—APPLICANT—

APPELLANT

versus

HARDIT SINGH AND OTHERS—CREDITORS

—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 10—Applicant when entitled to declaration of insolvency—Inability to pay debts, proof of.

For purposes of being declared insolvent all that an applicant need show is that *prima facie* his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man or that his father allows him to cultivate some land is not sufficient to show that he can pay his debts.

Miscellaneous first appeal from an order of the Additional District Judge, Gurdaspur, dated the 14th February, 1927.

Mr. *Bodh Raj Sahni*, for the Appellant.

JUDGMENT.—Thakar Singh, appellant, applied to be declared insolvent and the learned District Judge rejected his application holding that he was capable of paying his debts. There is absolutely no evidence on the record either of the existence of the debts or of his ability to pay or not to pay. The appellant, however, put in a list in which he asserted that his debts amounted in all to Rs. 1,635 and his assets were only Rs. 15. Four creditors contested this application alleging that two of the so-called creditors, namely, Nos. 5 and 7, were relatives of the debtor and were not really creditors at all. They did not, however, challenge the assertion about their own debts and these debts are by themselves sufficient to justify a petition in insolvency, as they amount to

Rs. 955 in all. The assets of the petitioner are the Rs. 15 worth of articles that he states in his petition *plus* the fact that he is cultivating 7 *ghumaons* which evidently have been given to him by his father for this purpose. There is no evidence to show that the income of the 7 *ghumaons* is in one year sufficient to pay off all these debts.

I, therefore, accept the appeal and remand the case back to the District Judge for decision after a full enquiry and evidence taken as to the existence of the debts, and as to the capacity of the appellant to pay or not to pay these debts. It must be borne in mind that if the appellant is concealing any property, that may be taken into account when the question of his discharge comes up and if he has any property the income from which can be realised by him that income can be attached and the Court can see whether that is sufficient to pay off the debts. All that the would-be insolvent has to show is that *prima facie* his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man, or that his father allows him to cultivate 7 *ghumaons* of land is not sufficient to show that he can pay the debts alleged due by him, or even the unchallenged debts without further evidence.

R. L.

*Appeal accepted;
Case remanded.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 4 OF 1927.

February 4, 1927.

Present:—Mr. Justice Ramesam and Mr. Justice Odgers.

In re *MUSUMURI VENKATANARAYANA*

—DEFENDANT No. 8—APPELLANT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage—Suit for sale—Defendant, whether bound to raise question of paramount title.

In a mortgagee's suit for sale, the defendant is not bound to raise a question relating to paramount title.

In re Krishnaswami Pathan (1), distinguished. Srimanta Seal v. Bindubasini Dasi (2), dissented from.

Letters Patent Appeal against the judgment of Mr. Justice Devadoss, dated the 6th September, 1926, and passed in S. A. No. 1859 of 1923, reported as 99 Ind,

Cas. 468, preferred to the High Court against the decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 98 of 1922 (A. S. No. 53 of 1922 on the file of the District Court, Gôdavari) preferred against that of the Court of the Additional District Munsif, Rajahmundry, in O. S. No. 15 of 1921 (O. S. No. 596 of 1919 on the file of the Court of the Principal District Munsif, Rajahmundry).

Mr. G. Lakshman, for the Appellant.

JUDGMENT.—We agree with the view taken by Devadoss, J. of the cases cited by the appellant. Those relating to mortgagor's suits for redemption and possession [such as *In re Krishnaswami Pathan* (1)] are distinguishable on the ground that the mortgagor seeks possession. As to the cases relating to mortgagee's suits for sale, it is true that some cases lay down that, where the joinder has been made and a decree was passed on the paramount title, it is not merely an irregularity which vitiates the finding. No case lays down that the defendant is bound to raise the question relating to the paramount title. We are not able to agree with the decision in *Srimanta Seal v. Bindubasini Dasi* (2) where no reasons are given for the view taken.

The Letters Patent Appeal is dismissed.

This appeal came on for final hearing on 4th February, 1927.

JUDGMENT.—The plaintiff alleged common enjoyment by the family from 1905 to 1919 and this was not denied by the written statement. There is nothing in the new point. No change need be made in the judgment.

V. N. V.

Appeal dismissed.

A. N. A.

(1) 8 Ind. Cas. 885; 9 M. L. T. 173.

(2) 76 Ind. Cas. 517; 38 C. L. J. 183; A. I. R. 1924 Cal. 138.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 271 OF 1926.

June 29, 1927.

Present :—Mr. Hallifax, A. J. C.

SHRIBALABH BRAHMAN—PLAINTIFF—

APPLICANT

versus

GULAB MALI—DEFENDANT—NON-

APPLICANT.

* Civil Procedure Code (Act V of 1908), s. 151, scope of—Ex parte decree against minor without appointing

guardian—Decree declared void—Power of Court to restore suit.

Where an *ex parte* decree obtained against a minor without appointing a guardian is declared void at the instance of the minor, the Court which passed the decree has inherent power to restore the suit to the file and to proceed with its trial from the beginning. [p. 576, col. 2.]

Where there are direct provisions of the law by which justice can be attained and injustice avoided, s. 151, Civil Procedure Code, naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice. [p. 576, col. 1.]

Application for revision of the order of the First Additional Sub-Judge, Second Class, Harda, dated the 24th June, 1926, in Civil Suit No. 41 of 1922.

Mr. G. L. Subhedar, for the Applicant.

Mr. K. V. Deoskar, for the Non-Applicant.

ORDER.—Gulab Mali, the opponent of this and the two connected applications for revision, is an occupancy tenant of land belonging to the applicant Shribalabh Brahman. He attained majority on the 29th of May, 1924. On the 15th of April, 1920, Shribalabh filed a suit against him (C. S. No. 57 of 1920) claiming the amount of the second *kist* of rent for 1916-17 and the full rent of the two following years. The plaintiff described Gulab as fifteen years of age, which was very nearly correct, and asked for the appointment of his grandmother as his guardian for the suit. Notices were duly served, but there was no appearance for the defendant and the Court passed an *ex parte* decree on the 15th of April, 1920, without having appointed any guardian for the defendant.

In 1922 Gulab filed Civil Suit No. 85 of 1922 claiming a declaration that the rent-decree passed against him was void because he was still a minor and had not been represented in the suit at all. A decree to that effect was passed on the 6th of November, 1922, and an appeal against it naturally failed.

In the same year Shribalabh filed two more suits for rent against Gulab, No. 41 of 1922 on the 20th of February, 1922, about a month before the institution of Gulab's suit for a declaration in respect of the previous decree, and No. 323 of 1922, on the 8th of August, 1922, four or five months after it. That there was no fraudulent intention about this, at least when the suits were instituted, is proved by the excessive carelessness shown in describing Gulab not only as a major in both suits but as twenty-one years old in February in one and as

forty in August of the same year in the other. Summons in each case was served on Gulab personally, which, of course, he disregarded, and *ex parte* decrees for the rent claimed were passed on the 12th of June, 1922, a month after the first decree had been declared void, and the 3rd of October, 1922, a month before it. Like the first they were both declared void on the 2nd of May, 1925, in a suit instituted by Gulab in 1923.

After wasting some months in appealing against this declaratory decree, in addition to the two years wasted in contesting the suit in which it was passed, Shribalabh applied on the 5th of October, 1925, to have his three rent-suits restored to the file and treated as still pending, under s. 151 of the Civil Procedure Code. That is an admission that this could not be done under the provisions of the Procedure Code and a prayer that those provisions should be contravened, on the ground that that is the only way in which injustice can be prevented. The judgment of the lower Court is hard to follow, but at least it shows a complete failure to understand the position. Four arguments are set out as advanced against the granting of the application, and in the view that these "seem plausible enough," the application is rejected.

The first argument is "that when there are express provisions of law dealing with a case s. 151, Civil Procedure Code, has no application". That is perfectly true in a sense, but a sense directly opposite to that in which it has been understood. Where there are direct provisions of the law by which justice can be attained and injustice avoided, s. 151 naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice.

The next two "arguments" are instances of direct provisions of the law which would be violated if the application were granted. But the application is wholly one for the violation of provisions of the law and s. 151 says this can be done, though only in certain strictly limited circumstances. (One of the provisions mentioned is that for setting aside an *ex parte* decree. It is hard to see how that comes into this case.)

The fourth argument is "that if the applications are granted they will nullify the effect of the declaratory decrees passed by the Civil Courts." That is certainly a correct description of the applications, but

it is no argument for or against them. If it were a reason for not granting them, the declaratory decrees ought never to have been passed, as they certainly nullified the effect of the previous rent-decrees.

Gulab Mali has furnished many indications of the rent claimed in all three cases having been really due, particularly by failing to deny it in this Court even after time was allowed to him to ascertain the facts, if they were not known to him already. But even if it cannot be assumed for the purposes of the present discussion that the rent claimed was really due, it is at least certain that Shribalabh had a right to have that question examined when he filed his suits.

Now it is clear that Gulab understood the whole matter when the first notice was served on him in 1920. He was then fourteen or fifteen years of age, and in 1922 filed the suit in which the rent-decree was set aside. It is probable that he acted himself in the matter, perhaps under advice from others, but anyhow he himself or his guardian intentionally refrained from appearing in all the rent-suits for no purpose but that of allowing decrees to be passed in them which could be set aside on the ground of minority after the claims were time-barred. That is undoubtedly getting an undue advantage by the use of the rules of procedure, however correct that use may be, that is to say, it is an abuse of them.

In this case there is no way of preventing that abuse but by ordering that the three rent-suits shall be restored to the file and treated as pending cases, instituted on the dates on which the complaints were originally presented, and shall be tried out from the beginning. I know of no provision of the law authorising such an order, and there may be many that directly forbid it, but the power to pass it (mentioned in s. 151 of the Civil Procedure Code as existing of itself but not conferred by that section) can be used only in these circumstances; unless it is the power to break rules, it is nothing at all, and rules that do not exist cannot be broken. The order stated is accordingly passed. The whole costs of these proceedings, in which the Pleader's fee will be fifteen rupees, and of those in the lower Court out of which they arose, will be paid by Gulab Mali.

G. R. D.

A. N. A.

Application allowed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 257 of 1926.

November 10, 1927.

Present.—Mr. Justice Ffiorde and

Mr. Justice Agha Haidar;

EMPEROR—APPELLANT

versus

WALI MOHAMMED—ACCOUSED—

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 190**(1)(b)—“Report”, meaning of—Competency of Magistrate to take cognizance of non-cognizable offence upon report by Police Officer.*

The word “report” as used in s. 190 (1) (b), Criminal Procedure Code, as amended in 1923, means not only a “Police report” or “report of a cognizable case” but also covers a “report in a non-cognizable case”. Therefore a Magistrate is empowered under this section to take cognizance of cognizable; as well as non-cognizable offences upon a report made by a Police Officer. [p. 578, col. 2.]

Public Prosecutor v. Ratnavelu Cheitty (1) and Bholanath Das v. Emperor (5), followed.

Criminal appeal against an order of the Sessions Judge, Hissar, dated the 4th January, 1926, reversing that of the District Magistrate, Gurgaon, dated the 19th August, 1925.

Mr. C. H. Cardon Noad, Government Advocate, for the Appellant.

Mr. S. R. Laul, for the Respondent.

JUDGMENT.

Agha Haidar, J.—This is an appeal by the Local Government against an order of the learned District Judge of Hissar Division, acquitting the respondent Wali Mohammed who was convicted of an offence under s. 161 of the Indian Penal Code and sentenced to one year's rigorous imprisonment by the District Magistrate of Gurgaon. The learned Sessions Judge has disposed of the appeal which had been preferred by the respondent, Wali Mohammed, on a purely legal ground and has ordered his acquittal.

Wali Mohammed, the respondent, was a foot constable in the Gurgaon District. It is alleged on behalf of the prosecution that he received a currency note of Rs. 100 from one Sohan Lal as illegal gratification. The Deputy Superintendent of Police made a report to the Superintendent of Police about Wali Mohammed's misconduct as a Police Officer and the Superintendent of Police on the 13th of December, 1924, submitted the following note to the District Magistrate:—

“District Magistrate.

“I send these papers to you for information.

“Foot constable Wali Mohammed is

accused of taking Rs. 100 from one Sohan Lal of Police Station, Punhana, who was suspected of complicity in the Jainarain murder case. The offence against Wali Mohammed is clear. I, therefore, suggest that a judicial enquiry should be held against him under s. 161/165 of the Indian Penal Code. The note of Rs. 100 is attached with these papers in an envelope bearing on both ends of one side my initials.”

On receipt of this note the District Magistrate passed an order in Urdu which may be translated as follows:—

“The case may be entered in the register. Witnesses and the accused may be called by means of summons for the 14th of January, 1925. Dated the 13th December, 1924.”

On appeal to the learned Sessions Judge, the Counsel for Wali Mohammed raised the objection that as a result of the communication addressed by the Superintendent of Police to the District Magistrate the latter could only punish Wali Mohammed departmentally but could not take any action against him under the general penal laws. This contention found favour with the learned Sessions Judge who put a certain construction under s. 190 of the Criminal Procedure Code, quashed the conviction and sentence and acquitted the appellant without going into the merits of the case.

The sole question, therefore, in appeal, is whether the view taken by the learned Sessions Judge is correct or not. It may be observed that before the Criminal Procedure Code (Amendment Act), 1923, the language of cl. (b) of s. 190 (1) was “upon a Police report of such facts”. By the Criminal (Amendment) Act, 1923, an organic change was introduced in s. 190, and cl. (b) of s. 190 (1) now runs thus: “Upon a report in writing of such facts made by any Police Officer”. This has a very important bearing upon the matter under consideration. As s. 161 of the Indian Penal Code refers to a non-cognizable offence the argument on behalf of the respondent is to the effect that a Police Officer could only make a report of a cognizable offence and that he was not empowered under the law to make a report in a non-cognizable case. In other words, the word “report” as used in the amended clause of s. 190 should be interpreted as meaning “Police report” in spite of the change in the phraseology introduced by amendment and that the words “Police report” should be constructed as meaning

technically the report of a cognizable offence. The learned Government Advocate, on the other hand, argued that this interpretation was no longer possible, having regard to the alteration in cl. (b) the word "report" not being limited or restricted as meaning "Police report", as the word occurs in the various sections of Ch. XIV, e.g., s. 174.

There has been considerable divergence of judicial opinion on the subject and reference was made during the course of the argument to a number of cases. It is unfortunate that, although the appeal was argued on the 7th and again on the 10th of November, 1927, the learned Government Advocate did not invite the attention of the Court to the Full Bench decision reported as *Public Prosecutor v. Ratnavelu Chetty* (1), as this would have shortened the discussion very considerably. It was only a mere accident that the attention of the Court was drawn to this important decision after the arguments had been over. The learned Government Advocate referred to *Dilan Singh v. Emperor* (2). That case does not seem to have any direct bearing upon the matter in controversy and need not be discussed.

The case reported as *Chiragh Din v. Emperor* (3), though it does not meet the real point in controversy, yet has some bearing upon the question before us. In this case at the instance of the Superintendent of Police, the Sub-Inspector filed a document which purported to be a complaint, though it was not addressed to any particular officer and the Sub-Inspector was not examined under the provisions of s. 200 of the Criminal Procedure Code. It was held that this defect of the Sub-Inspector not having been examined under the law, as it stood before the amendment, was cured by s. 537 of the Criminal Procedure Code, seeing that the accused did not suffer any injury and it was also held that the document filed by the Sub-Inspector was to all intents and purposes a complaint.

The case of *Bhairab Chandra Barua v. Emperor* (4) was also relied upon. The importance of that decision lies in the

fact that although it was given before the amendment of the year 1923 the learned Judge placed a liberal construction upon the language of s. 190 and held that a "Police report" in a non-cognizable case is either a "complaint" under s. 4 (h) or a "Police report" within s. 190 (1) (b) of the Criminal Procedure Code and the Magistrate has jurisdiction to take cognizance of an offence disclosed by that report, although the offence may be a non-cognizable one.

Then we come to the case reported as *Bholanath Das v. Emperor* (5). This case was decided after the amendment of the year 1923 and the learned Judges held that "the provisions of s. 190 extend to any offence and notwithstanding the use of the words 'Police report' in s. 173, s. 190 (1) (b) cannot be restricted merely to non-cognizable offences, and a Magistrate is empowered by s. 190 (1) (b) to take cognizance both in cognizable and non-cognizable offences upon a report such as is mentioned in s. 190 (1) (b)."

Two more cases were cited by the learned Government Advocate during the course of the arguments, namely, *Chaudri Bawoo v. Emperor* (6) and *Lee v. Adhikary* (7). The case reported as *Chaudri Bawoo v. Emperor* (6) was decided after the amendment of the year 1923 but the circumstances of the case were peculiar seeing that the question decided in that case depended largely upon the scope and meaning of certain Local Acts and cannot be considered as an exposition of the meaning of s. 190 (1) (b) which may be of general importance. The case in *Lee v. Adhikary* (7) does not seem to have any bearing upon the question under consideration.

Emperor v. Ghulam Hussain (8) is very important and instructive. It was a case decided after the amendment of the year 1923, and the learned Judges observed as follows:—

"Now s. 190 of the Code is, and is intended to be, very wide. It empowers a Magistrate to take cognizance of an offence in

(1) 96 Ind. Cas. 983; 49 M. 525; A. I. R. 1926 Mad. 865; 27 Cr. L. J. 1031; (1927) M. W. N. 43; 25 L. W. 248; 52 M. L. J. 210 (F. B.).

(2) 17 Ind. Cas. 570; 40 C. 360; 13 Cr. L. J. 826.

(3) 76 Ind. Cas. 189; 4 Lah. 359; 25 Cr. L. J. 125; A. I. R. 1924 Lah. 258.

(4) 53 Ind. Cas. 698; 46 C. 807; 29 C. L. J. 318; 23 C. W. N. 484; 20 Cr. L. J. 794.

(5) 83 Ind. Cas. 628; 28 C. W. N. 490; A. I. R. 1924 Cal. 614; 26 Cr. L. J. 68.

(6) 85 Ind. Cas. 57; 49 B. 212; 26 Bom. L. R. 1225; A. I. R. 1925 Bom. 131; 26 Cr. L. J. 441.

(7) 5 Ind. Cas. 553; 37 C. 49; 14 C. W. N. 304; 11 Cr. L. J. 145.

(8) 82 Ind. Cas. 753; 6 Lah. L. J. 606; 1 Lah. Cas. 10; 25 Cr. L. J. 1361; A. I. R. 1925 Lah. 237.

almost every conceivable set of circumstances."

The matter, however, seems to be definitely settled by the Full Bench decision reported as in *Public Prosecutor v. Ratnavelu Chetty* (1) which, as already stated, was not cited by the Government Advocate. I may observe that during the course of the arguments I referred to the provisions of s. 529 of the Criminal Procedure Code and observed that, even when a Magistrate is not empowered by law to take cognizance of an offence under s. 190, sub-s. (1), cl. (a) or cl. (b), on the ground that he was not competent to receive from the Police the report of a non-cognizable offence, the defect could be cured if he acted in good faith and the proceeding shall not be set aside merely on the ground that he had no power under the law to entertain the report. I am glad to find that my view finds full support in the judgment of the Full Bench which lays down, among others; that the law requires that the Magistrate who takes cognizance of an offence under s. 190, sub-s. (1), cl. (a) or cl. (b) without having jurisdiction should only act in good faith, though erroneously to make his proceedings valid. It, further, lays down that s. 10 (1) (b) authorises certain Magistrates to take cognizance of any offence upon a report in writing of facts which constitute such offence made by any Police Officer and s. 200 (aa) provides that where a public servant acting or purporting to act in the discharge of his official duties, makes a complaint of an offence nothing shall require the Magistrate to examine him before taking cognizance of the offence. This Full Bench decision fully covers the question, raised in the present appeal and I follow the same as well as the case reported as *Bholanath Das v. Emperor* (5).

On behalf of the respondent a certain number of cases were cited, e.g., *Chidambaram Pillai v. Emperor* (9), *In re Perumal Naick* (10), *Ram Lal v. Emperor* (11) and *Sarferaz Khan v. Emperor* (12).

Chidambaram Pillai v. Emperor (9) does not seem to have any direct bearing upon

(9) 1 Ind. Cas. 36; 32 M. 3; 5 M. L. T. 18; 9 Cr. L. J. 130.

(10) 90 Ind. Cas. 398; A. I. R. 1925 Mad. 672; (1925) M. W. N. 317; 22 L. W. 209; 26 Cr. L. J. 1550.

(11) 55 Ind. Cas. 285; 1 P. L. T. 73; 21 Cr. L. J. 269.

(12) 19 Ind. Cas. 314; 14 Cr. L. J. 218; 11 A. L. J. 331.

the present case and as it merely lays down that where a Police Officer files a complaint in a non-cognizable case or regarding an offence of which it is not his duty to report, such complaint is a complaint within s. 4 (b) of the Criminal Procedure Code and is not a Police report. The case reported as *In re Perumal Naick* (10) consists of a very short judgment in which there is no discussion of any principle of law or reference to any reported case.

Ram Lal v. Emperor (11) was a case under the old law and cannot be invoked in aid as an authority, having regard to alteration in the section introduced by the Legislature in 1923.

Sarferaz Khan v. Emperor (12) is a case which really supports the contention of the Crown. In that case Knox, J., held that reports of investigation made by the Police into non-cognizable offence under order of the Magistrate passed under s. 155 (2) fell under s. 173 and the Magistrate could take cognizance of the case upon receiving such a Police report.

I may note that the Full Bench case reported as *King Emperor v. Sada* (13) has also been discussed before us. That case lays down that where a Police Officer of his own motion makes a report in a non-cognizable case, it is not a Police report as there is no provision in the Criminal Procedure Code which empowers a Police Officer to make such a report. Having regard to the change introduced in s. 190 of the Criminal Procedure Code, this case loses all its importance as an authority.

Thus we see that the weight of authority after the amendment of the law, is entirely in favour of the Crown. This being so the order of the learned Sessions Judge cannot be maintained.

I would accordingly allow the appeal, set aside the order of the learned Sessions Judge and as the case had been disposed of on a purely technical ground and the evidence had not been gone into, I would remand the case for decision on the merits.

Fforde, J.—I agree.

R. L. Appeal allowed;
A. N. A. Case remanded;
(13) 26 B. 150; 3 Bom. L. R. 586.

ODDH CHIEF COURT.

CRIMINAL REVISION No. 105 OF 1927.

November 18, 1927.

Present:—Sir Louis Stuart, Kt., Chief

Judge, and Mr. Justice Raza.

EMPEROR—APPELLANT*versus***BANDE ALI AND OTHERS—ACCUSED.***Jurisdiction—Crime committed by British subject in Nepal territory—Jurisdiction of British Court.*

A British Court has jurisdiction to try a British subject for an offence committed by him in the Nepal territory.

Appeal against an order of the Additional Sessions Judge, Bahraich, dated the 19th September, 1927.

Mr. H. K. Ghose, Government Pleader, for the Crown.

Messrs. H. Husain and Naim-Ullah, for the Accused.

JUDGMENT.—In this case, the Court had issued notices to four persons, namely, Bande Ali, Azam, Dhondhe and Katter Khan to show cause why the sentences passed upon them should not be enhanced. They have been represented before us by their learned Counsel who has argued their case both on the question of their guilt and on the question of enhancement of sentences. He has argued that on the question of their guilt the prisoners in question have not been proved to have been guilty of any offence and he has argued on the question of sentences that even if they are guilty of any offence, the sentences passed upon them are sufficient and should not be enhanced.

This is the first time that the prisoners have put forward any plea in this Court. They were convicted on the 19th September, 1927, but they have not so far appealed. We do not in any way hold against them the fact that they have not appealed; we note simply that they have not done so. We have heard their learned Counsel and we have considered his arguments. The case is not of a usual nature. The offence of which the prisoners have been convicted is in respect of the death of two persons which resulted from a violent attack upon them committed on the 26th May, 1926, just within the Nepal territory.

The case for the prosecution was that Ram Narayan and Udit Narayan both now deceased, servants of a *theikadar* for grass in Nepal, had on that day apprehended a man called Bande Ali who was interfering with the monopoly possessed by their master

and that they had taken him to a village called Baniagaon in Nepal where they asked a Muhammadan called Sahib Din to give them sufficient escort to take Bande Ali to the nearest Police Station in Nepal. Sahib Din was unable to provide that escort at once and meanwhile Bande Ali managed to have the news of his capture sent to his village in British territory. As a result three of the prisoners with other persons arrived on the spot and rescued Bande Ali forcibly. In the course of the rescue they along with Bande Ali inflicted injuries upon Ram Narayan and Udit Narayan which resulted in the deaths of the two latter. The four persons were accordingly tried for culpable homicide under the provisions of s. 304, Indian Penal Code, and have been sentenced to five years rigorous imprisonment.

The main evidence against them is the evidence of Sahib Din and his brother Kareem, and if this evidence is believed there can be no doubt as to their guilt. This evidence is corroborated directly against three of them and indirectly against all by Shankar, and Sarju has also given corroborative evidence. The learned Counsel for the prisoners who has argued with great force on behalf of his clients has endeavoured to show to us that the evidence of Sahib Din and Kareem is not deserving of credence. He bases his arguments upon the fact that apparently the prisoners have suggested to the Nepal Government that the real person who murdered Ram Narayan and Udit Narayan was Sahib Din himself. Sahib Din is not under arrest, but an inquiry against him seems to be progressing. We have been taken at length through this evidence and we are satisfied that the learned Sessions Judge has arrived at a correct conclusion in believing that Sahib Din and his brother Kareem have told the truth. We attach no value to the alleged discrepancies in the first report made at the Nepal Chauki and in the omission of mention of names from that report. We do not believe that the report was recorded in such a manner as to justify our attaching any weight as to its correctness. The manner in which this case has come before the British Court is as follows: Although the crime was committed in the Nepal territory, it has been committed by British Indian subjects. The prisoners are all British subjects and thus the British Courts had jurisdiction to try them. We

are satisfied upon the evidence that they are guilty.

In regard to the question of sentence we consider that a sentence of five years' rigorous imprisonment is too lenient. As they have been convicted under s. 304, the maximum sentence that can be passed against them is one of transportation for life. We do not consider it necessary to pass that sentence. We pass the next sentence, that is, one of ten years' rigorous imprisonment and direct that in each instance the sentence be enhanced to a sentence of ten years' rigorous imprisonment.

G. H.

Sentence enhanced.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1061 OF 1927.

October 28, 1927.

Present :—Mr. Justice Tek Chand.

MUNSHI SINGH AND OTHERS—ACCUSED

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 79—Public servant acting under colour of office—Right of private defence.

Where a constable effects an arrest under colour of his office, there is no right of private defence against him even though the arrest is not strictly justified by law. [p. 582, col. 1.]

Appeal from the order of the Additional Sessions Judge, Ferozepore, dated the 11th May, 1927, modifying that of the Honorary Magistrate, First Class, Jallalabad, District Ferozepore, dated the 31st March, 1927.

Mr. *Fakir Chand*, for the Petitioners.

Mr. *Mulk Raj*, for the Government Advocate, for the Respondent.

JUDGMENT.—The petitioners were tried and convicted by the trial Magistrate for having committed offences under ss. 147, 332 and 225, Indian Penal Code, and were sentenced to various terms of imprisonment under each count. It was found that they had caused hurt to Police constable Wali Muhammad and his companions while rescuing from his custody certain persons who had been arrested for offences under the Excise Act. On appeal the learned Sessions Judge held that the search of the house and the arrest of those persons were illegal and that no offence under s. 332 or s. 225 had been established. Accordingly, he acquitted

the petitioners of those offences, but maintained the conviction under s. 147, holding that the petitioners had used more force than was necessary. He also found as a fact that the petitioners had come to the scene of the occurrence armed with *lathis* in order to prevail upon the constable to release the culprits immediately but when all attempts at persuasion had failed they took the law into their own hands and rescued the offenders by causing hurt to Wali Muhammad and five other persons. He accordingly sentenced them to rigorous imprisonment for six months each. They have preferred a petition for revision to this Court and I have heard Mr. Fakir Chand at length.

Mr. Fakir Chand has attacked the findings of fact arrived at by the learned Sessions Judge, but after going through the record I find that there is legal evidence on the record in support of the findings on which the conviction under s. 147 is based. Indeed it appears that the learned Sessions Judge has misread the record in favour of the petitioners at least on two points. In his judgment he refers to P. W. No. 11 Qasim Ali as having deposed that Wali Muhammad constable was not in uniform. The statement of Qasim Ali as recorded does not, however, support this conclusion. The witness distinctly stated twice that the constable was in uniform at the time he made the search and effected the arrest. The learned Sessions Judge has further stated that "the constable admits in this case that he did not tell the accused that they were at liberty to furnish security before they were actually arrested. As a matter of fact, no security was demanded from them." It appears, however, from the statement of Wali Muhammad as recorded, that he actually told the petitioners that the offence was a bailable one and that they could furnish security but they expressed their inability to produce any person who would stand surety for them. In these circumstances I am not prepared to accept Mr. Fakir Chand's contention that the findings of fact arrived at by the learned Sessions Judge on which the conviction under s. 147 is based are erroneous and ought to be interfered with by this Court on revision.

Mr. Fakir Chand's next argument was that as the learned Sessions Judge has found that the arrest of the excise offenders Panju Singh and Suhari was illegal, they

had been wrongfully confined and under s. 100, Indian Penal Code, the petitioners, who are their friends and caste-fellows, were justified in rescuing them. Mr. Mulk Raj for the Crown meets this by urging that in this case the constable was acting under colour of his office and, therefore, there was no right of private defence against the arrest effected by him even though such arrest was not strictly justified by law. There is force in this argument and I agree with it. The petitioners were not justified in taking the law into their own hands, nor could they, while rescuing the excise offenders, use more force than was necessary. I, therefore, uphold the conviction under s. 147, Indian Penal Code.

The petitioners had already been in jail for about four months, when they were released on bail by this Court. Having regard to all the circumstances of the case I think the ends of justice will be met by reducing the sentence of rigorous imprisonment from six months to the period already undergone. With this modification the petition is dismissed.

R. L.

Petition dismissed.

A. N. A.

ODDH CHIEF COURT.

CRIMINAL REVISION No. 114 OF 1927.

December 1, 1927.

Present:—Sir Louis Stuart, Kt.,
Chief Judge.

SUMRAN SINGH AND OTHERS—DEFENDANTS
—APPLICANTS
versus

EMPEROR THROUGH JASKARAN
SINGH—PLAINTIFF—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—
Evidence recorded by Reader and not by Magistrate—
Irregularity—Trial, whether illegal.*

The omission of a Magistrate in proceedings under s. 145, Criminal Procedure Code, to make a memorandum of the evidence as required by s. 356, Criminal Procedure Code, is a mere irregularity and does not vitiate the proceedings where no prejudice has been caused thereby. [p. 582, col. 2.]

Criminal revision against an order of the Sessions Judge, Fyzabad, dated the 14th September, 1927, confirming that of the First Class Magistrate, Sultanpur, dated the 14th July, 1927.

Mr. *Hyder Husain*, for the Applicants.

JUDGMENT.—I sent for the record in this application owing to the fact that

the learned Sessions Judge had in his first order expressed the view that the matter should come before the Chief Court, although he subsequently changed his opinion and by a later order refused to send the record. I considered it only fair to the learned Counsel who presented the application to see the record. The application is concerned with proceedings under Chap. XII of the Code of Criminal Procedure. The Police having reported that the present applicants were endeavouring to take forcible possession over a certain tank stated to be in the possession of one Jaskaran, the Sub-Divisional Magistrate, who was duly authorised in that behalf, issued an order which purported to be under the provisions of s. 145 of the Code of Criminal Procedure. After having issued the order he proceeded to take documentary and oral evidence; and finally finding that Jaskaran was in possession of the tank and that there was a danger of a breach of the peace directed that Jaskaran should remain in possession and warned the other side not to interfere with his possession. He further directed that they should seek any remedy which they alleged against Jaskaran by a suit in the Civil Court. This order is objected to on two main grounds. One that there was no order drawn up within the terms of s. 145 for the initiation of proceedings, and the other that the Magistrate did not record the evidence of the parties as provided for under s. 356 of the Code of Criminal Procedure. The examination of the record shows that there is no force in the first objection. There was a regular order properly drawn up. On the second point it is true that the Magistrate has not complied with the provisions of s. 356. The evidence was recorded in the language of the Court, that is to say, in Hindustani, by his Reader. There was no objection to this being done, but under the section the Magistrate should have made a memorandum of the statement of each witness. The Magistrate will kindly note in future that in proceedings under Chap. XII he must follow the instructions of s. 356. But, in my opinion, this omission in no way vitiates the proceedings. The irregularity is in the proceedings. I have gone through the record carefully. I am satisfied that the Magistrate applied his mind to the evidence, that he took considerable care in sifting the evidence and that he

arrived at a correct conclusion. It did not, in fact, make the slightest difference whether he did or did not record a memorandum of the evidence. He heard the evidence and he clearly appreciated its gist. In these circumstances the irregularity did not occasion a failure of justice and is covered by the provisions of s. 537 of the Code of Criminal Procedure. There are occasions when nevertheless for instructional reasons it is advisable to send the case back to the Magistrate, who has omitted to carry out the provisions of the law and direct him to try it over again. But in this particular case it appears to me that I should not only be wasting the time of the Magistrate but I should be wasting the time of the parties also. If I take this course, it would do the applicants no good. The tank clearly is in possession of Jaskaran. There clearly is an apprehension of a breach of the peace and I fail to understand what good there will be either to the parties or to the community by sending the case back to have the evidence recorded over again with a memorandum superadded according to the law with the result that exactly the same order will be passed again which has been passed already. I, therefore, reject this application.

G. H.

A. N. A.

*Application rejected.***MADRAS HIGH COURT.**

CRIMINAL REVISION CASE NO. 47 OF 1927.

(CASE REFERRED NO. 5 OF 1927)

March 28, 1927.

Present:—Mr. Justice Devadoss and

Mr. Justice Madhavan Nair.

TIRUMALA VENKATAREDDY AND

OTHERS—ACCUSED

versus

SIKATAPU RAMAYYA—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 408—Second Class Magistrate invested with First Class powers during pendency of trial—Conviction—Appeal, whether lies to District Magistrate or Sessions Court.

The moment a Second Class Magistrate is invested with the powers of a First Class Magistrate he becomes a First Class Magistrate and any convictions by him in cases which were taken up by him as a Second Class Magistrate are convictions by a First Class Magistrate, and appealable to the Court of Session and not the District Magistrate.

Sheobhanjan Singh v. Emperor (1), followed.

Case referred for the orders of the High Court, under s. 438 of the Code of Criminal Procedure, by the Sessions Judge, West Godavary Division, in his letter, dated the 23rd December, 1926.

Mr. P. V. Vallabhacharyulu, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.—This is a reference by the Sessions Judge of West Godavary Division. The case was tried by a Magistrate who had Second Class powers and the trial was continued by him after he got First Class powers. The case was re-numbered after he got First Class powers. He convicted the accused and an appeal against this conviction was preferred to the District Magistrate who quashed the conviction holding that the case against the accused was not made out. The question is whether the District Magistrate had jurisdiction to hear an appeal from the decision of a First Class Magistrate. The District Magistrate seems to justify his action on the ground that the trial was started by a Second Class Magistrate and he thought that he had jurisdiction to entertain the appeal. Section 408 of the Code of Criminal Procedure, 1828, says:

"Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class, or any person sentenced under s. 349, or in respect of whom an order has been made or a sentence has been passed under s. 380, by a Magistrate of the First Class, may appeal to the Court of Session." So it is clear that only a Court of Session can hear appeals against convictions by First Class Magistrates. It is contended for the accused before us that inasmuch as the trial was begun by a Second Class Magistrate the appeal lay to the District Magistrate. This on the face of it is an untenable position. The District Magistrate has jurisdiction to hear appeals only from the decisions of Second Class Magistrates. The moment a Second Class Magistrate is invested with the powers of a First Class Magistrate he becomes a First Class Magistrate and any convictions by him in cases which were taken up by him as a Second Class Magistrate would be only convictions as a First Class Magistrate. We do not think it necessary to cite any authority but we may refer with approval to the case reported as *Sheobhanjan Singh*

v. Emperor (1). The District Magistrate not having had jurisdiction to hear the appeal his decision must be set aside as being without jurisdiction. We, therefore, set aside the acquittal by the District Magistrate on appeal, direct the Sessions Judge to send for the appeal records from the District Magistrate's Court, to take it on his file and to dispose of it according to law, after giving notice to the accused.

V. N. V.

Order accordingly.

A. N. A.

(1) 86 Ind. Cas. 978; A. I. R. 1925 Pat. 472; (1925) Pat. 120; 3 Pat. L. R. 100 Cr.; 26 Cr. L. J. 914; 6 P. L. T. 554.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 283 OF 1927.

November 19, 1927.

Present:—Mr. Justice Zafar Ali.

LABHA MAL—PLAINTIFF—PETITIONER

versus

WASAWA MAL AND OTHERS—DEFENDANTS

—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 476-B—*Appeal from order making complaint—Party at whose instance complaint was made, whether entitled to notice—Limitation, starting point of.*

In an appeal under s. 476-B of the Criminal Procedure Code by a person against whom a complaint has been made, the opposite party entitled to notice is the Crown and not the person on whose application the complaint was made.

Rashid Muhammad Khan v. Emperor (2), followed.

Starting point of limitation for an appeal from an order making a complaint is the date on which the complaint is filed and not the date on which it is signed.

Fitzhollmes v. Emperor (1), followed.

Petition under s. 115 of Act V of 1908 and s. 44 of Act VI of 1918 read with s. 439, Criminal Procedure Code, for revision of the order of the Senior Subordinate Judge, Sialkot, dated the 28th February, 1927, reversing that of the Subordinate Judge, Fourth Class, Daska, District Sialkot, dated the 28th June, 1926.

Mr. Nanwan Mal, for the Petitioner.

Mr. M. L. Puri, for the Respondents.

JUDGMENT.—The learned Senior Subordinate Judge, Sialkot, having on appeal under s. 476-B of the Criminal Procedure Code directed the withdrawal of the complaint that had been lodged by a Subordinate Judge, the petitioner

on whose application the complaint had been made, seeks revision of the order in appeal mainly on two grounds, viz., (1) that the appeal was barred by time and (2) that the Appellate Court gave no notice of the appeal to him as it was bound to do under s. 476 B.

There is nothing on the record in support of (1). The complaint was signed by the Subordinate Judge on the 3rd July, 1926, and it appears from the Copyist's note on the top of a copy of the complaint which is on the record that it was filed on the 14th December, 1926. If that was correct limitation commenced from that date and the appeal was filed within time because it was filed on the 5th January, 1927; see *Fitzhollmes v. Emperor* (1).

As regards (2), notice of the appeal was sent to the Collector of the District, and his reply was that representation of the Crown was not necessary. According to s. 476-B, notice was to be sent to the parties concerned. In an appeal against a refusal to make a complaint the parties entitled to receive notice would be the accused person. But if the appeal were by the person against whom a complaint has been made, the opposite party is the Crown, as in all other criminal cases. [See on this point *Rashid Muhammad Khan v. Emperor* (2) in which it was held that respondent in a criminal appeal or revision is the Crown only].

I, therefore, see no reason for interference and dismiss this application in revision.

R. L.

A. N. A.

Application dismissed.

(1) 98 Ind. Cas. 393; 7 Lah. 77; 27 Cr. L. J. 1321; A. I. R. 1927 Lah. 54; 28 P. L. R. 232.

(2) 101 Ind. Cas. 192; 8 Lah. 568; 28 P. L. R. 177; 28 Cr. L. J. 416; A. I. R. 1927 Lah. 357.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 151 OF 1927

(CRIMINAL REVISION PETITION No. 133 OF 1927).

August 25, 1927.

Present:—Mr. Justice Madhavan Nair.

In re VIJAYARANGA NAIDU

AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 114—*Abetment of offence—Presence and instigation, whether sufficient to constitute abetment.*

To come within s. 114 of the Penal Code the abetment must be complete apart from the presence of the abettor.

The accused was present at the occurrence of an offence under s. 326 of the Penal Code and it was found that the assailant inflicted a blow at the instigation of the accused. There was no evidence to show that there was any conspiracy between the accused and the assailant prior to the occurrence.

Held, that the accused could not be convicted under ss. 326 and 114 of the Penal Code for abetment of the offence under s. 326.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Trichinopoly, in Cr. A. No. 35 of 1926 (C. C. No. 18 of 1926, on the file of the Court of the Sub-Divisional Magistrate, Trichinopoly).

Messrs. V. L. Ethiraj and A. S. Sivakamianathan, for the Petitioners.

Mr. K. Ganapathi, for the Public Prosecutor, for the Crown.

ORDER.—The petitioner is the 2nd accused in C. C. No. 18 of 1926 on the file of the Sub-Divisional Magistrate, Trichinopoly. His son the 1st accused was convicted under s. 326, Indian Penal Code, with having voluntarily caused grievous hurt with an *arwal* to P. W. No. 1. The petitioner was convicted under ss. 114 and 326, Indian Penal Code, with having abetted the 1st accused (the son) and being present at the occurrence. He was sentenced to rigorous imprisonment for four months. It appears from the judgments of the lower Courts that the part taken by the petitioner in the commission of the offence was only this, namely, that he desired his son to cut P. W. No. 1. In one part of the judgment of the Sessions Judge, the part played by the petitioner is thus described:

"Appellant No. 1 (the son) cut him with an *arwal* at the instigation of appellant No. 2 (the petitioner).

There is no evidence that prior to this incident there was any conspiracy between the father and son to way-lay P. W. No. 1 and cut him. The petitioner himself has not taken any other part in the offence. On these facts the Courts below convicted him under ss. 114 and 326, Indian Penal Code. It appears to me that the conviction cannot stand and should be set aside. To come within s. 114 of the Penal Code the abetment must be complete apart from the presence of the abettor. The only abetment charged in this case required the presence of the abettor and as I have already observed

there is no evidence of any conspiracy prior to the occurrence between the petitioner and his son. In these circumstances s. 114 cannot be invoked for convicting the petitioner reading with s. 326. This view of s. 114 was taken by the learned Judges of the Calcutta High Court in *Ram Ranjan Roy v. Emperor* (1). In that case the facts were very similar to the facts of the present case except that the main charge there was one of murder. This decision has been followed by our High Court in *Annabi v. Emperor* (2). The same view of the law has been taken by a Bench of this Court in *In re Jogali Bhaigo Naiks* (3). In this view the conviction of the petitioner under s. 326 read with s. 114 must be set aside.

The petitioner was sentenced to undergo four months' rigorous imprisonment of which I understand he has already undergone three months. I do not think, therefore, that it is necessary in the interests of justice that he should be called upon to undergo a fresh trial. I set aside the conviction and sentence and acquit him. His bail-bond will be cancelled.

V. N. V.

Conviction set aside.

A. N. A.

(1) 27 Ind. Cas. 554; 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170.

(2) 82 Ind. Cas. 262; 21 L. W. 19; 25 Cr. L. J. 1254; A. I. R. 1925 Mad. 364.

(3) 97 Ind. Cas. 958; 27 Cr. L. J. 1198; A. I. R. 1927 Mad. 97.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 566 OF 1927.

October 10, 1927.

Present:—Mr. Justice Coldstream.

ALA SINGH AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 288—Statement recorded by Committing Magistrate transferred to Sessions Court record—Use of statement as substantive evidence, legality of.

It is not illegal to treat as substantive evidence the statement of a witness recorded by the Committing Magistrate and transferred to the Sessions Court record under s. 288, Criminal Procedure Code. [p. 587, col. 1.]

Amir Zaman v. Emperor (1), followed.

Criminal appeal from an order of the Sessions Judge, Lyallpur, dated the 23rd April, 1927.

Mr. L. Saunders, for the Appellants.

Mr. Khurshid Zaman, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellants, Ala Singh, a *Jat*, and his nephews Saudagar Singh, Sant Singh and Udham Singh, have been convicted by the Sessions Judge of Lyallpur under s. 304-II of the Indian Penal Code for having caused the death of Gurbachan Singh, their collateral, by beating him with sticks on the 13th September, 1926, at village Jhabbar. Ala Singh has been sentenced to eight years' rigorous imprisonment and his nephews to six years' rigorous imprisonment each.

The story disclosed by the record is as follows: Ala Singh's son Anokh Singh was married to *Musammatt Wiro* some five years ago when she was about ten years old. About three years ago *Musammatt Wiro's* mother, who was married to one Buta Singh, eloped with Gurbachan Singh taking her children with her and went to live at Akki in Lahore District, about 40 miles from Jhabbar, where *Musammatt Wiro* was married by Gurbachan Singh to one Fauja Singh, apparently for a handsome consideration. Some five months later Ala Singh, his brother Ladha Singh father of Santa Singh, the appellant and Ujagar Singh, the brother of the appellants Udham Singh and Saudagar Singh (sons of Jawala Singh, another brother of Ala Singh, the appellant) went to Akki and took *Musammatt Wiro* away to Chak No. 9 where Ala Singh's nephews reside. Gurbachan Singh had been living at Akki under the name of Bahadur Singh, his intention, no doubt, being to conceal his whereabouts from Ala Singh and his family. About the end of August, or in the beginning of September, 1926, Ala Singh returned to Jhabbar. The story for the prosecution is that Ala Singh summoned his nephews, the appellants, to his aid and with them on the morning of the 13th September, 1926, attacked Gurbachan Singh in the latter's field where he was ploughing with his brother Piara Singh (P. W. No. 3) and Mangal Singh (P. W. No. 5). The attack was seen by Wadhawa Singh (P. W. No. 4) cousin of Ala Singh, who at once went to the village and informed the *Zaildar* Naupal Singh (P. W. No. 9). Naupal Singh sent the *Lambardar* Hira Singh (P. W. No. 13) to report the matter at Shekhupura Police Station, about fifteen miles away, where the first report was recorded about six o'clock in the

evening. Gurbachan Singh was carried to the Jhabbar village dispensary where he died, after making a declaration accusing the appellants, at about half past nine in the morning.

In support of the charge against the appellants the prosecution produced medical evidence proving that Gurbachan Singh had died of the shock caused by his injuries which were seventeen in number, apparently the result of blows upon his arms and legs. The left humerus, part of the left ulna bone, two fingers and the left fibula as well as the left tibia were fractured.

Motive was proved by witnesses who told the story of *Musammatt Wiro's* abduction along with her mother by Gurbachan Singh and her recovery by Ala Singh. Doctor Shamsheer Singh, the Sub-Assistant Surgeon in charge of the village dispensary, who had examined Gurbachan Singh and witnessed his death Naupal Singh (P. W. No. 9), Fateh Muhammad *Patwari* (P. W. No. 10) Kartar Singh a cousin of the *Zaildar*, and Kharak Singh a *sarbrah lambardar*, gave evidence to prove that Gurbachan Singh had made a statement immediately before he died naming the four appellants as his assailants. This declaration was recorded by Naupal Singh. Piara Singh, Wadhawa Singh and Mangal Singh gave evidence as eye-witnesses of the assault. Naupal Singh also testified that Ala Singh had confessed to his participation in a fight with Gurbachan Singh. There was also a chance witness Bahadur Singh (P. W. No. 15) who stated that he had seen Ala Singh's three nephews riding away from Jhabbar together.

The appellants denied that they had assaulted Gurbachan Singh as alleged by the prosecution. They could not give any reason why they had been falsely accused and they produced no evidence in defence.

Two of the assessors were of opinion that the charge had been proved against all the four accused, one was for acquitting all of them and the fourth thought Ala Singh alone was guilty. The Sessions Judge, agreeing with the convicting assessors, convicted and sentenced the four accused as stated in the beginning of this order.

I have been taken through the record by Mr. Saunders who appears for the appellants and have also heard Mr. Khurshid Zaman who opposes the appeal on behalf of the Crown.

[His Lordship then referred to the evidence and proceeded :—]

The evidence, in my opinion, amply justifies the conviction of all the four accused. Mr. Saunders has not disputed the truth of the story about the elopement of *Musammât Wiro* from Gurbachan Singh. The facts proved are certainly such as would justify a finding that motive existed for a murderous attack by Ala Singh's relations upon Gurbachan Singh.

As regards the dying declaration, there is no doubt whatever that before he died Gurbachan Singh named the four appellants as his assailants. It is possible that the Sessions Judge is right in doubting whether Gurbachan Singh's statement was recorded at the very time at which it was made. My own opinion is that it was so recorded.

As regards the evidence of the eye-witnesses I am in complete agreement with the learned Sessions Judge's very carefully considered finding that it establishes the guilt of the four accused.

Mr. Saunders has questioned the legality of the Sessions Judge's acceptance as substantive evidence of the statement of Wadhawa Singh, recorded by the Committing Magistrate, and transferred to the Sessions Court record under s. 258 of the Code of Criminal Procedure. This point, however, is conclusively settled against Mr. Saunders by the judgment in *Amir Zaman v. Emperor* (1).

As regards the discrepancy about the nature of the weapons used by the assailants, it is significant that Doctor Shamsher Singh's opinion at first was that one of the injuries on Gurbachan Singh's leg had been inflicted by a sharp weapon, and I note that in the statement of Doctor Hari Chand, Assistant Surgeon, Sheikhpura, who made the *post mortem* examination of Gurbachan Singh's body, two contused wounds on the outer side of Gurbachan Singh's left leg were described as bone deep.

In my opinion the appellants were rightly convicted. The learned Sessions Judge inflicted the heavier punishment upon Ala Singh because he was obviously the leader in the assault. I am not prepared to interfere with any of the sentences imposed and I dismiss the appeal.

• R. L.
A. N. A.

Appeal dismissed.

(1) 88 Ind. Cas. 861; 6 Lah. 199 at p. 202; A. I. R. 1925 Lah. 452; 26 Or. L. J. 1245.

PATNA HIGH COURT.

GOVERNMENT APPEAL No. 6 OF 1927.

November 16, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Ross.

EMPEROR—APPELLANT

versus

SHIB DAS MARWARI—RESPONDENT.

Bihar and Orissa Food Adulteration Act (II of 1919), ss. 3 (1), 14 (2)—'Labelled', 'sealed', meanings of—Sale of sealed tins—Power of Inspector to demand smaller quantities out of open tins—Adulteration of article—Conviction of accused, legality of—Prejudice.

A Sanitary Inspector went to the accused's shop and found 15 tins of mustard oil exposed for sale. He demanded and got 2½ *chhataks* of oil and found that the oil was highly adulterated. The accused was prosecuted for an offence under s. 3 (1) of the Bihar and Orissa Food Adulteration Act of 1919. The accused pleaded that he had purchased the tins in a sealed condition and used to sell them in the same condition.

Held, that the procedure adopted by the Inspector in not taking a full tin of oil in its unopened condition was illegal and seriously prejudicial to the accused in view of the provisions of cl. (2) of s. 14 of the Act, and that the accused could not under the circumstances be convicted under s. 3 (1) of the Act. [p. 589, col. 1.]

The word 'labelled' in s. 14 (2) of the Act denotes a written slip of paper or a metal or any other thing fixed or attached to articles of manufacture for the purpose of describing them or specifying their quality, etc., or the name of the maker. Neither the word 'labelled' nor the word 'sealed' necessarily means that the article should contain the name of the manufacturer. All that is required is that it must be distinctive from which the maker or manufacturer or the firm could be easily traced. [p. 588, col. 2.]

Appeal from an order of the Magistrate, Dhanbad, dated the 9th July, 1927.

The Government Advocate, for the Appellant.

Mr. S. N. Bose, for the Respondent.

JUDGMENT.—This is an appeal by the Government under s. 317 of the Code of Criminal Procedure against the order of the Magistrate, dated the 9th of July, 1927, acquitting the accused Shib Das Marwari. He is a shop-keeper in *Mauza Katras*. On the 16th of January, 1927, the Sanitary Inspector of Jheria Mines Board of Health went to his shop and found 15 tins of mustard oil exposed for sale. He demanded 2½ *chhataks* of oil and told him that he required it for analysis. The chemical analysis disclosed that the oil was highly adulterated. The accused told the Inspector that he had purchased the tins of oil in a sealed condition, in the same condition in which he purchased

them and he used to sell them in that very condition. A Sanitary Inspector visited the Dhanbad Oil Mills on the 23rd of January and purchased a sample which was found to be slightly adulterated. The accused was then prosecuted for an offence under s. 3 (1) of the Bihar and Orissa Food Adulteration Act (II of 1919), and was convicted by the Magistrate on the 25th of February, 1927. On appeal the conviction was set aside by the Sessions Judge of Purulia by his order dated the 2nd of May, 1927, upon the ground that no evidence was gone into the case and that the accused had not admitted his guilt. The accused was ordered to be re-tried and was accordingly placed on his trial again on the 9th of July, 1927. He has again been acquitted by the Magistrate upon the ground that the Sanitary Inspector did not take a full tin of oil in its unopened condition and consequently the accused was not given an opportunity of proving that he bought the oil in the same unopened tin and in the same condition in which it was exposed for sale. The Magistrate says that the procedure adopted by the Sanitary Inspector was irregular and the *bona fide* intention of the accused was not rebutted and that he was entitled to the benefit of doubt especially when according to the evidence he had purchased the tins only on the day previous to the date on which the sample was taken. The irregularity referred to in the judgment of the Magistrate relates to s. 14, sub-cl. (2) of the Act which says "no person shall be required under s. 6 to sell such food except in the unopened tin or packet in which it is contained." The learned Government Advocate disputes the correctness of the view taken by the Magistrate and says that the above-mentioned sub-cl. (2) of s. 14 has no application to the case, inasmuch as it refers to "food sold or offered for sale or exposed for sale in an unopened tin or packet duly labelled" as is set forth in the preamble to s. 14 and the oil in question in this case was contained in an unopened tin but the same was not duly labelled. The case of the accused from the very beginning has been that he had purchased the tin containing the oil, sample of which was taken by the Inspector, along with other similar tins thirty-two in number bought from the Oil Mills at Dhanbad and that he used to sell those tins in the unopened condition in

which he had purchased them with the oil therein in the same condition and that on the day and the time when the Inspector took sample from the tin in question it along with 14 others was exposed for sale. That this was his case is to be found in the statement of the case given by the Inspector in his complaint wherein he says that he found exposed for sale 15 tins of mustard oil and subsequently in order to test the explanation of the accused he had the Oil Mills at Dhanbad inspected and sample of mustard oil taken from that Mill. The Inspector was examined on the 9th of July, 1927. The accused was asked to plead and did make his defence on the 8th of July, a day earlier. In his plea the accused stated to the Magistrate that he had taken sealed tins from the Dhanbad Oil Mills and that they remained in the condition in which he had purchased them and he used to sell them in the same condition. The expression used by the accused "sealed tins" is meant to import the idea that the tins were purchased from a recognized shop with a distinctive mark put on them. Accepting the contention of the learned Government Advocate as to the scope and meaning of "unopened tin or packet duly labelled" used in s. 14 it would come under that. The word "labelled" according to the ordinary acceptance of the term would denote a written slip of paper or a metal or any other thing fixed or attached to articles of manufacture for the purpose of describing them or specifying their quality, etc., or the name of the maker. The accused says that the tins were sealed and apparently he could not mean anything else than that they bore the distinctive mark showing that they belonged to the Dhanbad Oil Mills from which the accused had purchased them. Let it be stated that neither the word "labelled" nor the word "sealed" necessarily means that it should contain the name of manufacturer. All that is required is that it must be distinctive from which the maker or manufacturer or the firm could be easily traced. The accused clearly gave the condition of the tins on the 8th of July as bringing it within s. 14 of the Act when he was examined in Court, in the cross-examination of the Inspector questions were directed to corroborate the case of the accused on this point. The prosecution, therefore, had full notice and knowledge of what the defence was, namely, that the tins in question came under the definition of it given in s. 14. The

Inspector did not question it, but suggested that it was easy for the accused to put in adulterated matter into the tin, inasmuch as it could be easily opened and then closed easily, because the mouth was closed with liquified tin.

The suggestion then was that the accused after having purchased the tin from the Dhanbad Oil Mills opened it and further adulterated the oil and then closed it again, which according to the Inspector would take a few minutes.

I, therefore, hold in agreement with the Magistrate that the tin in question was such as is contemplated by s. 14 of the Act and that the accused could not be required to sell the oil contained in it except the entire unopened tin as it was. Clause (2) of the section would, therefore, apply to the case. It was, therefore, wrong on the part of the Inspector to require the accused to sell to him $2\frac{1}{2}$ chattaks of the mustard oil by opening the tin.

The learned Government Advocate says that even if the Inspector had acted illegally in not purchasing the entire tin as is required by cl. (2) of s. 14, yet the oil of the tin having been found to be highly adulterated the accused could not take advantage of the illegality or irregularity and must suffer the penalty of law for exposing the oil contained in the unopened tin for sale. He refers to cl. (1) of s. 14 and says that it was for the accused to show that the oil in the tin was in the same condition in which it was sold to him by the Mill and after that after due care and attention he believed that it was genuine. The procedure adopted by the Inspector has to my mind prejudiced the accused seriously and deprived him of the best evidence to prove his *bona fides*. Had the tin containing the oil in question been taken possession of by the Inspector by purchasing it in the condition in which he found it, the accused could have been in a position to show that the oil in the tin was in the same condition in which he purchased it from the Mill. It could also have been seen whether the tin had any mark to indicate that it was surreptitiously opened and the contents thereof adulterated by the accused by the easy process referred to by the Inspector in his evidence. The accused made his own statement and examined the Assistant Manager of the Dhanbad Oil Mills, who admitted that only a day earlier the accused had purchased 32 tins of mustard oil from the Mill and that the tins were soldered with liquified tin.

The tin in question also was soldered in similar manner. This would indicate that the accused was telling the truth and that he gave the best evidence that was available and that any further best evidence was very much affected by the illegal procedure adopted by the Inspector.

In the circumstances of the case the accused was entitled to an acquittal. The appeal is, therefore, dismissed.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 912 OF 1926.
(CRIMINAL REVISION PETITION No. 790
OF 1926.)

February 16, 1927.

Present:—Mr. Justice Wallace.

TARANAGOWD AND OTHERS—PETITIONERS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V. of 1898), s. 120—Period for which security is to be given, commencement of—Joint trial of several persons, legality of.

Under s. 120, sub-s. 2, Criminal Procedure Code, the period for which security is to be given commences on the date of the order under s. 118, that is, the date of the final order, and not from the date of the preliminary order. [p. 590, col. 1.]

Where in proceedings under s. 107 of the Criminal Procedure Code the essence of the charge was that the accused formed one gang with one purpose, namely, that of harassing the complainant and each act spoken to by the witnesses was an act prompted by that common object and directed towards accomplishing it and the evidence of the common association of all the persons for that one purpose was particularly strong:

Held, that the accused could be jointly tried. [p. 591, col. 1.]

In re Kutti Goundan (1), Hari Telang v. Queen-Empress (2) and Anugoo Singh v. Emperor (3), distinguished.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Bellary Division, dated the 15th November, 1926, in Criminal Appeal No. 23 of 1926, preferred against the judgment of the Court of the Sub-Divisional Magistrate, Bellary, in M. O. No. 22 of 1925.

Mr. V. L. Ethiraj, for the Accused.

Mr. R. N. Aiyenger, for the Crown.

ORDER.—This criminal revision case is against the order of the Sessions Judge of

Bellary dismissing an appeal to him against an order of the Sub-Divisional Magistrate of Bellary in a case under s. 107 of the Criminal Procedure Code. Two points are urged (1) that the period for which security has been ordered to be given exceeds the period fixed in the preliminary order under s. 112 (2) that the joint trial of the petitioners was illegal and highly prejudiced them.

As to point (1), the preliminary order under s. 112 was drawn up apparently on 28th October, 1925. Then the date has been struck out and 4th January, 1926, entered. That order called on the petitioners to show cause against giving security to keep the peace for one year, not, be it noted, for one year from that date. The final order was written, signed apparently on 21st September, 1926, and pronounced on 2nd October, 1926. It is the petitioners' contention that it is not open to the trial Court to order security for more than one year from the date of the preliminary order, that is, at the farthest upto 4th January, 1927. I am not prepared to accept this argument which would entail that in a case of this kind the time occupied by the trial Court would have to be subtracted from the period for which security should be given; such an interpretation of the law is bound to encourage accused persons in prolonging the trial as long as possible, since the longer they prolong it the shorter will be the time for which they will give security. In fact were they successful in prolonging the trial for one year, they will escape having to give security at all, and render the whole proceedings something of a farce. I am clear that this was not the intention of the Code. Section 120, sub-s. 2 lays down clearly that the period for which security shall be given shall commence on the date of the order under s. 118, that is, the date of the final order.

As to the second point, the argument is that the joinder of the petitioners in one trial has prejudiced them because the lower Courts have considered the evidence as a whole against all the petitioners and thus have used against some petitioners evidence which was given only against others. There were seven accused and the general case against them was that accused Nos. 2 to 7 are the hangers-on of the 1st accused who is the village Reddy, and owing to enmity between the 1st accused and P. W. No. 1 the 1st accused along with

these adherents of his, accused Nos. 2 to 7 have been making P. W. No. 1's life in the village a burden to him, endeavouring to have him boycotted by the coolies and barbers and to drive him from the village. The prosecution case was that all these accused combined with one purpose to bring about this result. I have studied the evidence as a whole and it is clear that it is all directed towards this common purpose animating all the accused, namely, accused No. 1 urging the other accused to accomplish this purpose and the other accused carrying out in various ways petty acts of social tyranny and use of criminal force to aid and abet the 1st accused in his purpose. It is not a case where evidence is given of isolated acts which have no relation to this common purpose. The evidence of witnesses who speak to only some of the accused doing a particular act is, therefore, in my view, relevant to prove the common purpose animating all of these. In these circumstances it appears to me, that the joint trial was proper and that no illegality or prejudice to the accused has occurred.

My attention has been called to a ruling of a Single Judge of this Court reported as *In re Kutti Goundan* (1). It, however, can easily be distinguished on the facts. In that case two persons were put up jointly for giving security under s. 110, cls. (d), (e) and (f), that is, put shortly, for being habitual extortioners, mischief makers and dangers to the community. The learned Judge held that the evidence regarding their association in their nefarious acts was not strong; that being so, he held that their joint trial prejudiced each of them. The case in *Hari Telang v. Queen-Empress* (2) was also a case under s. 110, cls. (d), (e) and (f), and the Court held that it was improper to try jointly two persons charged under s. 110 (f), because it could not be said that their individual characters were so connected together that a joint trial on the ground that their characters render them dangerous persons was permissible. The case in *Angnoo Singh v. Emperor* (3) is very similar and in it also the learned Judge held that the evidence connecting the various accused

(1) 86 Ind. Cas. 49; (1925) M. W. N. 57; 37 M. L. J. 689; A. I. R. 1925 Mad. 189; 26 Cr. L. J. 673.

(2) 27 C. 781; 4 C. W. N. 531; 14 Ind. Dec. (N. S.) 511.

(3) 71 Ind. Cas. 865; 45 A. 109; 20 A. L. J. 881; A. I. R. 1923 All. 35; 24 Cr. L. J. 257.

together was very vague, general and of a hearsay description.

This cautionary principle does not apply to the present case. The essence of it is that the petitioners formed one gang with one purpose, namely, that of harassing P. W. No. 1 and each act spoken to is an act prompted by that common object and directed towards accomplishing it. The evidence of the common association of all the petitioners for that one purpose was particularly strong. I do not find that any objection on the ground of joint trial was taken before the trial Court, and it certainly was not made a ground of appeal before the Sessions Judge. In these circumstances I am not prepared to say that the joint trial was illegal or in any way prejudiced the accused. I am not prepared to interfere in this case and dismiss the petition.

V. N. V.

A. N. A.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 348 OF 1927.

June 29, 1927.

Present :—Mr. Justice Allanson and Mr. Justice Sen.

GENDO URAON AND OTHERS—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 142, 147, 353—Unlawful assembly—Persons joining assembly, liability of—Mob—Innocent spectator—Burden of proof—Assault in furtherance of common intention—Separate sentences under ss. 147, 353, legality of.

Any person who intentionally joins or continues in an unlawful assembly while the assembly is committing an offence becomes a member of that assembly. Any person who has innocently got into the crowd and is unable owing to pressure of numbers to escape from it is not a member of the unlawful assembly; but he would have to make out his case on the point. [p. 592, col. 1.]

Separate convictions are legal under ss. 147 and 353 of the Penal Code even when assault is committed in furtherance of the common intention of the unlawful assembly. [p. 592, col. 2.]

Prakash Chandra Kundu v. Emperor (1), followed.

Criminal revision from an order of the Judicial Commissioner, Chota Nagpur,

dated the 21st May, 1927, affirming that of the Sub-Divisional Magistrate, Chatra, dated the 17th February, 1927.

Sir Ali Imam (with him Mr. B. C. De), for the Petitioners.

Mr. C. M. Agarwala, Assistant Government Advocate, for the Crown.

JUDGMENT.

Allanson, J.—The 21 petitioners have been convicted under ss. 147 and 353/34 of the Indian Penal Code and sentenced to six months' rigorous imprisonment under each section, the sentences to run consecutively. The petitioner, Gendo, has also been fined Rs. 50.

On the 5th November, 1926, an Excise Inspector and Sub-Inspector with a number of Excise subordinates went to make house searches for illicit liquor and illicit distilling apparatus in village Haphua. The accused, who are all Oraons, belong to this village. The houses of Gendo and Mirwa accused were searched and also the house of one Dukhi and illicit liquor or distilling apparatus were found in each of these houses. While the search was going on in the house of the accused Somra there was an alarm, and a mob of 40 or 50 men started smashing and removing the articles which had been already attached and which had been left in charge of an Excise Head Constable. The Excise Inspector and his men remonstrated, but they were attacked by the excited mob and nine of them were injured and the whole party had to run away. The only names that could be given in the First Information were those of the persons whose houses had been searched. But at subsequent test identifications a number of persons, including the present petitioners, were identified by various members of the Excise party.

The prosecution witnesses who were not previously acquainted with the petitioners were not in a position to say what overt act each person did, that is which of them smashed the *handis* or which of them struck which of the excise party. They could only identify them as among the rioters. The learned Judicial Commissioner on appeal ignored the evidence of two witnesses, who in their depositions merely said that at the test identification they identified certain persons. This was really a faulty record by the Magistrate. The witnesses ought to have said that they

identified these persons as among the mob. No defence witnesses were examined.

Sir Ali Imam on behalf of the petitioners urged that as the occurrence took place in the village, and as the Excise Officers were picketing certain houses and not allowing egress and ingress, the villagers must have been looking on, and no one can be convicted unless an overt act is proved against him. I find no evidence or suggestion that among a crowd of onlookers certain persons suddenly formed an unlawful assembly. The smashing of the *handis* and the subsequent attack on the Excise Officers was, according to the evidence, the work of a number of men. Moreover, in an occurrence of this kind, in which the witnesses did not know from before the person taking part but were only able to pick them out at a subsequent test identification, clearly it would be the persons nearest to the witnesses who would be likely to be identified. It would be curious if, instead of identifying as among the rioters those persons whom they really saw in the unlawful assembly, the prosecution witnesses should have picked out innocent onlookers who would presumably be at some distance. Any person who, when the smashing of the *handis* began, intentionally joined or remained in the unlawful assembly was a member of that unlawful assembly. Such a person could not help being aware that the action of those men was unlawful. Any person who has innocently got into a crowd and is unable owing to pressure of numbers to escape from it, of course, is not a member of the unlawful assembly; but he would have to make out his case on that point. There is no question here of such a crowd that innocent onlookers could not get out of it. No one who intentionally joins or continues in an unlawful assembly can be allowed to say that he was merely a harmless spectator. He must prove that he was there owing to no fault of his own and that he could not get out of the crowd. The whole object of the provisions of s. 142 of the Penal Code would otherwise be defeated. There is nothing to show that any of the accused were innocent onlookers or that the witnesses have identified as rioters persons who were merely looking on. None of the accused pleaded he was an innocent onlooker.

The other point argued on behalf of the petitioners is that they have really been convicted twice over for the same offence. But the common object of the unlawful as-

sembly was to compel by criminal force the Excise Officers to stop the house searches, and this was effected by smashing up the *handis*, etc. When the Excise Officers expostulated with the rioters, they proceeded to attack them. The common object of the unlawful assembly was not to assault the officers, but the occurrence subsequently developed into such an assault. There can be no doubt that the assaults were made in furtherance of the criminal intention of the accused, namely, to drive away the Excise Officers. It was held in *Prakash Chandra Kundu v. Emperor* (1) which was also an Excise case, that separate convictions are legal under ss. 147 and 353, even when the common object of the unlawful assembly was to assault the public servants. The persons actually assaulting could also be sentenced under s. 353. In the present case the assault on the public servants was not the common object of the unlawful assembly. The assault took place later; but from the evidence it is clear that it was done in furtherance of the common intention of the mob and each of the accused is liable under s. 353/34. As was remarked in the above case, the question is rather an academic one; as the sentences passed could have been given under s. 147 only.

The aggregate sentences are not excessive. The assaults on the Excise Officers, the interferences with their work, and the destruction of the evidence of illicit distilling that had been detected were quite unjustifiable. The occurrence was of a serious nature and the work of Excise Officers would be brought to a standstill and their persons endangered, if they were liable to be attacked with impunity by a large body of aboriginals when they go to make searches in a village.

The application is rejected.

Sen, J.—I agree.

A. N. A.

Rule discharged.

(1) 23 Ind. Cas. 203; 41 O. 836; 15 Cr. L. J. 251; 18 C. W. N. 918.

ODDH CHIEF COURT. FULL BENCH.

FIRST CIVIL APPEAL No. 121 OF 1926.

October 18, 21, 22, 29 and 30, 1927.

November 1, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, Mr. Justice Hasan, Mr. Justice Misra, Mr. Justice Raza and Mr. Justice Pullan.

Thakur JAGMOHAN SINGH—
PLAINTIFF—APPELLANT

versus

Musammatt SHEORAJ KUAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Will—Construction—Absolute estate with clause that if devisee does not appoint successor estate shall descend to testator's heirs—Validity of disposition—Gift over—Defeasance clause—Executory devise—Condition prescribing succession unknown to law—Principles relating to construction of Wills—'Malik', meaning of.

A testator after making dispositions of certain property in favour of his son's widow M, and his grandson's widow P, provided as follows: 'On the death of M or P, the survivor will become the proprietor of the entire property or of that property which exists then (that is, at the time of the death of the lady who dies first) with power of transfer and then she will have all the powers of sale, mortgage, gift and bequest; after the death of the last survivor, the property which she will leave without nominating a successor will devolve on the legal heirs of the declarant (that is, the testator), but as against the said Musammats and their successors whom they will nominate no one will have any claim.' In a suit by the heir of the testator against the heirs of P who survived M and died without appointing any successor:

Held, (1) that P took an absolute estate under the Will; [p. 597, col. 2.]

(2) that there was no executory gift in favour of the heirs of the testator, and that even if there was such a gift it was invalid in law; [*ibid.*]

(3) that the estate taken by P was not an estate defeasible in the event of her not making a Will; [p. 597, col. 2; p. 598, col. 1.]

(4) that the testator had by the latter portion of the Will merely endeavoured to lay down a line of succession contrary to the succession known to the law, which he had no power to do; [p. 598, col. 1.]

(5) that the heirs of P were entitled to the estate on P's death in preference to the heir of the testator. [*ibid.*]

Per Stuart, C. J.—Where a testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an absolute estate, it is necessary to decide what were his real intentions. Did he mean to grant an absolute estate? If he has done so, he cannot reduce the powers of the owner; and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint. But if, on the other hand, it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute. This is the law both in England and in India. [p. 598, col. 1.]

Per Wazir Hasan, J.—It is a universal rule of

construction that the "grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. [p. 599, col. 1.]

'In construing Wills in all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e., to construe the Will. In so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair.' But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent to carry out of the testator's true intentions." [p. 599, cols. 1 & 2.]

Rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. [p. 599, col. 2.]

A Court cannot speculate upon what the testator may have intended to do or may have thought that he has actually done. It cannot give effect to any intention which is not expressed or plainly implied in the language of the Will. [p. 600, col. 1.]

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case. [*ibid.*]

If a testator makes an absolute gift of property to A, any gift over of what may be left undisposed of by A is repugnant and void. [p. 603, col. 1.]

Per Misra, J.—The word 'malik' when used in a Will or a gift imports full proprietary rights unless there is something in the context to qualify it. [p. 607, col. 2; p. 608, col. 1.]

Where clear words have been used in a Will indicating that the donee has been made 'malik' and complete powers of transfer have been conferred upon him, it is not further necessary in order to give effect to the full powers conferred

upon the donee that there must also be a provision in the Will to the effect that the estate conferred upon him is a heritable one. [p. 608, col. 2.]

[English and Indian case-law discussed.]

First appeal under s. 96, Civil Procedure Code, against the judgment and decree of the Sub-Judge, Lucknow, in Suit No. 239 of 1925, dated the 20th August, 1926.

The case came on for hearing before the Hon'ble the Chief Justice and Raza, J. on the 9th August, 1927, who made the following

ORDER OF REFERENCE.

The facts may shortly be stated as follows:—A certain Baldeo Singh executed a valid Will, dated the 24th February, 1911, under which he devised a portion of his property to *Musammam Mahraj Kuar*, the widow of his deceased son and to *Musammam Param Kuar*, widow of his deceased grandson, in the following manner. If they survived him—they did so survive him—they were to succeed jointly to a life-interest in this property. On the death of one of them.—*Mahraj Kuar* predeceased *Param Kuar*—the survivor was to succeed to the property “with power of transfer and powers to sell, mortgage or give away by gift or Will.” *Param Kuar*, as survivor, did so succeed. The Will continues that after such survivor's death the property, which she will leave without nominating the successor, will pass to the legal heirs of the deceased. It is on this latter clause that contest has turned. The plaintiff-appellant has been found by the learned trial Judge to be the sole legal heir of *Baldeo Singh*. The defendant-respondents all have been found to be the legal heirs of *Param Kuar*; and accepting for the moment the position that this conclusion of fact is correct, the decision of the case would turn upon the legal effect of the clause directing that such succession should open to the testator's heirs in event of the survivor, i.e., *Param Kuar*, not making a Will. We may here deal briefly with one or two points. It was asserted on the part of the plaintiff-appellant that under a custom of the family daughters could not succeed and that he was the legal successor to *Param Kuar*. The learned trial Judge has decided against the existence of such a custom. The learned Counsel for the plaintiff-appellant has stated to us that although the appeal asserts the existence of such a custom he does not propose to

argue in favour of its existence. It is also the case that the defendants-respondents asserted the existence of a Will in favour of one of them. The learned trial Judge has decided against the genuineness of this Will. We are given to understand that the learned Counsel for the defendants-respondents proposes to argue in favour of the genuineness of the Will. We now come to the main point. What is the law in a case like this? The matter is one of some difficulty as there have been conflicting decisions in the late Court of the Judicial Commissioner upon the point and there is no binding authority by this Court. In view of the importance of the question involved we are of opinion that it should be decided by a Full Bench of this Court, and we accordingly refer to a Full Bench the decision of the question. We consider that it will be better not to put the point into the form of an exact question. We make the reference under the provisions of s. 14, Local Act IV of 1925.

[August 9, 1927.—The learned Chief Justice directed that in view of the importance of this question a Full Bench consisting of all the Judges of the Court (five in number) be formed and that one whole day be devoted in the cause list for the argument.]

Messrs. *Ali Zaheer*, *Niamat Ullah* and *Bisheshwar Prasad Misra*, for the Appellant.

Messrs. *P. L. Banerji*, *Rameshwar Dayal*, and *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Stuart, C. J.—(October 18, 1927).—This is a reference to a Full Bench of the Court made under the provisions of s. 14, Local Act IV of 1925. The reference was made on the 9th August, 1927, by a Divisional Bench of which I was a member; and as it was considered that the questions involved in the reference were of considerable importance it was directed that the Full Bench should consist of all the Judges of the Court. The facts upon which the reference is based are as follows. A certain *Baldeo Singh* executed on the 24th February, 1911, a Will (Ex. 17) a translation of which will be found at page 5 of Part III of the printed paper-book. The plaintiff-appellant, *Thakur Jagmohan Singh*, and the defendants-respondents, *Musammam Sheoraj Kuar*, *Janki*

Kuar and Suraj Kuar are agreed that this Will was executed by Baldeo Singh, and that the testator was of sound disposing mind. The first portion of the Will is devoted to a devise of certain property to the testator's daughters. In this it is clearly declared that the property in question is to be given at the time of the testator's death to his daughters and their heirs and in no circumstances is that property to return to the testator's family. The reference is only concerned incidentally with this portion of the Will.

The portion of this Will with which the reference is concerned explicitly is in respect of the following devise. The testator had a son Ambar Singh and a grandson Anrudh Singh. Both Ambar Singh and Anrudh Singh had died before the date of the execution of the Will. The testator made dispositions of certain property in favour of Mahraj Kuar, widow of Ambar Singh, and of Param Kuar, widow of Anrudh Singh. This portion of the Will commences by stating that the property which is to come into the possession of Mahraj Kuar and Param Kuar at the time of the testator's death is to be considered the estate proper, and that the property devised to the daughters and their heirs is to be considered as property separated from the estate. The Will directs that Mahraj Kuar and Param Kuar are to maintain the status of the estate and the house as they exist, and are not to alter them. The disposition in favour of Mahraj Kuar and Param Kuar in respect of the property devised to them is stated to be that Mahraj Kuar is to become proprietor (*malik*) and possessor of the entire ancestral property (with the exception of the property devised to the daughters) without any right to sell or mortgage it except to meet the charges of land revenue, the expenses of marriages, or other necessary expenses. Mahraj Kuar was to retain the management of the property and to meet from the income disbursements in respect of the payment of servants, marriages, and family ceremonies, and other expenses of management. She was to support Param Kuar if Param Kuar agreed to live with her. But in event of Param Kuar refusing to live with Mahraj Kuar, the net balance left over from the income after the payment of all charges was to be divided into two moieties one of which was to be enjoyed by Param Kuar.

Their estate was of a limited nature. This portion of the Will presents no difficulty.

I now come to the portion of the Will which presents difficulty and which constitutes the main portion on which the reference is based. The Will continues, that on the death of *Musammatt* Mahraj Kuar or Param Kuar the other will become the proprietor of the property detailed at the end of the Will with any additional property that may exist upon the death of the lady who predeceased the other; and then follows a condition that such property is to be given to the survivor as proprietor with power to transfer; that she is to have the power to transfer the property in question by sale, mortgage, gift or by a testamentary devise. The next clause states that, should such lady die without having nominated a successor by Will, the property is to pass to the heirs of Baldeo Singh.

Mahraj Kuar predeceased Param Kuar, and Param Kuar succeeded as survivor to the property in question. Param Kuar is now dead. It does not appear that Param Kuar transferred any property in her lifetime. The learned trial Judge has found that Param Kuar died intestate. Jagmohan Singh, the plaintiff-appellant, is admitted by the defendants-respondents to be the heir, under the Mitakshara Law, of Baldeo Singh, and *Musammats* Sheoraj Kuar, Janki Kuar and Suraj Kuar are admitted by the plaintiff-appellant to be the heirs, under the Mitakshara Law, of *Musammatt* Param Kuar. The questions which arose in the appeal before the Divisional Bench that have been referred to the Full Bench for decision are these. What is the construction to be placed upon the portion of the Will to which I have adverted and what is the law which should be applied to that portion of the Will when constructed? I take first the question of construction. The principles which I consider should be applied in a case like this are these. The Will must be read as a whole, and it must be decided what the testator actually meant in respect of the particular disposition. In arriving at this conclusion different considerations will arise. The Will in question has clearly not been drafted by a trained conveyancer. It is drafted loosely and carelessly, and it can be asserted with confidence that the words are used in a popular sense. Remembering

that the document is drafted not by a trained conveyancer and that the words are used in a popular sense, it is necessary to decide what Baldeo Singh intended to give to Param Kuar upon the death of Mahraj Kuar, in the circumstances which have now occurred. According to my reading of the terms of the Will I consider that he intended Param Kuar to be the absolute owner of the property in question. I should not attach undue importance to the use of the word *malik* or proprietor by which he describes the recipient, if that word stood alone, for I find that in an earlier part of the Will the same word *malik* is used when only a limited estate has been granted to the recipient. Reading together the words—*malik kul jaedad ba ikhtiyar intaqal*—the said words meaning proprietor of the whole estate granted with power of transfer with the subsequent words that the recipient is to have full power to transfer by sale, mortgage or Will, I can only draw the conclusion that Baldeo Singh intended to make the recipient a full proprietor. That is the first point. It is true that he adds a condition that should the recipient have died without making a Will the property is to devolve, not to the recipient's heirs, but to his heirs. This is the difficulty and this is the principal point upon which the reference has been made. In a case such as this in which the testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an absolute estate, it is necessary to decide what were his real intentions. Did he mean to grant an absolute estate? If he has done so, he cannot reduce the powers of the owner; and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint. But if, on the other hand, it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute. This is the law both in England and in India. I do not think it necessary to refer to authority as the question, in my opinion, does not admit of argument. The Court has frequently difficulty in such a case in construing the testator's intentions, but the difficulty here is not altogether one of construction. There have been two previous decisions of the Judicial Commissioner's Court which have treated this subject in view of the decision in

Hanbury v. Fisher (1); the decision of the House of Lords in appeal in the same case contained in *Comiskey v. Bowring Hanbury* (2) and a judgment of a Single Judge of the Court of Chancery in *Comiskey v. Hanbury* (3). The first decision of the Judicial Commissioner's Court was a decision of my own in 1918 when I was officiating as Judicial Commissioner. It is reported as *Indar Kuar v. Chheda Singh* (4). That decision was considered in a subsequent appeal decided by a Bench of the Judicial Commissioner's Court in 1921. This is reported as *Rajeshuri v. Mathura Singh* (5). It largely was owing to the apparently divergent views in these two decisions, that this reference was made by the Divisional Bench of which I was a member. I need not repeat the facts in *Hanbury v. Fisher* (1) and *Comiskey v. Bowring Hanbury* (2) as those facts are stated at length in the Oudh decisions in question. But I wish to explain what I meant in my previous decision. All that I wished to decide upon the point was that where an estate had been granted absolutely subject to an executory gift of the same at the death of the recipient, the executory gift was effective. In the case which I then tried I was of opinion that an absolute estate had been conferred subject to an executory gift. I might have expressed myself better in that judgment, and I do not contend in favour of every statement I made therein. I consider that I overstated the power of Mrs. Hanbury to dispose of the property, and I wish to withdraw the somewhat loose statement that in cases such as this there is a necessary antagonism between the gift of an absolute estate and the gift over. I am of opinion now that the true meaning of the decision of the House of Lords was that Mrs. Hanbury had obtained an estate which would become absolute if the executory gift failed. The subjection of the absolute nature of the estate to the executory gift, if the executory gift prevailed, was in effect to limit the estate to a certain extent. This was the view taken by Eve, J. in *Comiskey v. Hanbury* (3). In the well-known treatise

(1) (1904) 1 Ch. 415; 73 L. J. Ch. 222; 52 W. R. 662; 90 L. T. 66; 20 T. L. R. 269.

(2) (1905) A. C. 81; 74 L. J. Ch. 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252.

(3) (1909) W. N. 157; 101 L. P. 32; 53 S. J. 616; 25 T. L. R. 654.

(4) 50 Ind. Cas. 197; 22 O. C. 7; 6 O. L. J. 88.

(5) 63 Ind. Cas. 348; 24 O. C. 187; 3 U. P. L. R. (O.) 59.

Jarman on Wills, 6th Edition, the editor considers the decision in *Comiskey v. Bowring Hanbury* (2) to be authority for the proposition that it was "a gift to the wife for life with a power of appointment among the nieces and a gift to the surviving nieces in default of appointment, and if no niece survived, the wife shall take absolutely" page 1185 and he further at page 1323 stated that Mr. Hanbury's Will gave to his wife "an absolute interest defeasible in the event of any niece surviving her." I consider that this is the correct interpretation of the decision. In the particular case of *Indar Kuar v. Chheda Singh* (4) I laid down nothing more. I found that the recipient of the estate *Musammam Mithana* had received an absolute estate subject to an executory gift in favour of *Indar Kuar*. If *Indar Kuar* had predeceased *Musammam Mithana* the absolute estate in favour of *Musammam Mithana* would have become a perfect estate, but as *Indar Kuar* survived *Musammam Mithana* the executory gift held good. I do not think that the learned Judges who decided *Rajeshuri v. Mathura Singh* (5) appreciated my position. In the particular case which they decided they found that an absolute estate had been granted, and that there was no executory valid gift. Holding that view they rightly decided against the person who asserted the executory gift. I think it sufficient to say that what I consider to be the law on the subject is the law as known before the decision in *Comiskey v. Bowring Hanbury* (2) which laid down nothing to the contrary.

I can now approach the conclusion. Mr. Niamat Ullah, who has argued very ably on behalf of the appellant, has asked us to construe the Will as giving to the survivor of *Mahraj Kuar* and *Param Kuar* nothing more than a life-estate with a power such as is known in English Law as a power of appointment. He would have us take the view that *Baldeo Singh* did not grant under this portion of the Will a full proprietary estate, that he granted only a power of enjoyment and in addition a power of appointment. If I accepted the view that on the construction of the Will he had granted only a power of enjoyment together with a power of appointment I should accede to his argument, but I do not accept that view. In my opinion *Baldeo Singh* devised in this portion of the Will a full estate, but superadded to it a direction that the intestate succession of the holder of the full estate should

be succession other than the succession known to the Hindu Law. Mr. Niamat Ullah would have us take the words "owner with power of transfer by sale, mortgage, gift or Will" as nothing more than conveying a power of appointment. But as I read the words they made the recipient a full owner; and the words denoting the power of transfer were descriptive of full ownership. I cannot find in the deed that there was any good executory gift to *Baldeo Singh's* heirs. I cannot find that there was any executory gift at all. My construction of the Will is that *Baldeo Singh* created the recipient a full proprietor, and that he added words by which he endeavoured to substitute for the succession known to the Hindu Law a succession which appealed to him. It is true that in the Will he does not state the recipient is to have hereditary rights, and from this Mr. Niamat Ullah argues that he meant she was not to have hereditary rights. In my opinion the possession of hereditary rights follows as a consequence of full proprietorship. In my opinion it is not necessary to state explicitly that a donee has a hereditary rights when the donor intends that he should have them, provided the donor has made his meaning absolutely clear to the effect that the donee is to have a full proprietary estate. The ownership of a full proprietary estate includes the possession of hereditary rights. I consider that *Baldeo Singh* intended to give an unfettered absolute estate, and being ignorant of the law which prevented him, when he had made such a gift, from controlling the intestate succession of the donee endeavoured to control it by laying down a rule of succession contrary to the rule of the law. Mr. Niamat Ullah commenced with the argument that no absolute estate was granted. I have already decided that on my construction of the Will an absolute estate was granted. He next took up the position that, even if an absolute estate were granted there was a good executory gift in favour of his client that had taken effect. I have already found that on my construction of the document there was no executory gift. He then took a third alternative plea. His case was that all that *Param Kuar* acquired was an absolute estate defeasible in the event of her not making a Will, and that inasmuch as she did not make a Will the estate reverted to the heirs of the testator, that is to say, to his client. This argument is similar to the argument which I have

previously considered. I cannot construe the Will in this manner. Upon its wording it is, in my opinion, impossible to draw the conclusion that Baldeo Singh intended that if the recipient died without making a Will, the portion of the estate of which she had not disposed during her lifetime would be forfeited. This is purely a question of construction. I consider that he had no thought of a forfeiture of the estate granted. He has endeavoured, according to my view, to lay down a line of intestate succession contrary to the succession known to the law. There was no intention of forfeiture, in any circumstances. What I consider him to have intended is that if the recipient did not make Will, the portion of the estate of which she had not disposed during her lifetime should be diverted according to a line of succession unknown to the Hindu Law.

I now summarise my views. I consider that this case and all other cases of the same nature should be determined upon a construction of the document as a whole relating to the disposition. I consider that in cases such as this the actual intention of the testator should be sought from the words of the document keeping in mind the circumstances in which it has been prepared. Where, as here, the document has been prepared by persons unskilled in conveyancing the construction should follow the meaning of the words as found to be meant by the testator.

When, as here, it is found that the testator had intended to give an absolute estate and has attempted to limit the rights of the holder owing to an erroneous view of his powers so to limit those rights, the attempt to limit the rights must be rejected on the ground of repugnancy. I would, therefore, return the case to the Divisional Bench with a finding that *Musammam* Param Kuar succeeded to an absolute estate and that upon her death intestate the property would devolve upon her heirs. On this view the appeal would fail.

Hasan, J.—(October 29, 1927).—The question in this reference is the interpretation of the Will of one Baldeo Singh dated the 24th of February, 1911. Baldeo Singh, died in 1912 and it is agreed that *Musammam* Mahraj Kuar succeeded to the estate now in dispute under the devise contained in the said Will of Baldeo Singh. *Musammam* Mahraj Kuar was the widow of Ambar Singh, who was the son of Baldeo Singh and had predeceased his father.

Musammam Mahraj Kuar died on the 3rd of October, 1917, and it is further agreed that on her death *Musammam* Param Kuar succeeded to the same estate under the terms of the same Will. *Musammam* Param Kuar was the widow of Anrudh Singh, son of Ambar Singh and grandson of Baldeo Singh. Anrudh Singh had also died in the lifetime of Baldeo Singh. *Musammam* Param Kuar died on the 29th of May, 1922. The suit, out of which this reference arises, is brought by Jagmohan Singh for possession of the estate of Baldeo Singh, which was held possessed by *Musammam* Param Kuar at her death. For the purposes of this reference it is agreed that the plaintiff, Jagmohan Singh, is the heir-at-law under the rules of the Mitakshara to the estate of Baldeo Singh. The plaintiff claims the right to enter into the possession of the estate in suit on the death of *Musammam* Param Kuar. The three defendants, *Musammam* Sheoraj Kuar, *Musammam* Janki Kuar and *Musammam* Suraj Kuar, are the daughters of *Musammam* Param Kuar.

The plaintiff's case as presented at the arguments before us is that the estate which *Musammam* Param Kuar acquired under the Will of Baldeo Singh was determinable at her death and on the happening of that event the plaintiff is entitled to succeed either as a devisee under the same Will or as an heir-at-law of Baldeo Singh. The precise matter for decision, therefore, is the nature of the estate acquired by *Musammam* Param Kuar under the Will of the 24th of February, 1911 and its legal effect.

The estate of which *Musammam* Param Kuar died possessed was, it is agreed, devised to her in terms of cl. 3 of the Will and the argument on behalf of the appellant is that on a proper construction of that clause and in the light of other dispositions in the Will *Musammam* Param Kuar acquired only a limited estate with powers of alienation and testamentary disposition. The second line of argument that whatever be the nature of the estate which *Musammam* Param Kuar acquired, absolute or limited, it was subject to defeasances on the happening of the contingency of her dying without nominating a successor and it is agreed for the purposes of this reference that the contingency has happened. The broad contention on behalf of the defendants is that *Musammam* Param Kuar acquired an absolute estate and that the course of succession prescribed by the clause in

question on the happening of the contingency is invalid both as gift over and as a direction. It is agreed that this course of succession is not the course of inheritance according to law which will follow on the death of *Musammam* Param Kuar if she died possessed of an estate of inheritance. The trial Court has accepted the defendants' interpretation and contention and dismissed the plaintiff's suit.

Clause 3 of the Will of the 24th of February, 1911, is unfortunately not in such a happy state of lucidity as to enable us to ascertain the intention of the testator without any difficulty. This being so, the principles of construction which eminent Judges have on former occasions enunciated for arriving at a conclusion as to the intention of the testator are to my mind of great and abiding value and I confess that I ordinarily take light from such principles in construing documents where language employed to express the intention is ambiguous, equivocal or to say the least not clear. To my mind the saying "to construe one man's nonsense by another's is nothing but pedantry. It seems to me that to apply the same rules of sound judgment as have been applied by former Judges to the interpretation of documents is but common sense.

In *Grey v. Pearson* (6) Lord Wensleydale observed that it was the universal rule of construction that the "grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

The second principle, which I should bear in mind, may best be expressed in the language of Lord Moulton in the case of *Venkata Narasinha Appa Row v. Parthasarthy Appa Row* (7). His Lordship made the following observations:—"In all cases, the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e., to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely

the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair'.....

But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life.... That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions."

To the observations of Lord Moulton I would add the following observations of Wilson, J. in *Ram Lal Sett v. Kanai Lal Sett* (8) quoted with approval by Lord Macnaghten in the case of *Bhagabati Barmanya v. Kali Charan Singh* (9).

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are

(6) (1857) 6 H. L. C. 61 at p. 106; 26 L. J. Ch. 473; 5 W. R. 454; 10 E. R. 1216; 3 Jur. (N. S.) 823; 108 R. 19.

(7) 23 Ind. Cas. 166; 41 I. A. 51; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 37 M. 199 (P. C.).

(8) 12 C. 663; 6 Ind. Dec. (N. S.) 450.

(9) 10 Ind. Cas. 641; 38 I. A. 54; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375; 38 C. 468; (1911) 2 M. W. N. 295 (P. C.).

rules designated to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently, from Englishmen, and who have never heard of the rules in question".

The third principle upon which I rely is this—"We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his Will". Per Lord Watson in *Scale v. Rawlins* (10).

The fourth and the last principle of which I want to make use in this case is stated by Sir John Edge in the case of *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (11) "that it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case."

I now proceed to the task of interpreting the Will before us. In the first part of this Will the testator recites the fact that he has no male issue and that he had made a previous Will. He then expresses his desire to alter the nature of the devise which he had made in his previous Will in favour of his grand-daughter and alters it. By this Will there is no doubt that he gives absolute "proprietary" estate to them and emphasizes it by saying that

"under any circumstances and at any time it shall not revert to my family". The estate so conferred on those daughters is clearly an estate of inheritance in terms of the Will itself. He, however, restricts the inheritance, in case of issue, to male issue only as is also clear from cl. 6 of the Will. This, it is not disputed, he could not do. It is clear, therefore, that the testator was labouring either under ignorance or forgetfulness of the rule of law that he had no power to prescribe a course of inheritance different from the course prescribed by law. After this appear manifestations of the testator's intention to make devise in favour of *Musammam Mahraj Kuar* and of *Musammam Param Kuar*. The first devise in favour of these ladies is made and expressed in the following passage:—

"As to my remaining property at first *Musammam Mahraj Kuar*.....and after her *Musammam Param Kuar*.....will become proprietors. Nothing will be done against this; that they will maintain the status of the family and the estate which exists at present and will not alter it, only the land granted to the daughters shall be separated from the estate." I regard the words just now quoted the main and the real words of disposition and what follows as "conditions" annexed to the said devise as the Will itself says. I construe these words as constituting the two ladies full and complete owners (*malik*), successively, of the property of the testator except the property bequeathed to the grand-daughters. The absolute ownership is emphasized by the words "Nothing will be done against this" which clearly mean that nothing will affect their status of full owners. "That they will maintain the status of the family and the estate.....and will not alter it," is an expression of wish, or at the most, is a direction, as to the mode of enjoyment conveying the desire of impartibility of the estate. Here again the futility of the testator's wish is apparent and the same wish permeates through all the subsequent clauses of the Will which the testator describes as "conditions". In condition No. 2 he again makes *Musammam Mahraj Kuar* proprietor (*malik*) of the estate "together with all the rights and things without exception of anything and right," and again imposes a restriction on her power to sell and to mortgage limited by the need of paying the revenue, meeting the expenses of the

(10) (1892) A. C. 342; 61 L. J. Ch. 421; 66 L. T. 542.

(11) 66 Ind. Cas. 193; 49 I. A. 25; 15 L. W. 434; 26 C. W. N. 425; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368; A. I. R. 1922 P. C. 63; 1 Pat. 305; 3 P. L. T. 133 (P. C.).

daughters' marriages and for other necessary expenses. There is much force in the arguments advanced by Mr. Niamatullah, Advocate for the appellant, that the status of a "proprietor" conferred on *Musammatt Mahraj Kuar* in cl. 2 is subjected to such disabilities as appertain to the status of a Hindu female and, therefore, the estate conferred is not higher than the usual Hindu female's estate. I think, however, that the argument loses all its force when it is considered in relation to the main words of the devise and the first portion of cl. 2 and lastly cl. 3. From the language employed in the whole of the Will and in the several clauses when separately considered I am irresistably led to the conclusion that the dominating idea in the testator's mind was that he could confer full ownership on a person and could also validly impose restraints on mode of enjoyment, on power of alienation and on the course of inheritance. This is by no means an uncommon failing of Indian testators.

Now comes cl. 3 of the Will. It may be translated as follows:—

"That on the death of *Musammatt Mahraj Kuar* or *Param Kuar* the survivor will become the proprietor of the entire property or of that property which exists then (that is, at the time of the death of the lady who dies first) with power of transfer and then she will have all the powers of sale, mortgage, gift and bequest; that after the death of the last survivor the property which she will leave without nominating a successor will devolve on the legal heirs of the declarant. But as against the said *Musammats* and their successors whom they will nominate no one will have any claim".

The construction of this clause is not free from difficulty. The intention of the testator as evidenced by the language of cls. 2 and 3 is, however, clear in one respect and it is this that the fetters as to the mode of enjoyment and power of alienation are removed as soon as one of the two ladies dies and the property passes into the hands of the survivor. This shows that the fetters placed on one of the conditions were intended to be placed for the benefit of the other.

Now the words "will devolve on the legal heirs of the declarant," are either words of limitation appertaining to the estate of the survivor or words of purchase; in other words they either prescribe a

line of inheritance which the testator wished to follow on the death of the survivor of the two ladies intestate or they constitute a direct gift by the testator in favour of his legal heirs in the same event. If the latter construction is the true construction then there is a gift over in favour of a class to be ascertained at the death of the survivor. It seems to me, however, that the former construction is more supported by the language of the clause under consideration and by the general scheme of the Will. In the first place, there are no words of gift in favour of the heirs. In the second place there is no specified individual as the object of the testator's bounty. Be that as it may, if the preceding estate is an absolute estate the subsequent direction treated either as laying down a course of inheritance or as a gift over to a class must fail as will be shown hereafter.

Is there then a gift of absolute estate to the survivor? I have already expressed the opinion that the estate in dispute was devised in favour of the two ladies successively in absolute ownership under the first part of the Will of Baldeo Singh. In legal phraseology the devise amounts to the devise of an absolute estate in favour of one subject to an executory devise of the same estate in favour of the survivor. Clause 3 now under consideration is intended to explain and amplify the nature of the estate in the hands of the survivor. I find nothing in the language of cl. 3 to disclose the intention on the part of the testator of cutting down in any respect the absolute estate already devised. To my mind the nature of the estate in the hands of the survivor as expressed in this clause is precisely the same as is conferred upon her by the devise contained in the first part of the Will. The language employed on the first occasion for the purpose of indicating the nature of the estate is "at first *Mahraj Kuar*.....and after her *Param Kuar* will become proprietors (*malik*)". In cl. 3 the words used are "on the death of *Musammatt Mahraj Kuar* or *Param Kuar* the survivor will become the proprietor (*malik*)". The grammatical and ordinary sense of the word '*malik*' is well understood. Expressed in English language it means "owner of property" and this is the sense in which the testator must be taken to have used it, having regard to the language spoken and written by the

testator, to the modes of expression prevailing amongst persons of his class and to the entirely inartistic frame of this Will. As observed by Lord Buckmaster in *Bhaidas Shivdas v. Bai Gulab* (12) the word "*malik*" is not "a term of art, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be." This Will is the Will of my countryman and is couched in the language which is my language. I strongly feel that I can say with confidence that the word "*malik*" in the setting in which it is placed here means nothing less than the status of a full owner embracing within it and connoting the incidents of an estate of inheritance and of power of alienation. In this particular Will, however, the two incidents of absolute ownership just now mentioned do not rest on implication alone. They are both expressly stated as will be presently shown.

It is argued by Mr. Niamat Ullah that the power of alienation is added by devise to the limited estate conferred on the survivor and in support of the argument reference is made to powers of appointment in English Wills and deeds. To my mind the analogy is misleading. Power of appointment, as understood in English law of real property was not, I am convinced, within the mental vision of the testator at all. I presume that he was wholly ignorant of it. According to my judgment the testator speaks of the power of alienation and testamentary disposition not by way of a gift of such power in addition to the gift of a limited estate but simply by way of explanation and amplification of what was implied as an inseparable incident in the status of a *malik*. There are no words connoting the gift of such a power and we cannot create one. I should not be understood to mean that the testator was under any legal disability to make a devise of a power of appointment if he intended to make one. All I say is that he had no conception of it and he has not made such a devise. The decision of their Lordships of the Judicial Committee in *Bai Motivahu v. Bai Manubai* (13) is, if I may respectfully say so, instructive in this

connection. In this case their Lordships held that the testator had substituted his daughter Mameo in his own place and in that character had given her power to designate the person by her Will in whom the estate was to vest absolutely. They held that there was nothing contrary to any principle of Hindu Law in the testator making a gift of such a power. They said that there is an analogy to it in the law of adoption. They further held that the person taking the estate by virtue of the exercise of the power must take it as a devise of the testator and must fulfil the conditions in which the testator could himself make him a devisee. Their Lordships ended their judgment by making a very important pronouncement and it is this: "But whilst saying this they think they ought also to say that, in their opinion, the English Law of powers is not to be applied generally to Hindu Wills." The word "power" in cl. 3 of the Will stands for the word "*ikhthiar*", which only means "freedom, liberty" and is not a technical term. On the other hand, the word "power" in English conveyancing is a technical term and quite distinct from the power which a man has over his own property by virtue of his ownership—*Tremayne v. Rashleigh* (14). In my long experience extending over a quarter of a century in this part of the country I have not come across a Will or a deed in which power of alienation has been conferred as distinct and separate from the incident of ownership in property. To use the language of Wilson, J. in *Ram Lal Sett v. Kanai Lal Sett* (8), already quoted, "it is a very serious thing to use rules of construction of English Law in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question". I think the limits of the application of the doctrine of "power" as understood in English Law to instruments executed by Indians must be taken to have been defined by their Lordships of the Judicial Committee in *Bai Motivahu v. Bai Manubai* (13), where power to designate a successor to the testator was upheld.

But even if I assume that there is a power of appointment added to a devise of a limit-

(12) 65 Ind. Cas. 974; 49 I. A. 1; 26 O. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 O. L. J. 314; 24 Bom. L. R. 551; 46 B. 153; A. I. R. 1922 P. C. 193 (P. C.).

(13) 24 I. A. 93; 21 B. 709; 1 O. W. N. 366; 7 Sar. P. O. J. 140; 11 Ind. Dec. (N. S.) 477 (P. C.).

(14) (1908) 1 Ch. 681 at p. 688; 77 L. J. Ch. 292; 98 L. T. 615.

ed estate the assumption does not in any opinion advance the plaintiff's case. The scope and validity of a devise of power is subject to the same rules of law as any other devise, for instance, the rule against perpetuity. In the exercise of such wide and general powers as are given by cl. 3 of this Will, there is a possibility of the rule being broken. The power is, therefore, bad in law. But whether this is so or not one thing is clear. When the learned Advocate for the appellant asks me to construe the power of alienation contained in this clause as a power of appointment according to English Law I feel at liberty to take aid from cases decided in English Courts in construing the power under consideration. According to English decisions a gift over for life with a general power of appointment by deed or Will is equivalent to an absolute gift—*Bray v. Bree* (15), *Jebb v. Tugwell* (16) and *In re Wolstenhome, Marshall v. Aizlewood* (17).

The other argument advanced for the purpose of wresting the word "*malik*" of its necessary incidents and natural meaning is that the context shows that the devisee was divested of the estate of inheritance. The argument is fair but not sound. In support of the argument reliance is placed upon the passage—"the property...will devolve upon the legal heirs of the declarant." I am unable to conceive that a person possessed of testamentary powers without any restriction, as is the case here, is not possessed of an estate of inheritance. A Will may and it usually does provide for succession which may be either in accordance with law or against it. In my opinion the passage relied upon is an express provision as to succession to the estate of the devisee and in this sense it is consistent and not inconsistent with the implication involved in the full estate already and repeatedly devised in favour of the survivor by the testator. Thus the natural meaning of the word "*malik*" is not in any manner displaced or qualified by the context. The present case, therefore, entirely falls within the principle of the decision of *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (11), in which the previous cases are reviewed.

Even if I construe this passage as a provision of gift over, which I do not, I cannot

(15) (1834) 2 Cl. & F. 453; 8 Bligh (N. s.) 568; 6 E. R. 1225; 37 R. R. 172.

(16) (1855) 7 De G. M. & G. 663; 2 Jur. (N. s.) 54; 4 W. R. 137; 44 E. R. 53; 109 R. R. 284.

(17) (1881) 43 L. T. 752; 29 W. R. 414.

consistently with rules of sound judgment hold that the gift over was intended to cut down the prior estate of inheritance. There are no words showing such an intention and I cannot enter into the region of speculation. A gift over on the happening of a contingency of the nature mentioned in this clause (that is the devisee dying without nominating a successor) does not with reasonable certainty indicate the testator's intention to reduce the preceding absolute estate into a limited estate—*Thornhill v. Hall* (18), *Fetherston v. Fetherston* (19), *Watkins v. Weston* (20). In *In re Freeman, Hope v. Freeman* (21) Lord Justice Buckley at page 691* says—"The second principle is that a clear gift in a Will is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down. If there be a plain gift in a Will the Court will not say it is defeated by something ambiguous in a codicil which does not plainly cut down the previous gift." Moreover, the gift over, if any, is quite consistent with the testator's view amply manifested in this Will that he could make a devise of an absolute estate and at the same time put restraints on such an estate.

I do not, however, hold that the passage "will devolve upon the legal heirs of the 'declarant'" contains any gift over. There are no words of gift. On the contrary, the words employed are clearly words indicating the devolution of inheritance. They are in marked contrast with the language used in relation to the estate of the grand-daughters: "It shall not revert to my family." I take no objection to the gift over, if any, on the ground that it is not in favour of a specified individual. It would be valid in favour of such members of the class as are in existence at the testator's death—*Bhagabati Barmanya v. Kali Charan Singh* (9). But I am of opinion that there is no gift over. I hold that in the passage relied upon the testator prescribes the course of inheritance which he desires, that the estate of the devisee should follow in case of intestacy. It is agreed that this course is con-

(18) (1834) 2 Cl. & F. 22 at p. 41; 37 R. R. 1; 8 Bligh (N. s.) 88; 6 E. R. 1065.

(19) (1835) 2 Cl. & F. 67 at p. 81; 39 R. R. 1; 6 E. R. 1363.

(20) (1863) 3 De G. J. & S. 434; 138 R. R. 718; 32 L. J. Ch. 609; 8 L. T. 406; 11 W. R. 408; 46 E. R. 703.

(21) (1910) 1 Ch. 681; 79 L. J. Ch. 678; 102 L. T. 516; 54 S. J. 443.

*Page of (1910) 1 Ch.—[Ed.]

trary to the course prescribed by law. The testator's wish, therefore, must fail and the inheritance according to law should be left to run its course. It seems to me that the present case is wholly covered by the decision of their Lordships of the Judicial Committee in the case of *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (22). This was a case which went before their Lordships on appeal from a decision of the late Court of the Judicial Commissioner of Oudh and I may be permitted to add that I was Counsel in the case in the said Court. In that case the ultimate remainder in absolute estate was held to have vested in one Lachhman Singh. The document had also provided that the inheritance shall devolve according to the provisions of s. 22 of the Oudh Estates Act, 1869. The rules of inheritance according to that section were, however, applicable to the grantor himself, and could not be applicable to the grantee. The document was, therefore, construed to mean that the grantor intended that the heirs to Lachhman Singh's estate shall be the same persons as were the heirs of the testator himself. [See the report of the appeal in the Court of the Judicial Commissioner in *Narain Singh v. Deputy Commissioner of Partabgarh* (23).] In deciding the appeal Lord Phillimore said: "In the first place, they (their Lordships) think that, to borrow a phrase from the English law of real property, the words 'heirs and representatives' are to be treated as words of limitation and not of purchase,—that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachhman as distinguished from the life-estates which had preceded it. This being so, the latter words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and, therefore, to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case, his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachhman received an absolute estate in reversion."

Now I assume that there is a gift over: but

having regard to the nature of the contingency on which it rests and the rule of law applicable to such an executory gift I hold that the gift over fails. It is clearly repugnant to the absolute estate conferred by the testator on the survivor of the two ladies. In the case of *Sreemutty Soorjee-money Doozee v. Denobundo Mullick* (24), Lord Justice Turner said:—"A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy." This was quoted by Lord Justice Willes in the well-known case of *Jotendromohun Tagore v. Ganendromohun Tagore* (25), and he himself made the following observation:—"Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or Will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail and the inheritance take place as the law directs." In the case of *Dixon v. Charlesworth* (26), Swinfen Eady, J., held, on the authority of *Holmes v. Godson* (27), that a gift over on death "without a Will" following a prior absolute estate "being inconsistent with the law regulating the devolution of the property in that event, is void for repugnancy."

It now remains to consider the last argument of the learned Advocate for the appellant in support of the appeal. He argues that the estate vested in *Musammam Param Kuar* was defeated by the happening of the contingency that she has died without nominating a successor. In support of this argument reliance is placed on *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury* (28) and *Kristoromoni Dasi v. Narendro Krishna Bahadur* (29). In the first mentioned case, the defeasance of the

(24) 6 M. I. A. 526 at p. 555; 1 Ind. Jur. (N. S.) 37; 4 W. R. P. O. 114; 1 Boulr. Rep. 238; 1 Suth. P. O. J. 291; 1 Sar. P. O. J. 583; 19 E. R. 198.

(25) 2 I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. O. J. 692; 3 Sar. P. O. J. 83 (P. O.).

(26) (1903) 2 Ch. 458; 72 L. J. Ch. 642; 88 L. T. 862; 51 W. R. 652.

(27) (1856) 8 De G. M. & G. 152; 44 E. R. 347; 114 R. R. 73; 25 L. J. Ch. 317; 2 Jur. (N. S.) 383; 4 W. R. 415.

(28) 5 I. A. 138; 4 O. 23; 3 O. L. R. 339; 3 Sar. P. O. J. 815; 3 Suth. P. O. J. 537; 2 Ind. Jur. 430; 1 Shome L. R. 241; 2 Ind. Dec. (N. S.) 16 (P. O.).

(29) 16 I. A. 29; 16 O. 383; 13 Ind. Jur. 90; 5 Sar. P. O. J. 255; 8 Ind. Dec. (N. S.) 252 (P. C.).

(22) 76 Ind. Cas. 922; 50 I. A. 265; (1923) M. W. N. 591; A. I. R. 1923 P. O. 160; 9 O. & A. L. R. 746; 21 A. L. J. 777; 26 O. O. 257; 33 M. L. T. 355; 45 A. 596; 10 O. L. J. 513; 47 M. L. J. 260; 29 C. W. N. 86 (P. O.).

(23) 55 Ind. Cas. 896; 7 O. L. J. 93.

absolute estate depended on the failure of issue of the donee of the absolute estate (the contingency did not happen). In the second case on the construction as placed by their Lordships of the Judicial Committee on the Will in that case no estate shifted on defeasance from one donee to another. The bulk of the devise was held to be invalid. Certain life-estates and remainderman's estates were upheld. The two cases, therefore, are wholly inapplicable to the present case. In this case there are no words of defeasance and apart from the gift over there is nothing from which a defeasance of the prior estate can be inferred; and if the gift fails it must be held that the prior estate subsists and the plaintiff cannot succeed as an heir-at-law to the testator.

An executory devise on defeasance of a prior estate resting on a contingency of this nature is invalid, as already shown but I here take the liberty of quoting a passage from the judgment of Fry, J., in the case of *Shaw v. Ford* (30) which is as follows:—

"Now, that being so, I have to inquire what are the general principles of law applicable to such a case? They may, I conceive, be stated in this way. *Prima facie*, and speaking generally, an estate given by Will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well-established by the cases of *Gulliver v. Vaux* (31); *Holmes v. Godson* (27) and *Ware v. Cunn* (32). Another exception to

the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley v. Peixoto* (33); *Ross v. Ross* (34) and *In re Yalden* (35)."

The executory devise (or the gift over) also fails on the ground that the subject-matter was uncertain. The uncertainty arises out of the fact that the testator clearly intended that the survivor may dispose of the property which passes into her hands either by transfer *inter vivos* or by testamentary disposition. She could exercise this power to the extent of the whole property or she may not exercise it at all. On the date of the death of the testator, the date from which the Will came into operation, the subject-matter of the executory devise was, therefore, uncertain. It is immaterial for this purpose that *Musummat Param Kuar* as a matter of fact died without making any transfer or disposition. This principle was applied by Lord Buckmaster in the case of *Bhaidas Shivdas v. Bai Gulab* (12), on the authority stated therein of the case of *Horwood v. West* (36). "It may be observed", says Mr. Jarman, "that in numerous instances a devise or bequest of what shall remain or be left at the decease of the prior devisee or legatee has been held to be void for uncertainty". Most of the cases quoted by Mr. Jarman in support of the view just now stated can

(30) (1878) 7 Ch. D. 669; 47 L. J. Ch. 531; 37 L. T. 719; 28 W. R. 235.

(31) (1746) 8 De G. M. & G. 167n; 44 E. R. 353; 114 R. 83.

(32) (1830) 10 B. & C. 433; 5 Man. & Ry. 341; 8 L. J. K. B. (o. s.) 64; 109 E. R. 511; 34 R. R. 469.

(33) (1797) 3 Ves. Jur. 324; 30 E. R. 1034; 4 R. R. 7.

(34) (1819) 1 Jac. & W. 154; 20 R. R. 263; 37 E. R. 331.

(35) (1851) 1 De G. M. & G. 53; 42 E. R. 471; 91 R. R. 24.

(36) (1823) 1 Sim. & S. 337; 1 L. J. Ch. (o. s.) 201; 24 W. R. 199; 57 E. R. 155; 24 R. R. 199.

also be explained on the ground that if a testator makes an absolute gift of property to A any gift over of what may be left undisposed of by A is repugnant and void as is remarked by the learned Commentator, of the sixth edition of Jarman's treatise on Wills at page 463. In *Bull v. Kingston* (37) the gift over in case the devisee dies without a Will was held void on the ground of uncertainty. Another case on the same lines is *Eade v. Eade* (38). This finishes the reference.

The Honourable the Chief Judge and my learned brother justices Misra and Raza have said something in their judgments in respect of *Indar Kuar v. Chheda Singh* (4) and *Rajeshuri v. Mathura Singh* (5). Out of respect to them I feel that I also must say something. In my opinion both these cases were rightly decided if I may respectfully say so. In the first-mentioned case, I was Counsel for the appellant and my arguments were accepted and the appeal was allowed. The first argument was as to the construction of the Will and the construction placed on behalf of the appellant was that the devise of absolute estate in favour of the widow was subject to an executory devise in favour of the daughter. In support of the validity of the devise *Comiskey v. Bowring Honbury* (2) was cited. On the side of the respondents the construction was not questioned. What was questioned was that there could be no valid executory devise annexed to an absolute preceding estate. This was overruled and if I may say so with great respect was rightly overruled as a proposition of law. This is the substance of the decision in *Indar Kuar v. Chheda Singh* (4). In the second case no argument was advanced that the absolute gift could well in law be subjected to an executory devise or that there was any valid executory devise at all in that particular Will. This being so, the decision on the arguments as they seem to have been presented in that case was, it seems to me and if I may again respectfully say so, rightly given.

As regards the decision of the House of Lords in the case of *Comiskey v. Bowring Honbury* (2) just now mentioned, the judgments delivered by several noble Lords constituting the tribunal clearly show that the case turned upon the construction of the particular Will alone and no point of

law was decided. The point of law involved in the case, all along assumed and not disputed, was that an absolute estate may be validly subjected to a valid executory devise. This is expressed in the terms of the decree prepared in the case.

My answer, therefore, to the reference is that *Musammam Param Kuar* acquired an absolute estate under the Will of Baldeo Singh, dated the 24th of February, 1911, and she died possessed of the same. The gift over, if any, is void in law.

Misra, J.—(October 21, 1927.)—The question referred to us for the decision of the Full Bench is one relating to the interpretation of a Will executed by one Baldeo Singh on the 24th February, 1911. Baldeo Singh owned immoveable property of large value in the District of Sitapur. He died in 1912 leaving *Musammam Mahraj Kuar*, widow of Ambar Singh his son, *Musammam Param Kuar*, widow of Anrudh Singh his grandson, and three grand-daughters. Under the terms of his Will he gave to his grand-daughters certain plots of land and devised the remaining portion of his estate to *Musammam Mahraj Kuar* and *Musammam Param Kuar* without any power of alienation as long as both of them were alive. After the death of one of them the surviving widow was to become owner of the entire property. It was also provided in the Will that the property which remained undisposed of by the surviving widow would go to his heirs provided no successor had been appointed by the said widow to succeed to the property after her death.

After the death of Baldeo Singh in 1912 the two widows, *Musammam Mahraj Kuar* and *Musammam Parama Kuar*, succeeded to his property. *Musammam Mahraj Kuar* died on the 3rd October, 1917, and after her death *Musammam Param Kuar* succeeded to the property. She also died on the 9th May, 1922. After her death Jagmohan Singh plaintiff-appellant applied for mutation of names in respect of the property left by the deceased *Musammam Param Kuar* but was opposed by *Musammam Sheoraj Kuar*, the defendant-respondent, who claimed the property under a Will alleged to have been executed by *Musammam Param Kuar* in her favour. The mutation of names was effected by the Revenue Courts in her favour, and subsequently by virtue of a compromise, defendants-respondents Nos. 2 and 3 obtained a decree for possession.

(37) (1816) 1 Mer. 314; 35 E. R. 690.

(38) (1820) 5 Madd. 118; 21 R. R. 284; 56 E. R. 840.

sion against her in respect of a certain share in her possession. The plaintiff-appellant Jagmohan Singh has now brought the present suit for possession of the entire property against all the defendants.

The defence entered upon by the defendants in the case was to the effect that under the Will of Baldeo Singh, *Musammat* Param Kuar was the absolute owner of the property in suit, and the plaintiff was not entitled to succeed in the face of the Will executed by *Musammat* Param Kuar in favour of defendant No. 1. It was contended that in any case, the property being the absolute property of *Musammat* Param Kuar, that is, her *stridhan* the plaintiff was not entitled to succeed to the property left by her in preference to daughters and thus preferentially entitled to succeed to her *stridhan* under the Hindu Law.

It was contended in reply on behalf of the plaintiff-appellant that on a true construction of the Will, only a life-estate had been conferred upon *Musammat* Param Kuar, and that on her death the property passed to the heirs of Baldeo Singh, the testator, and the plaintiff being the nearest reversioner to him was entitled to succeed to it. The genuineness of the Will alleged to have been executed by *Musammat* Param Kuar in favour of *Musammat* Sheoraj Kuar, defendant No. 1 was also denied, and it was further contended that there existed a family custom under which the daughters were excluded from inheritance of the *stridhan* of their mother; and thus the plaintiff-appellant was entitled to the property in suit being the nearest heir of Anrudh Singh, the husband of *Musammat* Param Kuar.

The learned Subordinate Judge of Lucknow who tried the case, found that no such custom as was pleaded by the plaintiff was proved to exist. He also found that the genuineness of the alleged Will of *Musammat* Param Kuar, set up by the defendant No. 1 had not been established. He further found that the plaintiff was the nearest heir of Baldeo Singh. He, however, interpreted the Will as conferring an absolute estate on *Musammat* Param Kuar and held that the defendants being the daughters of *Musammat* Param Kuar were preferentially entitled to succeed. He further held that the provision in the Will as to the succession of the heirs of Baldeo Singh was invalid and inoperative. In that view of the case he dismissed the plaintiff's suit,

In appeal the various findings arrived at by the learned Subordinate Judge were challenged, and one of the questions referred by the Bench, before which the case originally came for hearing, to the Full Bench was whether on a proper interpretation of the Will of Baldeo Singh, *Musammat* Param Kuar got an absolute estate or only a life-estate in the property in suit.

In order to be able to determine the said question I should like to quote para. 3 of the Will as it stands in the original:—

"Yeh ki *Musammat* Mahraj Kuar wa Param Kuar men seek bewah marjavegi to dusari malik kul jaedad musarraah zail ya us waqt jo ho ba-ikhtiyar intiqal ho jawegi aur usko jami ikhtiyarat bai wa rahen wa hibba wa wasiyat hasil honge aur bad wafat uske jo jaedad ki bila namzad karne kisi qayam-muqam chhor jawe wo wirsaa jaez manmuqir ko pohonchegi magar bamuqable *Musammat* man mazkur ya uske qayam maqum ke jisko bazariye tahrir namzad kare kisi ko koi haq na hoga."

The above clause of the Will when translated runs as follows:—

On the death of either *Musammat* Mahraj Kuar or *Musammat* Param Kuar, the survivor will become the absolute owner of the property detailed in the Will or of that portion of the property which may be found to exist at the time with power of transfer and that she will have all powers to sell, mortgage or to make a gift or Will of the said property; after her death whatever property she will leave undisposed of without nominating a successor, will devolve upon the legal heirs of the testator, but as against the said ladies or their successors whom they might choose to nominate in writing no one will be entitled to lay any claim to the property.

After giving my best consideration to the terms of the Will quoted above I have arrived at the conclusion that the estate conferred on *Musammat* Param Kuar was an absolute estate and not merely a life-estate. The words used in the Will, as will appear from the clause quoted above, are "*malik* *ba-ikhtiyar intiqal* (owner.....with powers of transfer). In order to make his intentions clear the testator further provided in the same clause that the survivor shall have all powers to sell, mortgage, to make a gift or Will of the property. In several cases their Lordships of the Privy Council have recently held that the word "*malik*" when used in a Will or a gift

imports full proprietary rights unless there is something in the context to qualify it. In the case of *Surajmani v. Rabi Nath Ojha* (39) the words used in the deed of gift were "*malik wō khud ikhtiyar*" and their Lordships held that the words implied a gift of full proprietary rights. In the case of *Fateh Chand v. Rup Chand* (40) the words used in a Will of a Hindu testator were "*malik wo qabiz*" (owner in possession), and their Lordships held that the Will conferred full ownership on the devisee.

In *Bhaidas Shivdas v. Bai Gulab* (12) a Hindu testator had made a gift to his widow by means of constituting her "*malik*" (owner) of his property and by further providing that she would have power to leave whatever property might remain after her death to her daughters named in the Will as she liked. Their Lordships held that the Will conferred an absolute estate on the widow.

In *Sasiman Choudhurni v. Shib Narayan Chowdhury* (11) a Hindu by his Will gave his moveable and immoveable properties to his two widows, and provided that after his death they should have in every way full power and proprietary rights over the properties devised. The word used in the Will was "*milkiyat*". Their Lordships referred to the previous cases decided by them and held that the word "*milkiyat*" which meant all proprietary rights was enough to confer full and complete rights as proprietors including the full rights of alienation. The same rule of interpretation was accepted by their Lordships in *Ramachandra Rao v. Ramachandra Rao* (41).

In *Tikram Singh v. Chet Kunwar* (42) a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Chamier, J. C., and Tudball, A. J. C. decided that where a property is given or devised though to a Hindu female, the

use of the word "*malik*" imported full proprietary rights unless there was something in the context to qualify it.

It was contended by the learned Advocate for the appellant that although full power of transfer was given to the survivor of the two widows, yet because there was no provision in the Will that the property was to go by inheritance to the heirs of *Musammam* Param Kuar, it could not be said that the testator intended to confer an absolute estate upon her. The argument was to the effect that in order to confer an absolute estate not only full powers of transfer should be given but also it should appear from the terms of the Will that the property was to go to the heirs of the devisee. It was pointed out that a person to whom a life-estate was given could also be given a power of transfer; and the mere fact that the power of transfer was given would not apply that it was intended to confer an absolute estate carrying with it heritability also. I do not dispute the proposition that in certain cases a testator may confer a life-estate and may also give to the donee power of appointment or power of transfer. I am not, however, inclined to accept the argument that where clear words have been used in a Will indicating that the donee has been made "*malik*" and complete powers of transfer have been conferred upon him, it is further necessary in order to give effect to the full powers conferred upon the donee that there must also be a provision in the Will to the effect that the estate conferred upon him is a heritable one.

In *Jotendromohun Tagore v. Ganendromohun Tagore* (25) their Lordships of the Privy Council have clearly laid down that if an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry with it an estate of inheritance. This case was decided by their Lordships in 1872, and it was followed by the Calcutta High Court so far back as the year 1875; *vide*, *Kollany Kooer v. Luchmee Pershad* (43).

In *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (44) their Lordships of the Privy Council laid down that the word "*malik*"

(39) 35 I. A. 17; 30 A. 84; 12 C. W. N. 231; 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144 (P. C.).

(40) 37 Ind. Cas. 122; 43 I. A. 183; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182 (P. C.).

(41) 67 Ind. Cas. 408; 49 I. A. 129 at p. 135; 45 M. 320; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 681; 43 M. L. J. 78; 21 Bom. L. R. 963; A. I. R. 1922 P. C. 80 (P. C.).

(42) 2 Ind. Cas. 924; 12 O. C. 157.

(43) 24 W. R. 395.

(44) 24 O. 831; 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1524 (P. C.).

conveyed an idea of a heritable and alienable estate. The same view was taken by a Bench of the late Court of the Judicial Commissioner of Oudh in *Karim Dad Khan v. Bibi Ghafuran* (45).

I am, therefore, of opinion that the estate conferred upon *Musammam Param Kuar* under the Will was an absolute estate carrying with it the idea of heritability as well as of complete powers of disposal.

The next point for our interpretation is how far the provision in the Will providing for the succession of the heirs of Baldeo Singh, the testator, in case of the surviving widow dying without nominating any successor to the property, was a valid provision.

On behalf of the appellant it was contended that the estate conferred upon the surviving widow was a life-estate and consequently the provision was valid and good in law. It was further contended that even if the estate conferred upon the surviving widow be considered to be absolute, the said provision amounted to an executory devise and was a valid one. It was also valid if it be looked upon as a clause in defeasance. On behalf of the respondents it was, however, contended that the said provision was invalid because it amounted to the testator's laying down a course of inheritance to be followed after the death of the surviving widow in certain eventualities.

I have already given my opinion that on a true construction of the Will the estate conferred upon the surviving widow was an absolute one. We have, therefore, to see how far the subsequent provision relating to the succession of the heirs of the testator is valid. It was argued on the strength of a decision of the House of Lords reported as *Comiskey v. Bowring Hanbury* (2) that an absolute gift coupled with an executory devise of the testator's property was a valid one. It appears to me that although in the decree appended at the end of the judgment on page 92* it is stated that on a true construction of the Will of the testator, Mr. Hanbury, there was a gift of his real and personal estate to his wife absolutely, yet it is evident from the body of the judgment that their Lordships did not desire to lay down such

a proposition. Lord Halsbury observed (page 88*) as follows:—

"To my mind it is clear that he (the testator) is contemplating that she (his wife) shall have the full use of the property during her lifetime, and that after her death one or more of his nieces is to be the object of his bounty, and if his widow does not select one or more, then they are all to share alike."

Lord Davey observes (page 89*) as follows:—

"Reading the Will without paying any attention to legal rules, and for the purpose only of seeking the testator's intention and the meaning of the words he used, it is obvious that he did not intend that his wife should have an absolute power to dispose of the estate in her lifetime or otherwise than by her Will."

Lord James observed (on page 91*) as follows:—

"I think the meaning of the testator from a common sense point of view is clear enough. He wished his widow to have a life-estate in his property, and he then wished after that life-estate that it should be left to his nieces—to those of his own blood."

It would thus appear from the observations quoted above that what their Lordships decided was that the nature of the estate though stated in the Will to be absolute was really of a qualified nature, and consequently the executory devise in favour of the nieces was held to be valid. I am supported in this interpretation by a decision of the late Court of the Judicial Commissioner of Oudh reported as *Rajeshuri v. Mathura Singh* (5). I am of opinion that that case was rightly decided when it laid down the rule that where an absolute estate was granted, the grant of an ulterior disposition was void. The learned Judges referred to the decision of the House of Lords quoted above and expressed that the ground of decision of their Lordships in that case was that on a true construction of the Will it did not confer upon the donee an absolute power of disposition of the property, and, therefore, there was no repugnance between the estate conferred upon her and the gift over. But even assuming that the true interpretation of the aforesaid decision of the House of Lords is that

(45) 68 Ind. Cas. 110; 9 O. L. J. 104; A. I. R. 1922 Oudh 42.

an executory devise can be validly engrafted to an absolute estate, we have to determine whether there is a good and valid executory devise in favour of a particular individual in the Will before us. I am clearly of opinion that the Will cannot be interpreted to contain any provision which may be considered to be a valid executory devise. The real meaning of the testator appears to be that in case property was not left to any person the surviving widow, it would devolve on his heirs. He did not make any executory devise or gift over in favour of any particular individual or individuals but he only laid down what he considered to be the course of succession which his property should take in a certain contingency. In my opinion, the true meaning to be attached to the clause is that the testator was laying down a course of inheritance but was not making any bequest in favour of any particular individual or individuals to take effect in future.

It is a settled rule of law that a gift over would be void for repugnance where the estate conferred was of an absolute nature. The limitation whether by way of gift over or by way of executory devise would be invalid because it would be inconsistent with the absolute estate or power of disposition expressly given by the Will. There are a large number of decisions of English and Indian Courts which support this principle. In *Ross v. Ross* (34) it was held that where there was a bequest of a particular sum of money absolutely to a certain individual and there was a further condition inserted by the testator to the effect that in case the donee did not dispose of the said sum by Will or otherwise during his lifetime the said sum should be payable to the heir in tail of the testator, the said condition was void.

In the case reported as *Watkins v. Williams* (46) the House of Lords laid down the same principle. In that case a certain money fund was given to a person absolutely and a condition was attached to the gift over that so much as he shall not dispose of, should go over to another person. It was held that the condition was invalid and could not be enforced.

In *Barton v. Barton* (47) it was held that where there was an absolute devise or bequest of real or personal property followed by a gift over in the event of the donee dying intestate, the gift over was repugnant and void.

In *Holmes v. Godson* (27) the same rule was laid down. A testator had directed that his property was to vest in his son on his attaining the age of 22 years but if he attained the said age but did not make a Will then the property was to be sold and the proceeds therefor applied on other trusts. It was held that the property vested in the son absolutely and gift over was repugnant and void.

In *Sures Chandra Palit v. Lalit Mohan Dutta Choudhru* (48) the same principle of law was affirmed. In that case a Hindu testator had given his property moveable and immoveable absolutely to his widow and had given her rights of gift, sale and of all other kinds of transfer. He had also authorised her to adopt a son and also provided that in case she did not adopt or if the son adopted by her was not alive at the time of her death, the testator's heirs according to Hindu Law alive at the time of the death of the widow were to get the property which remained after disposal by the widow by way of gift or Will of the same. It was held by their Lordships of the Calcutta High Court (Mookerjee and Roe, JJ.,) that the widow having taken an absolute interest in the estate devised to her, the gift over in favour of the testator's heirs of what might remain undisposed of by her, was void and inoperative in law. The judgment deals with this question most exhaustively, and I entirely agree with the conclusions arrived at by their Lordships of the Calcutta High Court in that case and have nothing to add.

As to the argument that this clause should be treated as a clause in defeasance, it appears to me that it cannot be so interpreted. The estate given to the widow is not anywhere stated in the Will to be liable to be defeated on the happening of a particular contingency. As stated above what the testator actually provided for was that in case the surviving widow did not leave the property to a successor nominat-

(47) (1857) 112 R. R. 266; 3 K. & J. 512; 3 Jur. (N. S.) 808; 69 E. R. 1212.

(46) (1851) 87 R. R. 228; 3 Mac. & G. 622; 21 L. J. Ch. 601; 16 Jur. 181; 42 E. R. 400.

(48) 31 Ind. Cas. 405; 20 C. W. N. 463; 22 C. L. J. 316.

ed by her by a Will the property such as was left by her was to go to the heir of the testator. He merely prescribed a course of succession which his property was to take if such a contingency happened; he did not provide for the defeasance of the estate held by the widow.

In *Kristoromoni Dasi v. Narendro Krishna Bahadur* (29) their Lordships of the Privy Council held that it was competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event but the clause relating to defeasance must comply with certain conditions *firstly*, that the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift; and *secondly*, that a defeasance by way of gift over must be in favour of some person in existence at the time of the gift. It would thus appear that in order to operate as a valid clause of defeasance, the clause must amount to a definite gift in favour of a definite individual in existence at the time of the gift. In my opinion the provision in the Will which is before us providing for the passing of the property to the heirs of the testator, cannot be interpreted as a gift in favour of a specified individual in existence at the time and cannot, therefore, be construed to be a valid provision.

My interpretation of the Will, therefore, is as follows:—

The Will conferred upon *Musammat Param Kuar* an absolute estate and the condition entered therein that in case she did not nominate a successor the property such as was left undisposed of by her was to pass to the heirs of the testator, was an invalid condition being inoperative and unenforceable in law.

Raza, J.—(October 22, 1927.)—The relevant and material clauses of the Will dated 24th February, 1911, are the second and third clauses, which are as follows:—

(2) "That after my death *Musammat Mahraj Kuar* shall become proprietor and possessor of the entire ancestral property, acquired property, moveable property, groves, trees and houses together with all the rights and things without exception of anything and right, with this condition that if *Musammat Param Kuar* and *Musammat Mahraj Kuar* may not live together

amicably then after deduction of—all the household expenses and expenses of the servants and guests and visitors and weddings of daughters and other ceremonies in which it may be necessary to give them, in the way in which they are incurred now—whatever profit is left, half of it *Musammat Param Kuar* will get from *Musammat Mahraj Kuar*. Besides this she will have no other power. And *Musammat Mahraj Kuar* shall have no power to contract debts and to sell or mortgage the property except in order to pay the revenue and meet the expenses of weddings of daughters and other necessary expenses."

(3) "That on the death of *Musammat Mahraj Kuar* of *Musammat Param Kuar*, the survivor will become the proprietor of all the property detailed below or that property which exists then, with power of transfer and she will have all the powers to sell, mortgage or give away by gift, or Will. And after her death, whatever property she may leave without nominating any successor, will devolve on the legal heirs of the declarant (testator). But as against the said *Musammats* or their successors whom they will nominate in writing, no one will have any right."

It is on the third clause that contest has turned in this case. It is contended on behalf of the plaintiff-appellant that on the proper construction of the Will, the last surviving widow (*Musammat Param Kuar*) was given only a life-estate and, assuming that she was given an absolute estate that estate was defeated on the happening of the contingency mentioned in the Will, namely, her failure to nominate her successor.

Thus two points arise for determination in this case.

(1) Was *Musammat Param Kuar* given only a life-estate by the Will?

(2) If she was given an absolute estate, is the plaintiff-appellant still entitled under the Will to claim the property in dispute after her death, as the heir of *Baldeo Singh* testator, as she died without nominating a successor?

I have considered the provisions of the Will very carefully. In my opinion *Musammat Param Kuar* was given an absolute estate and not merely a life-estate, by the Will. She became the absolute owner of the property under the Will and no trust was created in

favour of any person. She took the property absolutely for her own benefit. The testator intended to give her an unfettered absolute property and this is what he actually gave her by his Will. The testator has, of course, attempted, after giving the property to *Musammam* Param Kuar absolutely, to say how the property shall go if she dies leaving any property without nominating a successor, but that is a provision which the law will not allow and it is invalid, being repugnant to the prior absolute gift. When the property vested in *Musammam* Param Kuar absolutely, the gift over was repugnant and void.

In the case of *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (11) a testator by his Will provided as follows:—

"I the declarant, of my own accord and free will, in order to avoid future disputes and to perpetuate my name, give all the *mauzas* in entirety or in part, both ancestral and purchased, *theka* properties, and all goods, and assets.....and all other properties, to both my first and second wives, *Musammam* Subast Chowdhurain and *Musammam* Sasiman Chowdhurain, who after my death will be heirs to all the moveable and immoveable properties.....The said *Musammams*, after my death, shall have, in every way, full power and all proprietary rights over all the moveable and immoveable properties, and they should, under the deed executed by me, pay annually Rs. 360 to *Musammam* Lachmi Chowdhurain, widow of my brother, Dular Chowdhury, until her death for her maintenance, and by this deed the said *Musammams* should get their names recorded in the Government *sherista* in the columns of proprietors."

In a suit for declaration that the widows took only the ordinary widows' estate under the Hindu Law it was held by their Lordships of the Privy Council that the widows had an absolute estate in the property covered by the testament. The term "*malik*" when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold has been held apt to describe an owner, possessed of all proprietary rights including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full pro-

prietary rights were not intended to be conferred.

In the case of *Bhaidas Shivdas v. Bai Gulab* (12) a Hindu testator gave the whole of his immoveable estate to his wife as "*malik*" and directed that she should leave the property to his two daughters in such manner as she might like. The Will was divided into clauses. By cl. (2) the testator appointed his wife as the sole executrix. In the next clause after stating that he had no son, he appointed his wife to be his heir and the clause continued in these words:—

"And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like (either) by making a 'Will' or by making (some) other instrument. Of my two daughters one named Bai Jamnabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Dewali who has been married to Shah Bhaidas Shivdas (i. e.), to both of them my wife shall give (my) property in such manner as (she) may like."

By later clauses of the Will the testator referred to powers that he desired his wife to enjoy, for example, by cl. (6) he expressly stated that he gave his wife authority to do what she thought right with profits and the ready moneys of a shop where he carried on business and further to continue any partnership with the partners if she so desired. By cl. (18) he provided that after there had been defrayed out of the rents of certain specific immoveable property, the expenses in connection with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of the daughters if they were living with her, and if the surplus were insufficient she would deal with the moveable and immoveable properties in such manner as she thought fit. By cl. (20) again he gave express power to his wife to mortgage, lease, sell and use the properties. Finally, by cl. (23) he provided that after the death of his wife his daughters should be named executrices and he gave them authority to deal or manage the whole of his property and effects. The following observations were made by their Lordships of the

Privy Council in their judgment in that case :—

"There is no dispute that the word that was used in cl. 3 as the original word of gift was the word '*malik*' which would be appropriately used to constitute the wife absolute owner. It is not that the word is a 'term of art', it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present Will their Lordships think the estate was absolute. At the time when the Will was executed it may well have been that whoever drew the Will was aware that at that time words of absolute gift in favour of a Hindu widow might not be supposed capable of conferring upon her a power of alienation, for, in the case of *Surajmani v. Rabi Nath Ojha* (39),...we find that the High Court had ruled:—'that under the Hindu Law, as interpreted up to the present in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms.' The decision in *Surajmani v. Rabi Nath Ojha* (39) showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. If cl. 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife, he had not expressed his wishes in such a manner that they bound the property. The words under which the appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Horwood v. West* (36) would be applicable to this Will as it would to a Will in England. The Vice-Chancellor says at page 389* :— 'It is essential to the execution of a trust that the subject should be certain;

and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her and that his recommendation should extend only to what, if anything happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this Court'.....

.....Their Lordships, therefore, think that these subsequent clauses in the Will are not sufficient to displace the language of cl. 3, fortified by the powers given in cl. 20, and by that language there is no trust created in favour of the two daughters of the testator..... Even assuming it was intended to create a trust and the words were sufficient for that purpose the subject-matter on which the trust is to operate is by the terms of this Will too uncertain to enable the Court to give it administration".

In the case of *Tripurari Pal v. Jagat Tarini Dasi* (49) a testator by his Will provided as follows: "My present begotten son, Makunda Murari, will be '*shebait*' for the performance of those ceremonies. If during the minority of the said Makunda Murari Pal, I die, then my second wife *Srimati Brajamati Das*, who gave birth to Makunda Murari, will be '*shebait*' as his guardian, during the time of the said Makunda Murari's minority, and Makunda Murari, on attaining majority, will personally conduct the work of the *sheba*. God forbid, if during my lifetime or after my death, the said Makunda Murari dies, then the said Brajamati Dasi will be '*shebait*' and after her death, *Srimati Nistarini Dasi* and *Srimati Jagat Tarini Dasi*, daughters born of the said Brajamati Dasi and of my loins, will be '*shebait*'. Makunda Murari survived the testator and died after attaining majority and leaving a son. It was held by their Lordships of the Privy Council that there was an absolute gift of the *shebaitship* to Makunda Murari on his attaining majority. There were provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. It was further held that Makunda Murari's son succeeded him in the *shebaitship*. Thus the gift over, after the estate had once vested in Makunda Murari, was held to be contrary to law.

(49) 17 Ind. Cas. 696; 40 I. A. 37; 17 O. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 17 O. L. J. 159; 15 Bom. L. R. 72; 40 C. 274 (P. C.).

*Page of (1823) 1 Sim. & S.—[Ed.]

In my opinion the judgment of the House of Lords in the case of *Comiskey v. Bowring Hanbury* (2) is no authority for the proposition that a testator can make a gift over, after a vested bequest of an absolute estate. The judgment in that case has, I think, been rightly interpreted and explained in the case of *Rajeshuri v. Mathura Singh* (5) decided by the late Court of the Judicial Commissioner of Oudh in 1921. I may also refer to the case of *Sures Chandra Palit v. Lalit Mohan Dutta Chaudhuri* (48). It was held in that case that where a devisee takes an absolute interest, a gift over on his failure to dispose of the property or whatever part of the property he does not dispose of, is void. The judgment of the Calcutta High Court in that case is very instructive. It is an elaborate judgment in which almost all the authorities including *Comiskey v. Bowring Hanbury* (2) are referred to.

In my opinion the words in the Will under consideration on which the plaintiff-appellant relies are not sufficient to cut down the gift which, according to my construction, is absolute in favour of *Musammam Param Kuar* in the first instance. She took absolutely and not subject to any executory gift over. So far as I see the estate given to her is not anywhere stated in the Will to be liable to be defeated on the happening of a particular contingency. Having given the property absolutely to *Musammam Param Kuar*, the testator could not alter the line of succession allowed by law, for the purpose of carrying out his wishes or views of policy (if any). The power of disposition having been given, the widow took an absolute estate and the creation of further estate after the termination of the donee's interest which in terms was absolute, did not cut down the absolute estate, but was void.

I would, therefore, decide both the points mentioned above against the plaintiff-appellant.

Pullan, J. (October 30, 1927).—I have had the advantage of reading the judgments of the other members of this Bench and it is not necessary for me to re-state the terms of the Will or to do more than give briefly the grounds on which I concur in the finding of the Court. The reference has been made to a Full Bench because the Court of the Judicial Commissioner of Oudh placed two different interpretations on a judgment of the House of Lords. These cases are

reported as *Indar Kuar v. Chheda Singh* (4) and *Rajeshuri v. Mathura Singh* (5). The decision of the House of Lords was that given in the case of *Comiskey v. Bowring Hanbury* (2) and, in my opinion, the difficulty has arisen from the somewhat loose use of the word "absolute" which appears in the finding of the House of Lords but not in the judgment of their Lordships. In my opinion the word "absolute" should always be used in its true meaning which is absolved or freed, and the limitation of an absolute estate is a contradiction in terms. In the case of *Comiskey v. Bowring Hanbury* (2) the estate given to Mrs. Hanbury was found not to be an absolute estate but an estate which would become absolute if a certain executory devise failed to operate. As long as Mrs. Hanbury was bound to make a Will in favour of one of her husband's nieces, her estate was not absolute and it was only in the event of all these nieces dying before Mrs. Hanbury that she would become vested with an absolute estate. Once an estate has become absolute it cannot be limited but it may come to an end. It is only when the absolute estate comes to an end that a gift over comes into operation.

In the present case we have only to consider whether the estate given to the widow was an absolute estate. The first and principal test is the language of the Will. The words used leave no doubt in my mind that the estate was absolute. As long as the two widows were alive a restriction was imposed by the testator that the holder of the estate for the time being could only sell or mortgage the property for certain specific reasons and was bound to give half the property to the other widow, but on the death of one the survivor was given the property as owner (*malik*) with power of transfer, and her rights to sell, mortgage and give away the property by gift or Will were unrestricted. An estate so given does not come to an end on the death of the donor intestate. What has been given absolutely must devolve on her heirs even if she makes no Will. It is not as though there were some directions to the widow to make a Will. Even had the estate come to an end on the widow's death there is ample authority for holding that the subsequent clause in this Will does not create a gift over in favour of the heirs of the testator. Undoubtedly the testator believed that if she died intestate he would be able by the terms

of his Will to enact that the property should revert to his own legal heirs. But in enacting this clause the testator was in no way limiting the powers of the donee but was attempting to interfere with the ordinary law of intestate succession to an estate which he had already made absolute. Although the wishes of the testator when clearly expressed are carried out by the Courts wherever it is possible, it is not open to the testator to interfere with ordinary laws of succession to an estate which he has given absolutely by his Will to another person.

I do not consider that it is necessary for the determination of this appeal to consider further the applications made by the Judicial Commissioner's Court of the House of Lords' ruling. Every Will must be construed on the well-accepted principles which have been already laid down by the Hon'ble Chief Judge in his judgment. The present Will, in my opinion, conferred an absolute estate on Param Kuar. That absolute estate devolved on her heirs and the subsequent clauses in the Will in which the testator laid down that on her death intestate the property should devolve on his own heirs was invalid.

The case was returned to the Division Bench with the finding that *Musammāt* Param Kuar succeeded to an absolute estate and that upon her death intestate the property has devolved upon her heirs.

The Division Bench delivered the following judgment after receipt of the opinion of the Full Bench:—

Stuart, C. J. and Raza, J.—(November 1, 1927).—The finding of the Full Bench is that *Musammāt* Param Kuar succeeded to an absolute estate and that upon her death intestate the property devolved upon her heirs. The learned Counsel for the appellant has withdrawn the objection to the effect that the learned Subordinate Judge ought to have held the custom of exclusion of daughters from inheritance in their father's family with respect to all kinds of properties including *stridhan* to have been established. He does not argue the third ground of appeal. In consequence, this appeal is dismissed with costs.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 342 OF 1927.

September 21, 1927.

Present:—Mr. Justice Addison.

MUKH RAM—PLAINTIFF—APPELLANT

versus

HAR KESH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Pleadings, amendment of—Suit for perpetual injunction, conversion of, into one for possession—Possession—Presumption of continuance.

Where in a suit for a perpetual injunction restraining the defendant from preventing the plaintiff from reconstructing a fallen house it was found that the defendant had quietly taken possession of it in the absence of the plaintiff:

Held, that the Court should not dismiss the suit forthwith but should allow the plaintiff to amend it so as to make it a suit for possession. [p. 616, col. 1.]

In case of a house which has fallen down the presumption is always in favour of the continuance of the possession of the person who occupied it before it fell down and the placing of some articles by a stranger in a portion of the house which has not fallen down does not amount to possession of the house by such a person. [*ibid.*]

Second appeal, under s. 41 of Act VI of 1918, against an order of the Senior Sub-Judge, Rohtak, dated the 11th December, 1926, reversing a decree of the Sub-Judge, Third Class, Rohtak, dated the 2nd August, 1926.

Mr. Shamair Chand, for the Appellant.

Mr. Rama Nand, for the Respondents.

JUDGMENT.—The plaintiff a Brahman had a house for a long time in village Kahni. This house fell down a considerable extent about September, 1925, in the rains. The plaintiff wished to re-build it but was prevented by the defendants who are proprietors in the village, the plaintiff being a non-proprietor. The plaintiff accordingly sued for a perpetual injunction restraining the defendants from preventing him from constructing the house in dispute. The suit was decreed by the trial Court but was dismissed by the lower Appellate Court on the ground that the plaintiff should have sued for possession and had been wrongly advised to sue for an injunction. Against this decision the plaintiff has preferred this second appeal. It has been established that the plaintiff has not been living in the shop himself for some years though he never abandoned it. Nor was abandonment ever pleaded. He had been carrying on his business in a neighbouring village. The finding, however, of the lower Appellate Court on this point is that the defendants took advantage of the plaintiff's absence from the village at the

time when the house fell down and quietly took possession of it then as it adjoined there own. It was urged before me that they could not have taken possession of the greater portion of the house as it had fallen down. Some moveable property, however, appears to have been in a room which has still a roof on it. The plaintiff's witnesses stated that this belonged to Amin Lal a relative of the plaintiff, but they have been disbelieved by the lower Appellate Court as Amin Lal was not questioned about this when he was in the witness-box. This may have been a mere oversight. In any case, I am of opinion that the plaintiff must be held to have continued in possession of the house which had fallen down and the mere fact that the defendants placed some articles in a portion of the house which had not fallen down would not amount to possession of the house. The presumption always is in favour of the continuance of possession and, in my opinion, it cannot be said that a tumbled down house like the one in dispute is capable of possession being taken of it. For all these reasons I would hold that the lower Appellate Court was wrong in law in holding that the possession was with the defendants. I would, therefore, accept the appeal with costs throughout and setting aside the decree of the lower Appellate Court, restore that of the trial Court.

In any case on the finding that the defendants quietly took possession when most of the house fell down, the lower Appellate Court should have allowed an amendment of the prayer as was done in *Harji Mal v. Pokhar Das* (1). It was most unnecessary to compel the plaintiff to institute another suit.

R. L.

Appeal allowed.

(1) 135 P. R. 1906; 117 P. L. R. 1908; 160 P. W. R. 1906.

MADRAS HIGH COURT. FULL BENCH.

CIVIL APPEAL No. 226 of 1923.

August 19, 1927.

Present:—Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Anantkrishna Ayyar.

DAIVANAYAGA REDDIAR AND OTHERS

—DEFENDANTS—APPELLANTS

versus

RENUKAMBAL AMMAL—PLAINTIFF

—RESPONDENT.

Madras Civil Courts Act (III. of 1873), s. 13—Appeal

—Court to which appeal lies—Right of appeal to High Court on date of plaint—Amendment of Court Fees Act diminishing valuation below Rs. 5,000—Appeal, whether lies to District Court or High Court.

A decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000 but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, is appealable to the High Court and not to the District Court. [p. 619, col. 2.]

Colonial Sugar Refining Co. Ltd. v. Irving (3) and *Ratanchand Shrichand v. Hanmantrav Shivbakas* (4), followed.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in O. S. No. 11 of 1921.

Kumaraswami Sastri, J., and Devadoss, J. before whom the case came on for hearing made the following

ORDER OF REFERENCE TO A FULL BENCH.

The respondent's Vakil takes the preliminary objection that the appeal does not lie to the High Court but to the District Court. The plaintiff, a widow, claimed maintenance at the rate of Rs. 100 a month including value of cloths, etc., and valued her claim in the plaint at ten times the amount payable for one year under s. 7, cl. (2) of the Court Fees Act. She also claimed past maintenance and a house to reside in. The total value of her claim according to the plaint is Rs. 14 600. The Subordinate Judge of Cuddalore gave her a decree for maintenance at Rs. 60 a month together with past maintenance. He also decreed that she should be given possession of a house for her residence during her life. The defendants have preferred this appeal against the decree of the Subordinate Judge. In their appeal they have valued the relief for maintenance at the amount allowed for one year under the Court Fees Amendment Act, s. 5. The total value of the appeal together with the past maintenance and the value of the house is Rs. 2,633-5-4. The respondent's Vakil contends that though the suit was valued at more than Rs. 5,000 under the law in force at the time of the filing of the plaint, yet the valuation of the suit according to the Amended Court Fees Act at the time the appeal was presented would have been less than Rs. 5,000 and, therefore,

the appeal to this Court is incompetent. But for the amendment of the Court Fees Act the appeal would have been valued at Rs. 14,600, as in the plaint. It is admitted that the monetary jurisdiction of the Court is determined by the value of the claim in the plaint and not by the value of the relief decreed. Under s. 13 of the Madras Civil Courts Act III of 1873 "when the amount or value of the subject-matter of the suit exceeds Rs. 5,000 the appeal shall lie to the High Court." It is urged that the subsequent change in the law as to valuation makes the value of the relief in the plaint less than Rs. 5,000 and, therefore, the appeal lies only to the District Court, and reliance is placed for this contention upon two recent decisions of this Court in A. S. No. 32 of 1924 and in A. S. No. 415 of 1923.

In A. S. No. 32 of 1924, Ramesam and Jackson, JJ., held that the appeal lay to the High Court against the decree in a suit in which the relief claimed was valued at less than Rs. 5,000 according to the Court Fees Act before its amendment by the Madras Act V. of 1922, but which had to be valued at more than Rs. 5,000 under the Amended Act. The learned Judges relied upon *Muttammal v. Chinnana Gounden* (1) and the proceedings of the High Court in *Proceedings 15th November, 1870* (2). This case is converse to the present one. The point now raised was decided in A. S. No. 415 of 1923 which was also a suit for maintenance and Phillips and Odgers, JJ., held following the decision in A. S. No. 32 of 1924 that the appeal did not lie to the High Court as according to the valuation under the Amended Court Fees Act, the relief claimed in the plaint was less than Rs. 5,000. In *Muttammal v. Chinnana Gounden* (1) the plaintiff sued to recover one-eighth of a *mitta* and obtained a decree. The defendant resisted the execution of the decree and claimed to be in possession of the lands as purchaser at a Court sale in execution of another decree. His objection was disallowed by the District Munsif and on appeal the District Judge upheld the decision of the District Munsif. The High Court set aside the order of the District Munsif and the District Judge and the petition was registered as a suit under the directions of the High Court. The

District Munsif gave a judgment in favour of the defendant. The plaintiff appealed to the High Court. The first ground of appeal was that the District Munsif had no jurisdiction because the value of the property in dispute was Rs. 9,000. A preliminary objection was taken by the respondent that no appeal lay to the High Court. Kindersley and Muthuswami Ayyar, JJ., overruled the objection and observed: "We think that the subject-matter in appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal and not of the suit which led to it." They held that according to the law in force at the date of the appeal, the subject-matter of the suit exceeded Rs. 5,000 in value and, therefore, whether the District Munsif had or had not jurisdiction the appeal lay to the High Court. By Proceedings, dated the 15th November, 1870, the High Court gave this ruling "The High Court are of opinion that the valuation of an appeal must be according to the Act in force at the time of its presentation, and that the original valuation under a law obsolete at the period of appeal can have no influence on the decision." [*Proceedings 15th November, 1870* (2)].

We should have felt bound to follow the decision in *Muttammal v. Chinnana Gounden* (1), and the two recent decisions in A. S. No. 32 of 1924 and A. S. No. 415 of 1923, but for the high authority of Lord Macnaghten who delivered the judgment of their Lordships of the Privy Council in *Colonial Sugar Refining Co. Ltd. v. Irving* (3). In that case an appeal was presented to the Privy Council against the decision of the Supreme Court of Queensland. During the pendency of the suit in the Supreme Court, the Judiciary Act of 1903 was passed and by s. 39, sub-s. 2, the right of appeal to the Privy Council from the decisions of the Supreme Court was taken away but a right of appeal was given from the Supreme Court to the High Court of Australia. The respondent moved the Privy Council by a petition to have the appeal dismissed on the ground that the appeal did not lie as of right to the King in Council. Their Lordships rejected the petition holding that the matter was not one of procedure only but one touching a right in existence at the

(1) 4 M. 220; 1 Ind. Dec. (N. S.) 989.

(2) 5 M. H. C. R. xlv.

(3) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

passing of the Act and that "the Judiciary Act was not retrospective by express enactment or by necessary intendment." Lord Macnaghten observed: "The only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that Statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

It does not appear that this decision was brought to the notice of the learned Judges who decided the two appeals in A. S. No. 415 of 1923 and A. S. No. 32 of 1924.

An appeal to a certain forum is a vested right. It cannot be denied that an appeal to the High Court on facts is considered to be a very valuable right and it cannot be taken away except by an express Statute. The present suit was valued at more than Rs. 5,000 and if the suit was decided on the date it was filed, namely, 21st March, 1921, there would have been no question as to the maintainability of the appeal in the High Court. The Court Fees Act is only a fiscal enactment and in most cases the valuation for purposes of jurisdiction is the same as that for purposes of Court-fees. The jurisdiction value determines the forum for the appeal and the right of appeal to the High Court which either party to the suit had on the date of the plaint and some time after cannot be taken away by an enactment which amends some of the provisions of the Court Fees Act for the purpose of charging Court fees. As the decisions in A. S. No. 32 of 1924 and in A. S. No. 415 of 1923 are not reconcilable with the observations of their Lordships of the Privy Council in *Colonial Sugar Refining Co., Ltd. v. Irving* (3) to which the attention of the learned Judges does not seem to have been directed, and as the point is of considerable importance and is likely to

arise in many cases, we refer the following question to the Full Bench:—

"Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, lie to the High Court or to the District Court?"

The appeal came on for hearing in pursuance of the said order of reference to a Full Bench before the Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Anantakrishna Ayyar.

Mr. E. V. Sundara Reddiyar, for the Appellants.

Messrs. K. V. Krishnaswamy Ayyar and N. S. Srinivasa Ayyar, for the Respondent.

OPINION.—The question that has been referred for decision is, "Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000 but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, lie to the High Court or to the District Court?"

This question has been referred to us because there are two unreported decisions of this Court which hold that the valuation must be determined according to the Amended Act and, according to that valuation, the appeal will lie either in the High Court or in the District Court. In neither of these cases was any reference made to the decision of the Privy Council in a case from Queensland, *Colonial Sugar Refining Co., Ltd. v. Irving*, (3). In that case in certain suits a right of appeal to the Privy Council was given by an Ordinance of 1860. Subsequently by the Judiciary Act of 1903 the decision in those suits was held to be final subject to an appeal to the High Court of Australia. The question for decision was whether in a suit filed before the passing of the Judiciary Act of 1903 the appeal still lay to the Privy Council or to the High Court in Australia, and it was held that the new enactment could not take away a vested right, unless in express terms it had retrospective effect. The remarks of Lord Macnaghten in his judgment are entirely applicable to the present case: "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to

him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal". This clearly disposes of the point before us, for the question is whether the amendment of the Court Fees Act which came into force after the present suit was filed would deprive the plaintiff of a right of appeal to this Court which he had when he filed the suit. Under s. 13 of the Civil Courts Act, appeals from subordinate Courts lie either to the District Court or to the High Court, according to whether the value of the subject-matter of the suit is over or below Rs. 5,000. It is argued that this section does not confer any right of appeal to the High Court in definite classes of suits, but that the right of appeal is merely given to the Court authorized to hear appeals and the question of whether that Court is the District Court or the High Court depends on the valuation of the suit at the time of filing the appeal. It is difficult to treat this argument as in any way distinguishing the case from that in *Colonial Sugar Refining Co., Ltd. v. Irving* (3) for in both cases there was, when the suit was filed, a vested right of appeal to a particular tribunal, which is taken away by a subsequent enactment. According to the argument, when the right is taken away by a subsequent alteration in a mere fiscal enactment, the case is not the same as when the right depends on substantive law. This is untenable. It has been held by the Privy Council that this cannot be done and we are bound by that general expression of the law and must follow it. We may also refer to a case decided in 1869 *Ratanchand Shrichand v. Hanmantrav Shivbakas* (4) where the same principle was enunciated.

Respondent relies on some observations in *Canada Cement Co. v. Montreal East Corporation* (5). These observations do seem to give some support to the contention that a right of appeal can be taken away by a subsequent enactment, but there is no decision to that effect and no reference whatever to the previous decision of the Court in *Colonial Sugar Refining Co. Ltd. v. Irving* (3). The observation is *obiter* and can, therefore, have no force as against the prior decision which we must follow.

(4) 6 B. H. C. R. 1166.

(5) (1922) 1 A. C. 249 at p. 254; 91 L. J. P. C. 113; 126 L. T. 618.

The answer to the question before us may also be put upon another ground and that is that the forum of appeal from a Subordinate Judge's Court depends on the value of the subject-matter of the suit. Presumably the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and Court-fees paid accordingly. It is, however, contended that the value varies according to the particular enactment in force at the time; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as 1874 in *Muthusami Pillai v. Muthu Chidambara Chetti* (6) where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. If this is so, the value of the subject-matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment. To hold otherwise would lead to very great difficulties in the question of jurisdiction. A suit which when filed was within the jurisdiction of the District Munsif might subsequently become one which must necessarily be filed in a Subordinate Court or *vice versa*.

For both these reasons, therefore, we hold that in the suit referred to, the appeal lies to the High Court.

V. N. V.

Reference answered.

A. N. A.

(6) 7 M. H. C. R. 356.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1204
OF 1925.

October 12, 1927.

Present:—Mr. Justice Devadoss.

T. S. SOMASUNDARAM AYYAR

DEFENDANT—PETITIONER

versus

V. KRISHNA AYYAR—PLAINTIFF

—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Computation of time—Acknowledgment, whether creates fresh contract.

Under s. 19 of the Limitation Act, the fresh period of limitation should be computed from the time when the acknowledgment was signed. [p. 620, col. 1.]

A mere acknowledgment of liability cannot be treated as a fresh contract, furnishing the basis of a new cause of action. [*ibid.*]

Petition, under s. 25 of Act IX of 1887, to revise the decree of the Court of the District Munsif, Tenkasi, dated the 30th April, 1925, in S. C. S. No. 37 of 1925.

Mr. P. N. Appuswami Iyer, for the Petitioner.

Mr. Ramaswami Iyer, for the Respondent.

JUDGMENT.—This is an application to revise the decree of the District Munsif of Tenkasi, in S. C. S. No. 37 of 1925. The contention of Mr. Appuswami Ayyar is that if Ex. A is to be treated as an acknowledgment under s. 19 of the Limitation Act it would not save limitation as the period has to be computed from the date of signing the letter, namely, 6th November, 1921, and the suit was filed on 7th January, 1925, i. e., more than three years after the date of Ex. A. From the wording of s. 19, it is clear that the fresh period of limitation should be computed from the time when the acknowledgment was signed. The section being clear, it is unnecessary to rely on any decided cases. Mr. Appuswami Ayyar refers to Halsbury's Laws of England, Vol. XIX, page 108.

Mr. Ramaswami Ayyar's contention for the respondent is that Ex. A is a fresh contract under which the petitioner undertook to pay Rs. 33-15-3 after the first week of January and that his client is entitled to rely upon it not only as saving limitation but also as giving a fresh cause of action. I am unable to hold that Ex. A is a contract which would entitle the plaintiff to sue on it. Exhibit A was only filed by the defendant's Vakil in the course of the trial. I do not see how Ex. A could be construed as a contract under which the defendant could be held liable for any sum of money. Exhibit A is at best only an acknowledgment which would extend the period of limitation for three years from its date. It cannot form the basis of a fresh cause of action. In this case the judgment of the District Munsif is wrong.

The decree of the District Munsif is set aside and the suit dismissed with costs here and in the Court below.

V. N. V.
A. N. A.

Decree set aside.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 207 of 1922.

February 23, 1926.

Present:—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

ISHWARI PRASAD AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Rai HARI PRASAD LAL—DEFENDANT

—RESPONDENT.

Hindu Law—Adoption—Rule against adoption of daughter's son, applicability of, to Kayasthas—Kayasthas of Bihar, whether Sudras—Pleadings—Necessity of averring rule of prohibition—Family custom to the contrary, validity of—Mere declaration of adoption by adoptive father, effect of—Actual giving and taking, necessity of—Suit for possession against alleged adopted son—Adoption, whether should be set aside—Limitation and adverse possession, effect of—Partition suit—Court-fees.

Kayasthas of Bihar are not Sudras but belong to the Dwija or regenerate classes, and the rule of Hindu Law prohibiting the adoption of a daughter's son, sister's son and mother's sister's son among the regenerate castes is, therefore, applicable to them. [p. 635, col. 1; p. 636, col. 1.]

Raj Coomarr Lall v. Bissessur Dyal (2), dissented from.

[Case-law discussed.]

Inasmuch as this rule of prohibition can be varied by a family custom, a plaintiff seeking to challenge an adoption on the ground that it is in contravention of this rule of Hindu Law should raise his legal objection in the plaint so that the defendant may be able to plead the existence of a family custom to the contrary. [p. 636, col. 2.]

A mere declaration of adoption by the adoptive father is not sufficient to create a valid adoption; the actual giving and taking is essential whether the parties belong to the three regenerate classes or are Sudras. [p. 638, col. 2.]

A, claiming that he was the adopted son of his maternal grandfather X, took possession of properties of X to the knowledge of B and C, his brothers. After A's death C who claimed to be the adopted son of A, and A's widow were in joint possession and C continued to be in sole possession after the death of A's widow. After the lapse of many twelve years B's descendants sued for partition against C's descendants:

Held, (1) that the suit was not maintainable inasmuch as the adoptions set up by the defendants' ancestors had not been set aside within time; [p. 639, col. 2.]

(2) that as there was no proof that the plaintiffs' ancestry were in joint possession with A and C the suit was barred by limitation. [p. 640, col. 2.]

Court-fee is leviable on the construction of the plaint alone. *Ad valorem* fee on the value of the properties concerned cannot be levied on a plaint in a suit which is one for partition pure and simple. [p. 641, col. 2.]

Appeal against a decision of the Additional Subordinate Judge, Gaya, dated the 30th June, 1922.

Messrs. Khurshaid Husnain and Kailaspati, for the Appellants.

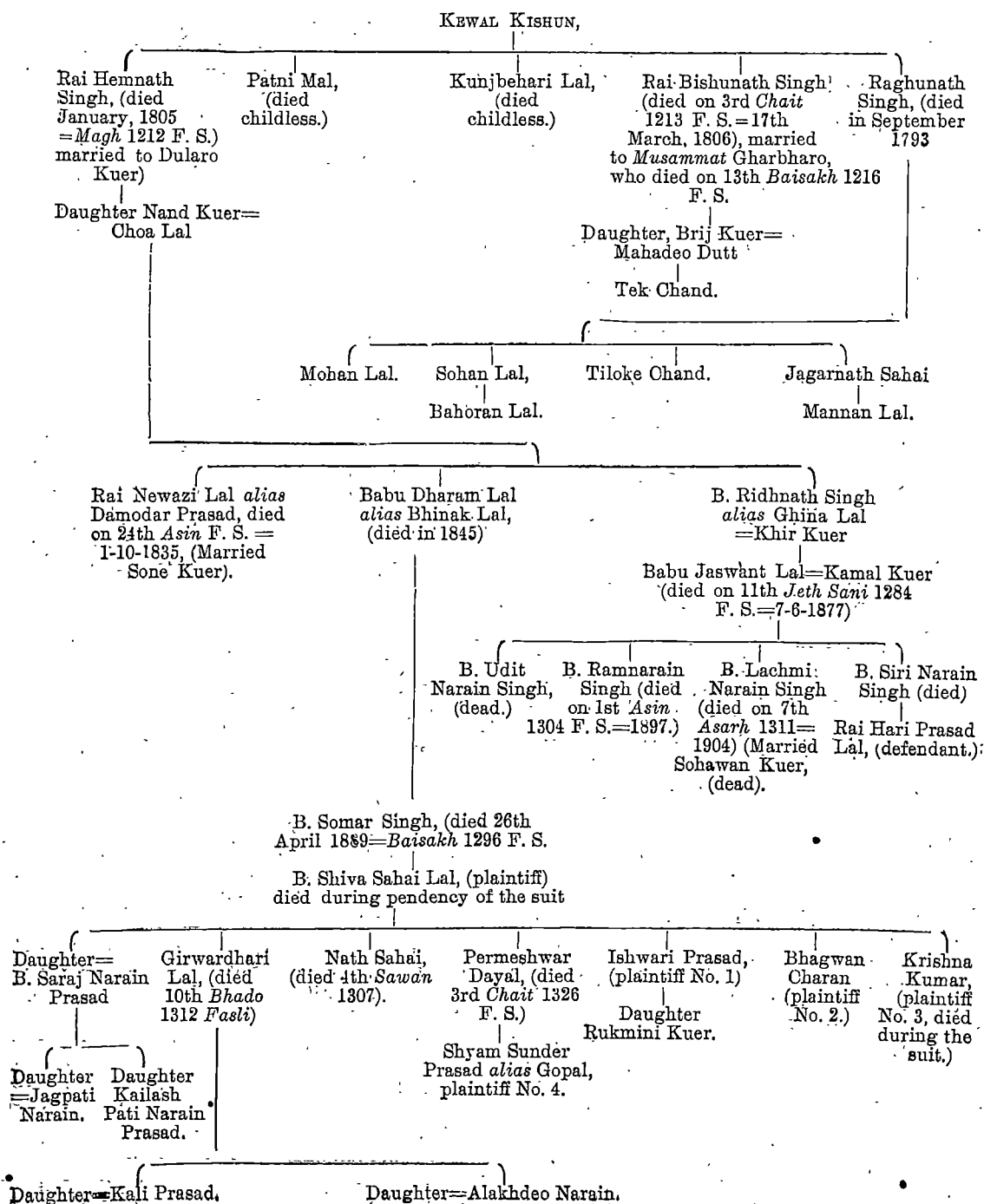
Messrs. Parmeshwar Dayal, Shiveshwar Dayal and Brij Kishore Prasad, for the Respondent.

against the decision of the Subordinate Judge, Gaya, dated the 30th June, 1922, dismissing the plaintiffs' suit.

JUDGMENT.

Jwala Prasad, J.—This is an appeal

The following genealogy taken from the pleadings and the evidence is not disputed—



The dispute in this appeal relates to the property of one Rai Hemnath Singh. He died in *Magh*, 1212, *Fasli* (January, 1805), leaving his widow Dularo Kuar and a daughter Nand Kuar who was married to one Chca Lal. Nand Kuar had three sons Newazi Lal, Dharam Lal, and Ridhnath. The plaintiffs are the descendants of Dharam Lal. The defendant is the descendant of Ridhnath. Newazi Lal had no issue. The plaintiffs' case is that the three brothers Newazi Lal, Dharam Lal and Ridhnath succeeded to the properties of Hemnath Singh, being his daughter's sons, and remained in joint possession of the same as members of a joint Mitakshara Hindu family, that by an arrangement set forth in an *ekrarnama* (Ex. 1), dated the 14th November, 1811, entered into amongst the aforesaid three brothers, Newazi Lal was to remain in possession of the joint family properties during his lifetime and after his death Ridhnath, the ancestor of the defendant, and his descendants, were to remain in possession on behalf of the other members of the family, whereas Dharam Lal and his heirs were to receive allowances with rights in certain circumstances set forth in the *ekrarnama* to have the family properties partitioned: that in accordance with this arrangement after the death of Newazi Lal, who had no issue, Ridhnath came into possession of the properties on behalf of all the members of the family including Dharam Lal and his descendants; that the defendant is now in possession of the family properties on behalf of himself and the plaintiffs who are descendants of Dharam Lal, and that he (the defendant) has been of late mismanaging the properties, has incurred heavy debts and has stopped payment of allowances to the plaintiffs and thus the plaintiffs are entitled to have the properties partitioned.

Accordingly, the plaintiffs pray (1) for a partition of the family properties claiming 8 annas share therein, (2) in the alternative for delivery of possession of properties representing their moiety share in case they are found to be out of possession and (3) in the event of their not getting the aforesaid reliefs, for payment of maintenance allowance to them at the rate of Rs. 21 per *diem* from *Kartik*, 1326, *Fasli* declaring the same to be the first charge on the estate.

The defendant resists the claim of the plaintiffs. He denies that the three brothers Newazi Lal, Dharam Lal (ancestor of the

plaintiffs) and Ridhnath (ancestor of the defendant) succeeded to the properties of their maternal grandfather Hemnath Singh and remained in joint possession of the same as members of a joint Mitakshara family. He says that the ordinary succession by inheritance to the properties of their grandfather was intercepted by the adoption of Newazi Lal, one of the brothers, by Hemnath and that Newazi Lal succeeded to the properties as an adopted son and having no male issue he adopted his youngest brother Ridhnath, ancestor of the defendant. Thus, the defendant says that the properties came to be held by Ridhnath not as a grandson of Hemnath but as an adopted son of his brother Newazi Lal and the succession to the properties has accordingly been in the line of Ridhnath, and thus the properties have now come to the defendant in the ordinary course as the sole direct male descendant of Ridhnath; and that Dharam Lal, the ancestor of the plaintiffs, did not succeed to the properties nor had he any share therein and consequently the plaintiffs have no share or interest in the properties. He also denies the genuineness of the *ekrarnama* (Ex. 1) set up by the plaintiffs as having been executed by the aforesaid three brothers and its binding effect on him. Accordingly, he says that the plaintiffs have no right to partition the properties in suit or to obtain maintenance allowance. He says that the plaintiffs and their ancestors were servants of the estate and received salaries and occasional help, that Sheo Sahay Lal, who was originally plaintiff and died during the pendency of the suit, was dismissed from service and is no longer entitled to receive any salary or maintenance. The defendant asserts that the plaintiffs or their ancestors have never been in possession of the properties and that the suit is barred by limitation.

The plaintiffs deny the adoption of Newazi Lal by Hemnath and that of Ridhnath by Newazi Lal set up by the defendant and the validity thereof.

Upon these contentions, the learned Subordinate Judge framed amongst others issues Nos. 9 and 10. Issue No. 9 relates to the adoption of Newazi Lal by Hemnath and issue No. 10 relates to the adoption of Ridhnath by Newazi Lal.

The learned Subordinate Judge has decided both these issues against the plaintiffs and his decision is challenged in this appeal.

The plaintiffs deny the adoptions and say that even if the adoptions did take place they were wholly invalid. It is urged that the adoption of Newazi Lal by Hemnath was invalid, inasmuch as Newazi Lal being the daughter's son of Hemnath was not capable of being taken in adoption by the latter. It is not disputed and in fact it has been settled by the authority of the highest judicial tribunal that an adoption of a daughter's son, sister's son and mother's sister's son being expressly forbidden by the texts on Hindu Law, is contrary to law and void in the three regenerate classes, Brahmin, Kshatriya and Vaishya, and the principle a *factum valet* will not validate such an adoption: *vide* the Privy Council decision in *Bhagwan Singh v. Bhagwan Singh* (1).

The parties in this case are Kayasthas of Gaya District in Bihar. The learned Subordinate Judge holds them to be Sudra, upon the ground that according to the decision in *Raj Coomar Lal v. Bissessur Dyal* (2), the Bihari Kayasthas as a class are Sudra, though he says that much stress was laid upon the evidence adduced in that case and that in this case no evidence was given by the parties. The decision in that case was based upon a passage in the *Vyavastha Darpana* of Shyama Charan Sarkar where it is stated that the Kayasthas were Kshatriyas but they, at least those of Bengal, have been degraded to Sudradom by using after their proper names the surname "Das" instead of their own Kshatriya epithet "Varma" and also by omitting to perform the Upanayana ceremony. Some recent decisions of the Calcutta High Court have held that so far as the province of Bengal is concerned the Kayasthas are Sudra: *Asita Mohan Ghose Moulik v. Nirode Mohan Ghose Moulik* (3), *Biswanath Das Ghose v. Sarosibala* (4) and *Bhola Nath Mitter v. Emperor* (5). The last two cases have gone so far as to legalise inter-marriages between Kayasthas and Tantis, Domes in Bengal, on the ground that both of them are sub-castes of Sudras. The matter was neither inquired into nor discussed. It was taken as settled

412; 1 Bom. L. R. 311; 3 C. W. N. 454; 7 Sar. P. C. J. 474; 9 Ind. Dec. (N. S.) 971

8 Ind. Jur. 621; 5 Ind. Dec. (N. S.)

127; 20 C. W. N. 901.

590; 25 C. W. N. 639; 48 C. 926.

99; 28 C. W. N. 323; 51 C. 488; A.

5 Or. L. J. 997.

and the only authority relied upon is the aforesaid passage in the *Vyavastha Darpana* referred to above. The first of these cases *Asita Mohan Ghose Moulik v. Nirode Mohan Ghose Moulik* (3), went to the Privy Council *Asita Mohan Ghose v. Nirode Mohan Roy Ghosh Moulik* (6), and their Lordships of the Judicial Committee refused to give assent to the decision that the Bengali Kayasthas are Sudras and left the question open in the following words:—

"One contention was as to the rights of succession of persons who were by caste Bengali Kayasthas. It has been found not on evidence, but following some decisions of the High Court at Calcutta, that Bengali Kayasthas are Sudras. Their Lordships do not think it necessary to decide whether or not Bengali Kayasthas are Sudras, or to decide as to the construction of a text of the *Dattaka Chandrika* which has been referred to by the Courts below as applicable to Bengali Kayasthas. Their Lordships are of opinion that the rights of the parties depend on the construction of the agreement upon which Kumar Narendra Chandra Roy gave his son Sailendra Mohan Ghosh to Radha Mohan Ghosh in adoption."

The decision referred to in the passage quoted above as the basis of the view of the Calcutta High Court is that given in the case of *Raj Coomar Lal v. Bissessur Dyal* (2). The Privy Council decision does not seem to have been referred to in the subsequent decisions of that Court.

Thus the Calcutta High Court decisions as to the Bengali or Bihari Kayasthas being Sudras are inconclusive and the matter has been expressly left open by their Lordships of the Judicial Committee.

We are in this case concerned with the decision of *Raj Coomar Lal v. Bissessur Dyal* (2), relied upon by the learned Subordinate Judge for his decision that the Bihari Kayasthas are Sudras.

Mr. Justice Field who delivered the judgment in that case observed as follows:—

"We think that the whole question has been fairly summed up in the following passage of Babu Shyama Charan Sarkar's *Vyavastha Darpana*:—"There is, therefore, a preponderance of authority to evince that the Kayasthas whether of Bengal or any other country, were Kshatriyas. But since several centuries past the Kayasthas (at least those

(6) 24 C. W. N. 794; 47 I. A. 140; (1920) M. W. N. 541; 12 L. W. 556; 28 M. L. T. 399 (P. O.).

of Bengal) have been degenerated and degraded to *sudradom* not only by using after their proper names the surname 'Dasa' peculiar to the Sudras, and giving up their own which is 'Barma' but principally by omitting to perform the regenerating ceremony, *Upanayana* hallowed by the *gayatri*."

According to the *Vyavastha*, the Kayasthas were Kshatriyas. Assuming for the sake of argument that the reasons given therein would entail degradation of a Kshatriya to *sudradom*, it does not say that the Kayasthas of Bihar call themselves *Das* or have given up the performance of *Upanayana* ceremony. Mr. Justice Field also does not find it as a fact that the Kayasthas of Bihar have adopted the surname *Das* and, as a matter of fact, the parties in that case did not bear the surname of *Das*. As regards the ceremony *Upanayana* also his finding is only that the usage of wearing sacred thread and performing certain other ceremonies of Kshatriyas amongst the Kayasthas of Bihar as a class is not uniform. He applied the *Vyavastha* (opinion) of Babu Shyama Charan Sarcar simply upon the assumption that the Kayasthas of Bihar are not distinguishable from the Kayasthas of Bengal. In this view he discarded the evidence of the *Pandits* and the *Vyavasthas* of Benares to the effect that the Kayasthas of Bihar are Kshatriyas, holding that the Kayasthas of Bihar are different from those of Upper Provinces and Benares. Thus Mr. Justice Field has differentiated the Kayasthas of Bihar from those of Upper Provinces and Benares. No reason has been given nor has any evidence been quoted for this view; it has simply been assumed. With great respect to his Lordship the view is not in consonance with the actual facts.

The social position, religious observances, customs and manners of the Kayasthas of Bihar are the same as those of the United Provinces and Oudh. Their marriages take place in the Kayastha families of the United Provinces and they dine with each other. They do not marry in the Kayastha families of Bengal, and in fact have no concern with the Kayasthas of Bengal in matters, social or religious. The Kayasthas of Bihar like those of the United Provinces are governed by the same School of Hindu Law, namely, the *Mitakshara* Law of Benares, as distinguished from the *Dayabhaga* which governs the Bengali Kayasthas. Benares is looked upon as an

authority in all religious and social matters by the Kayasthas of Bihar just as by the other communities of that Province. The territorial division is only for the purpose of administration. A large portion of the Shahabad and Saran Districts in Bihar was for a long time in the United Provinces, and the District of Benares was at one time in Bihar.

Mr. Risley of the Indian Civil Service in his book "The Tribes and Castes of Bengal", 1891 Edition, page 443, referring to the Kayasthas or *Lalas* of Bihar, says that they "trace their mythical parentage to Chitrakuta, the scribe or recorder of Yama, the regent of the dead, and pique themselves on being wholly distinct from the Kayasthas of Bengal." and observes that "The physical characters of the Bihar Kayasthas afford some ground for the belief that they may be of tolerably pure Aryan descent."

Mr. W. Crooke in his book "Tribes and Castes of the North-Western Provinces and Oudh," Volume III, Edition 1896, page 185, while quoting the aforesaid passage from Risley, remarks that the Bihari Kayasthas are identical with those of the North-Western Provinces and Oudh.

The correctness of the Calcutta High Court decision was doubted by the Full Bench of the Allahabad High Court, consisting of Sir John Edge, C. J., Straight, Brodhurst, Tyrrell and Mahmood, JJ. The observation of Mr. Justice Mahmood who delivered the leading judgment in *Tulsi Ram v. Behari Lal* (7) is weighty. Says his Lordship:—

"Notwithstanding the ruling of a Division Bench of the Calcutta High Court in *Raj Commar Lall v. Bissessur Dyal* (2), I entertain considerable doubts as to the soundness of the view which seems to have been adopted by both the Courts below, that the literary caste of Kayasthas in this part of the country, to which the parties belong, fall under the category of Sudras, as understood in the division of mankind in the *Institutes of Manu*, or elsewhere in authoritative texts of the Hindu Law. The question is one of considerable difficulty, not only ethnologically, but also from a legal point of view, so far as the administration of the law is concerned, to this important section of the population concerned."

(7) 12 A. 328; 6 Ind. Dec. (N. S.) 9

His Lordship further observed that the Kaysthas of lower Bengal "may be distinguishable from the twelve castes of Kayasthas in Upper India, such as the North-Western Provinces and Oudh."

The latter portion of the observation of his Lordship will apply to the Kayasthas of Bihar, inasmuch as they like the Kayasthas of North-Western Provinces and Oudh belong to the twelve sub-castes of Kayasthas and are descendants of the same common ancestor Chitragupta.

The learned Subordinate Judge to whom the judgment of Mr. Justice Mahmood was quoted felt himself bound by the Calcutta High Court decision. It seems that his attention was not drawn to the decision in the Privy Council case : *Asita Mohan Ghosh v. Nirode Mohan Roy Ghosh Moulik* (6) which left the point open. It is remarkable that Sir John Edge, who delivered the Privy Council judgment was a party to the Full Bench decision of the Allahabad High Court in *Tulshi Ram v. Behari Lal* (7).

The view taken in the Vyavastha Darpana in the Calcutta decision based upon it has not been accepted by Hindu lawyers of eminence and authority. Referring to the recent decision of the Calcutta High Court, Golap Chandra Sastri in his book on Hindu Law (1924), at page 143, says that it has come as a surprise to the Hindu community. Sarvadhikari in his book "the Principles of Hindu Law of Inheritance" (1923), at page 835, says that the decision is not correct and that it has given rude shock to the whole Kayastha community in Bengal. Similar is the view of Jogendra Chandra Ghosh in his book "The Principles of Hindu Law" (1917), at page 1006. These lawyers have not accepted the view that the Kayasthas who were admittedly Kshatriyas have become Sudras, nor the view that their giving up the sacred thread or assuming the epithet of 'Das,' even if this is a regret, would cause degradation. On this point Sarvadhikari in his learned work 'The Tagore Law Lectures' of 1880, at page 10, 1923 Edition, says:—

"Even the wearing of the sacred thread, the well-known badge of the regenerate classes, cannot furnish in many cases an inevitable test in this vexed question. There are many Thakurs and Baniyas who though they are universally recognized as members of the regenerate classes do not put on the sacred thread. The only safe rule to follow in all cases where the determination of the

caste of a person is in question is to ascertain the custom and usage by which the social conduct of the person given is regulated. The remarriage of widows and equal rights and privileges of legitimate and illegitimate sons and similar customs and usages are marks by which Sudras can be distinguished."

The learned author in the succeeding pages 831 to 835 of the book examined the question closely with reference to the texts of Srutis, Smritis, and Puranas, judgments of subordinate Courts, authoritative gazetteers, the Durpanas of the Pandits of the Sadar Dewani Adalat, Agra, Yajnavalkya and its commentary, the Mitakshara, which governs the Kayasthas of Bihar, North-Western Provinces and Oudh and has held that the Kayasthas belong to the regenerate class, are Kshatriyas and are by no means Sudras. He seriously questions whether the non-observance of some of the practices can permanently degrade people belonging to a high class into a lower one and says that suppose the people of this caste again resume their former practices, as many Kayasthas in Bengal have done in recent years, what would be their status. The question in the Calcutta case, he says, was neither argued nor decided and the opinion of Shyama Charan Sircar in his Vyavastha Darpana was regarded as decisive on the point. He says the Kayasthas of Bengal cannot be Sudras.

The cases relied upon by the Calcutta High Court for upholding a marriage between a Kayastha and a Sudra woman were those in which the parties were from their origin different sections of Sudra caste. Those cases should not have been applied to the Kayasthas who by their origin are Kshatriyas even if they are degraded Kshatriyas. A person belonging to a regenerate class does not lose his right of being governed by the rules of that class though he might be socially looked down upon.

As regards the Kayasthas of North-Western Provinces and of Bombay (this will include the Bihar Kayasthas), Sarvadhikari says that they justly say that they should be governed by the same laws by which the regenerate classes are governed. Similar is the view of Golap Chandra Sarkar both in his book on Adoption and on Hindu Law. He also closely examined all the texts and authorities on Hindu Law: Vyas, Vishnu, Vrihata, Prasara, Padana, Skanda and Bhavishya Puranas, Yajnavalkya

and Mitakshara. He is emphatic in his opinion that the Kayasthas are Kshatriyas and that the non-observance of the ceremonies would not degenerate a higher caste into a lower one so as to affect his civil rights. He says that the caste of a person did not originally depend on heredity but on the occupation and possession of characteristic merits under the texts of Manu, but with the lapse of time it has become a matter of heredity, and merit or no merit the son gets the caste of the father. By non-observance of ceremonies no regenerate class has been degraded. If that were so, there will be no caste among the Hindus now except the Sudra, as there are very few of the regenerate classes who can say that they and their ancestors did all the duties imposed on the caste. Why then the Kayasthas of all the regenerate castes should be degraded into the category of Sudras for want of orthodoxy? He further says that it should be noted that in all other respects the Kayasthas observe the rules enjoined upon the Kshatriyas.

Mr. J. C. Ghosh is also of the same opinion. Referring to Vyavastha Darpana of Shyama Charan he disputes its correctness and its applicability to the Kayasthas of North-Western Provinces who have got the sacred thread. He says that the distinction of caste being based on the nature of occupations of classes the Kayasthas who are Judicial and Revenue Officers, administering the laws of the Rishis and the Vaidyas who were physicians in the Hindu times, could not be regarded as Sudras.

The aforesaid Hindu lawyers base their opinion upon the Sruitis Smritis and Puranas, and the social position and occupations of the Kayasthas as well as upon the custom and usages regulating the marriages and other religious rites and ceremonies. The decision of the Calcutta High Court is based solely upon the Vyavastha Darpana of Shyama Charan Sarkar. The correctness of the decision has been doubted by the Full Bench of the Allahabad High Court. The recent decision of the Privy Council left the point open. The question is important, not only ethnologically but from the legal point of view so far as the administration of the Hindu Law to this important section of the population is concerned, as observed by Mahmood, J., in the case already referred to. Hence the question needs an early solution. Its determination will materially affect the law which will

govern adoption, marriage, rights of legitimate and illegitimate children to succeed, etc., inasmuch as the Hindu Law with regard to these matters is different for the three regenerate classes and the Sudras.

The Smritis of the Rishis, such as, Manu, Yajnavalkya, Narada, Vyas, Vasishta, etc., have divided mankind into four castes: Brahman, Kshatriya, Vaisya and Sudra. Manu in Chapter X, Sloka 4, says that there is no fifth caste. Therefore, the Kayasthas have to be located in one of these four castes. The Mahabharata asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation. According to Dr. Muir (Sanskrit Text, Volume I, pages 159 onwards) "the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of the society: next in importance are the royal class, the warriors on whom the protection and the very existence of the State depend, and who are characterised by physical abilities, courage, administrative capacity and intelligence. Then come those concerned in production of wealth by agriculture, trade and cattle breeding or cattle tending, requiring intelligence and a lower standard of morality. And lastly the labourers serving the preceding three classes or practising the mechanical or other similar arts, distinguished by their capacity for physical labour and spirit of dependence. The virtues and qualities requisite for distinction in these occupations as well as their importance to society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society and different classes of its members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution."

Dr. Muir gives a similar explanation of the mixed classes mentioned in the Smritis. According to him the origin of the mixed classes by inter-marriage between the four tribes is imaginary and allegorical. He says "where the abstract qualities of any two of the four tribes were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an inter-marriage of a man belonging to the one

tribe, with a woman appertaining to the other."

He illustrates this by referring to Ambasthas or the physician class of Bengal who combine in themselves the culture and learning of Brahmans and the commercial instincts of Vaisyas. The higher instinct is supposed to be derived from the superior class represented in the Smritis as the father and the lower instinct from the lower order represented by the mother. Thus he says "The principle of heredity underlies the system, and gained considerable support from the state of early society."

The scientific way of dividing the members of a society according to character and occupation laid down by Dr. Muir has been expressed in the form of allegory by the Dharma Sastras of Manu and other Rishis. It is sufficient to refer to Manu for all the Smritis and Puranas agree therein.

Manu says that for the furtherance of the good of the world the God Brahma created Brahman, Kshatriya, Vaisya and Sudra from his mouth, arms, thighs and legs, according to the relative sacredness of these parts of the body. The Brahman was produced from the mouth for the reason of being the repository of Vedas, the Ruler of all the creation and one who lays down the duties of all the social orders; the Kshatriya from the arms for the protection of the subjects; the Vaisya from the thighs or loins for the purpose of production of wealth by agriculture, trade, etc., and Sudra from the legs for the service of the three classes (Manu, Chap. I, Slokas 31 and 88 to 92).

Manu then deals with the mixed classes by inter-marriage between the four castes according to the occupation requiring mixed qualifications of the principal four castes and lays down rules for the location of them among the four classes according to their heredity. The general principle is that the offspring of an inter-marriage between two castes is lower than the caste of his father and higher than that of the mother. His caste is that of his father though inferior in rank due to the mother being of a lower order. When none of these tests applies, Manu would have the class determined in accordance with the occupation, act or conduct of the party. The names of castes and sub-castes etymologically denote the occupations of the various castes and sub-castes. The origin of a caste is

attributed to a particular limb of the God Brahma to mark the distinctive occupation and status of that caste in society. In this all the Smritis of Manu and others as well as Dr. Muir agree. These allegories and legends as to the origin of particular castes are important to show the character and occupation which originally were attributed to them the social position, the physical and mental capacity which they were originally supposed to possess and the light in which they were regarded by other castes. Therefore, they afford very important tests for determining the caste of a particular community. I would briefly refer to them in connection with the Kayasthas whose caste we have to determine.

According to the Hindus, the souls of men after death receive rewards and punishments according to their sins and virtues, and hence it is believed that good and bad deeds of men are not destroyed. The souls of men after death go to Yamapuri which is presided over by the deities called Yamas who keep records of men's actions and accordingly give them their dues. The principal Yama is called Yamaraja or Dharamaraja, that is, the ruler of Yamapuri or the King of La-

The Yama Samhita which is a tract from the 9th Chapter of Ahimsa Kamdhenu, a work of Hindu Law, says that Dharamaraja complained to Brahma about his difficulties in performing his most responsible duties of keeping records of the deeds of men and doing justice to them. Brahma went into meditation. Chitrugupta sprang from his body and stood before him bearing an inkpot and a pen. The God Brahma (Creator) said:—"Because you are sprung from my body (*kaya*), therefore, you shall be called Kayastha and as you existed in my body, unseen I give you the name of Chitrugupta." He then assumed charge of Yamapuri. Dharma Sharma married his daughter Irawati to Chitrugupta and Manuji, son of Surya (the Sun) married his daughter Sudakhina to him. Chitrugupta had eight sons from the former and four from the latter and these twelve sons became the progenitors of the twelve sub-divisions of the Chitruguptavansi Kayasthas, namely, Mathur, Gaur, Nigam, Ashthana, Kulshretha, Suryadwaja, Balmika, Bhatnagar, Srivastava, Ambastha, Sak-sena and Karana,

In Padma Purana, Uttar Khanda, it says that Chitrugupta had twelve sons by two wives. They were all invested with the sacred thread and were married to Nagakanyas. They were the ancestors of the twelve sub-divisions of the Kayasthas. The story also says that the Kayasthas are *Chitravansi Kshatriyas* and never *Sudras*. They are entitled to all the *Sanskars*.

The same legend with some slight difference is given in most of the Puranas. Padma Purana after stating the legend says: "Chitrugupta was placed near Dharamaraj to register the good and evil actions of all sentient beings, that he was possessed of supernatural wisdom and became the partaker of sacrifices offered to the gods and fire. It is for this reason that the twice-born always give him oblations from their food. As he sprang from the body of Brahma he was called Kayastha of numerous *gotras* on the face of the earth." Vide W. Crooke's *Tribes and Castes, North-Western Provinces and Oudh*, 1896 Edition, Vol. 3, pages 184-213.

In Shristhi Khanda the same Purana says that the sacrificial rites and study of the Kayasthas should be like the *Dwijas*, their occupation like that of the *Kshatriyas*.

Navishya Purana states that God, the Creator, gave the name and duties of Chitrugupta as follows:

"Because you have sprung from my body, therefore, you shall be called Kayastha and shall be famous in the world by the name of Chitrugupta. Oh my son, let your residence be always in the region of the god of justice for the purpose of determining the merits and demerits of men and receiving my irrevocable order, you should observe the *Dharma*, law and usages of the *Kshatriya* tribe according to *Shastras*."

Vignana Tantra says the same thing, adding that the descendants of Chitrugupta are *Kshatriyas* by caste, and not *Sudras* by any means.

The same is the enjoinder of Brahma to Chitrugupta according to Brihat Brahma Khanda quoted by Kamalakar Bhatta. He was named Kayastha *Kshatriya* having sprung from the body (*kaya*) of Brahma. He was directed to perform the *sanskars* of *Kshatriyas*, to marry *Kshatriya* girls and to have writing as his profession.

The story of Chandraseni Kayasthas as having descended from Chandra Sen, a *Kshatriya* Raja, is well-known and has been reported in the Puranas and also in the modern treatises on tribes, such as of Sherrings, Vol. II, Chap. II, page 181, 1879 Edition, and Steele's *Laws and Customs of Hindu Castes in the Deccan Province*, page 94, 1868 Edition. For a detailed account vide *Skanda Purana Renukamahatmaya*. On account of contest between the Brahmins and the *Kshatriyas* with respect to their relative rank in society a fierce war broke out between them in which Parsuram, the Brahmanic hero, is said to have twenty-one times extirpated the *Kshatriya* race (Sarkar's *Hindu Law of Adoption*). His father was killed by a *Kshatriya* Raja; he pursued in his thirst for *Kshatriya* blood the pregnant wife of Chandra Sen into the hermitage of Dalabhaya Rishi. The child in the womb was saved through the entreaties of the Rishi, who when born was called the Kayastha and though deprived of the martial profession was directed to carry on the profession of reading and writing which appertained to the *Kshatriyas*. He was attached to the Court of Kings, was initiated into the *Sanskars* of the *Kshatriyas* and was taught *Vedas*. His descendants are the *Kshatriyas* in the Deccan and are known as Parbhu Kayasthas.

Skanda Purana in another place as quoted in Vachaspathya, page 2943, gives an account of Raja Chitra also called Vivasvan, Aditya or Mitra, the blessed and purest, having performed for a long time *tapasya* (austerities) obtained from God Surya the boon of becoming *sarvagya* (omniscient), possessed of divine intellect and supernatural powers. Dharamaraja finding his duties of keeping records of the deeds of men and doing justice according to their merits and demerits too onerous managed to remove Raja Chitra to Dharmapuri to assist him in his duties. Chitra having thus disappeared from the mortal world was called Chitrugupta. He became one of the fourteen Yamarajas or ruler of Yamapuri (*Daksha Smriti*).

Garuda Purana describes the imperial throne of Chitrugupta in Yamapuri holding his Court and dispensing justice according to the deeds of men and maintaining their record, in the following words:

धर्म राजश्चित्रगुप्तः श्रवणोभास्करादयः ।

कायस्थ तत्रपश्यन्ति पापपुण्यचरसर्वशः ।

(There Dharmaraja, Ohitragupta, Sravana and others see all sins and virtues which remain concealed in the bodies of men).

Vyoma Samhita quoted in Shabda-Kalpadrum says:

ब्रह्मकायसमुद्गतो कायस्थो ब्रह्मसंज्ञकः ।

कलौहि क्षत्रियस्तस्य जपयज्ञेबुराजतम् ॥

The Kayasthas have sprung from the *kaya* or body of Brahma. They are similar in rank to Brahmaṇas, but in *Kaliyug* their religious observances and duties have been prescribed to be those of Kshatriyas. Brahma himself is said to have ordained them to perform the duties of Kshatriyas. Similarly, Apastamba Shakra of the Veda quoted in Shabda-Kalpadrum 2nd part, page 228, Shabda 20, under Kshatriya, states that Kayasthas are Kshatriyas. Ohitragupta who reigns in heaven and his son Chaitrarath, who was light of the family, meritorious and of illustrious deeds ruled on earth for a long time as King of Ohitrakoot near Allahabad.

Meru Tantra quoted in Shabda-Kalpadrum under the word 'Kshatriya' supports the same view.

The Mahabharata (Anusasan Parva, Chap. 130) recites the teaching of Ohitragupta requiring men to do virtuous and charitable acts and performing Yagya, saying that men are rewarded or punished according to their good or bad deeds.

These allegorical descriptions of the origin of Ohitragupta and the Kayasthas having sprung from God Brahma in meditation and, as Risley puts it, from his inner consciousness for the purpose of managing the business affairs, performing literary work, administering justice, punishing and rewarding the deeds of mortals and keeping records thereof, indicate the status and position of the Kayasthas in society and their occupation as appertaining to the three higher or regenerate classes and that they could not be classed as Sudras whose origin is said to be from the lowest part of Brahma indicative of the servile duties requiring absolutely no mental activity.

The name Kayastha etymologically denotes the occupation and social position of the Kayasthas. According to Shabda-Kalpadrum, a dictionary of high authority, and Brihat Bidhan, Kayastha is defined as

काय + स्था + क

कायेषु तिष्ठतीति = कायेषु सर्वभूतशरीरेषु

अन्तर्यामी यथा तिष्ठतीति

that is, one who lives in the body of everybody and thus comes to know of the inner life of men, that is their deeds and misdeeds, merits and demerits. The word "Ohitra" (चित्रः) is defined by Shabda-Kalpadrum as follows: चित्रयति पापपुण्य विचाराचित्रं करोति लिखतीत्यर्थः यमविशेषः यथातथ्या दिन्तैव one who pictures, records and considers the sins and virtues of men and who is one of the Yamas, so as to give the mortals their dues after death.

Turning to the Smritis, Vishnu in Ohap. VII, verse 3, says that a document attested by the King is one which is written or prepared by a Kayastha, an officer of the Court appointed by the King, and stamped with the finger prints of the head of the department. The words are राजाधिकरणं तन्नियुक्त कायस्थं कृतं तदध्यक्षकरं चिह्नितं राजसामिकम् ।

Virihat Parasara in Ohap. X, Sloka 10 says: लेखकानपि कायस्थान् लेखं कृत्यहितैषिणः ।

Kayasthas should be appointed as writers being expert in the art of writing.

Again in Ohap. I, Sloka 235, he says that Danda-dhrita (दाण्डधृतः), the Magistrates and Judges of the Courts should be (dharma-gya) persons versed in laws and good administration; Kayasthas who are versed in the art of writing (लेखकानपि कायस्थान्)

Similarly, Shukraṇiti in Ohap. XXXII, Sloka 420, describes Kayasthas as *lekhaks* (कायस्थो लेखकस्तथा), and in Ohap. II, verse 178, says that the accountant and *lekhak* knew the Vedas, Smritis and Puranas.

Brihaspati quoted in Prasara Madhava and Vyas cited in Vaijayanti say that "a *lekhak* and *ganak* (writer and accountant) must be a person who has command over languages (literally who knows particulars about words), is pure in mind (mind and body), has control over his temper, is not covetous, is truthful and can write clearly and in a lucid style."

Vyas says that the writer and the accountant should be श्रुताध्ययन सम्पन्नं that is versed in Mimamsa (Śrutis) and Vedas (Adhyayana) as explained by Mitakshara in commenting upon Yajñavalkya, Ohap. II,

Sloka 2, which says that the King's Councillors should be versed in the sacred books of Mimamsa and Vedas, expert in law, truthful and impartial.

Slokas 10 to 12, Chap. I of Vyas and slokas 32-34, Chap. VIII of Usana are either interpolations as some say, or, do not apply to the Chitruguptavansi Kayasthas who have been described by Vyas as writers and accountants, versed in Vedas and Smritis and Councillors and courtesans of kings, as Shyama Charan Sarkar himself says.

Yajnavalkya in Slokas 317 to 320 describes how the edicts of the king should be written, sealed and promulgated. Apararka in his commentary upon these Slokas quotes from Vyas and shows that these edicts should be written by *lekshaks*, the ministers of war and peace (*sandhi vighraha-kari*), and that they should be promulgated to the gentry and officials among whom Kayasthas have been mentioned.

Similarly, Vijnanesvara in his Mitakshara commenting upon these Slokas says:

"He (King) should cause it to be recorded by that officer of his, who is in charge of war and peace (i. e. by a *Kayastha*), and not by anybody else. As says a *Sruti*: That officer of his, who is *sandhi vighraha kari* or the officer in charge of peace and war should be its writer (*lekshak*)."

Yajnavalkya uses the word "*Kayastha*" in Slokas 335 36, Chap. I. Commenting upon this, Mitakshara says that Kayasthas are accountants and writers (*कायस्थानुक्ता लेखकाश्च*). He makes the word "*Kayasthas*" synonymous with accountants and writers. Similarly, Apararka says that Kayasthas were revenue-collectors. (*kar-adhikrita*).

The author of the Viramitrodaya makes the following comment on the text of Vyas already quoted and proves that the Kayasthas are a twice-born class, "The accountant must be twice born because it is declared, that he should be a person who has studied the Vedas which none but a twice-born can do; so also the writer must be twice-born, because they go together."

The accountants and scribes constitute one of the ten parts of a judicial proceeding (Jolly's Translation of Narada, page 6, s. 16). Brihaspati says the same thing, as quoted in Prasara Madhava, Vyavahara Kanda.

Yajnavalkya in Sloka 335 (numbered 334 and 336 in some books) enjoins the king to protect his subjects from the oppression of the Kayasthas especially. Mitakshara gives the reason that they being the favourites of the king (Rajvallabha) and officers of the Court as Ministers of War and Peace, Councillors and writers and accountants are more likely to take advantage of their position and oppress the subjects. This view is in accordance with Manu who in Chap. VII, Verse 123, says that the king's servants connected with the Government of the realm may become exacting and deceitful and the king should protect his subjects from such officials.

According to the Smritis, the officers of the realm, such as, ministers of peace and war, courtesans and Councillors, Governors and headmen of villages should be men versed in the *Sastras*, valorous and born of noble family, pure, intelligent, affluent in wealth and of tested virtue and comprehension: Manu, Chap. VII, Verses 54 to 121; Yajnavalkya, Chap. I, Verse 312.

The officers of the Court must be twice-born who are preferable to Sudras even if they are by name twice-born. A Sudra, the Smritis say, should in no circumstances be associated with the Court: Manu, Chap. VIII, Verse 20; Vyas, Chap. I, Verse: Vasishtha, Chap. XVI. The realm of a king wherein a Sudra official administers justice is destroyed under his very eyes like a cow merged in the mire (Manu, Verse 21, Chap. VIII).

Thus, according to the *smritis* and the commentaries thereon, notably of Apararka, Vijnaneshwara called the Mitakshara and Viramitrodaya the recognized authorities in the Benares School, the Kayasthas were officers of the Court, Ministers of War and Peace, writers and accountants and were required to study the sacred Vedas and the Dharma *Sastras*. Had they been Sudra, they would not have been allowed these privileges which appertain exclusively to the regenerate classes.

By origin the Kayasthas were of pure regenerate descent. Even if they be of mixed origin, as some say, they cannot be Sudras as shown below.

Yajnavalkya in Chap. I, Sloka 92, calls a son begotten by a Vaisya (twice-born) on a Sudra woman a *Karan*. Some commentators make *Karan* synonymous

with Kayasthas. Yajnavalkya himself does not say so. The confusion has probably arisen on account of Karan being one of the twelve sub castes of Kayasthas which has nothing to do with the offspring of mixed marriage mentioned either in Manu or Yajnavalkya. This is clear from Shabda Ratnakar which gives several meanings of the word "Karan", such as, "Cause, body, war, son of a Vaisya by a Sudra woman, and a sub-division of the Kayasthas."

These are different uses of the word ; one has nothing to do with the other. Karan sub-caste of the Kayasthas descended from Arun, one of the twelve sons of Chitrugupta, is not to be confounded with the offspring of a Vaisya husband and a Sudra wife. Even if Karan be Kayastha he will not be a Sudra, for according to Manu he will retain the caste of the father though he may not have the same respect on account of inferiority of the mother (सदृशानेव तानाहुर्मादिदोष विगर्हितान्). the reason for this given by Manu in Chap. X, Sloka 72, being that the seed of the father is of greater importance in an act of fecundation. In Sloka 41 of that Chapter he clearly states that the sons begotten by twice-born ones on wives of their own caste or on wives belonging to an inferior caste have the rights and privileges of the twice-born, that is, of being initiated with the thread, etc., and that he will not be a Sudra. Thus, even if Karan be the offspring of a Vaisya on a Sudra woman, he will be a twice-born, and not a Sudra. In any case Karan is only a sub-caste of Kayastha and cannot embrace the whole community. It is undisputed that if Kayastha is the offspring of a Kshatriya by a Vaisya woman, as given by Wilson in his glossary, he will be a twice-born called Mahishya according to Manu and Yajnavalkya, because both the father and mother are such. If he is the offspring of a Kshatriya by a Sudra wife he will be an Urga Kshatriya both according to Manu and Yajnavalkya, and an Urga Kshatriya is not a Sudra as held in *Sri Gajapaty Hari Krishna Devi Garu v. Sri Gajapaty Radhika Patta Maha Devi Garu* (8), *Brindavana v. Radhamani* (9), *Jawala Singh v.*

Sardar (10) and *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn*. (11) where the Vyavastha of the Pandit of Sadar Dewani Adalat was not accepted and the Rajput was held to be a Kshatriya. These authorities have examined the text carefully and have gone so far as to hold that even an illegitimate son of a twice-born retains the caste of his father and does not become Sudra.

Thus, even if Kayastha is an offspring of inter-marriage he will be a twice-born. Even Shyama Charan Sarkar whose Vyavastha is the basis of the decision under review does not accept that a Kayastha is the offspring of a mixed marriage or that he is Karan. He is decidedly of opinion that the Kayasthas are Kshatriyas and this is so according to the Smritis and the Puranas. He, however, says that they have degraded themselves to *sudradom* by omitting to perform the Upanayana ceremony. This will not cause their degradation to *sudradom*, as Manu himself in Chap. X, Verse 20, definitely lays down that twice-born ones devoid of the rights of initiation with the thread are Vratyas (broken vowed ones) called Vratya Brahmans, Vratya Kshatriyas and Vratya Vaisyas respectively. Among Vratya Kshatriyas he mentions the name of Karan in Sloka 22. So if Karan is synonymous with Kayastha as some commentators say, then Kayastha will be Vratya Kshatriya, that is Kshatriya by origin and descent but of broken vows. Yajnavalkya in Chap. 2, Sloka 38, says that they will be Vratyas, "so long as they do not perform the sacrifices called Vratyastoma," and Mitakshara commenting upon this says "performing which (Vratyastoma) they again become entitled to Upanayana."

Mitakshara and Balambhatta both explain Vratya as devoid of sacrament, that is, excluded from performing the religious ceremonies. They do not say that such a twice-born will lose the civil rights of succession, marriage and adoption. Sarva-dhikari, as already observed, emphatically expressed it and asked the question what would happen if the Kayasthas, who are Kshatriyas and who according to Shyama Charan Sarkar omitted to perform Upana-

(8) 2 M. H. O. R. 369.

(9) 12 M. 72 at p. 78; 4 Ind. Dec. (N. S.) 399.

(10) 51 Ind. Cas. 216; 41 A. 629; 17 A. L. J. 734; 1 U. P. L. R. (A.) 67.

(11) 7 M. L. A. 18; 4 W. R. P. C. 132; 1 Suth. P. C. 113; 1 Sar. P. O. J. 591; 19 E. R. 217.

yana and thus degraded themselves to *sudradom*, would again begin, as many are doing, to wear the sacred thread? It is not clear whether Shyama Charan Sarkar means by degradation to *sudradom* that they become Sudra in all respects and will be governed by the laws of Sudras. Perhaps he means to say what Yajñavalkya and Mitakshara have held that they will be devoid of sacrament only, while retaining their rights as Kshatriyas by birth.

Sirisa Chandra Vidyarnava in his translation of the Mitakshara at page 214, 1918 Edition, upon the authority of Balambhatta, says that the Chandraseni-Kayasthas or Parbhus of Bombay and the Chitrugupta Kayasthas are Kshatriyas. So far as the Kayasthas of Upper India, Behar and the Deccan are concerned, the matter is concluded by the authorities of Mitakshara and Viramitrodaya, which govern them, that they belong to regenerate class. By profession assigned to them from time immemorial they must be regarded as Kshatriyas, for according to Amar Kosha, Kshatriya verga, Slokas 16-17, writing is one of the duties of Kshatriyas.

The careful research of the modern writers of authority shows that the position assigned to the Kayasthas of the aforesaid Provinces is still retained by them by occupation and observance of religious rites and ceremonies.

W. Crooke of the Bengal Civil Service in his book on the Tribes and Castes of the North-Western Provinces and Oudh, Vol. III, pages 184 to 213, deals with the Kayasthas. He gives the Puranic legends of their original growth already referred to. Their common ancestor was Chitrugupta. He had twelve sons: Bhanoo, Vibhanu, Vishwabhanu, Virjawan, Charu, Sucharu, Chitra, Matiman, Himavan, Chitracharu, Arun and Atindriya. The twelve sub-castes of Kayasthas have descended from these twelve sons; Srivastava from Bhanoo, Surajdhwaja from Vibhanu, Asthana from Vishwabhanu, Balmiki from Virjawan, Mathur from Charu, Gaur from Sucharu, Bhatnagar from Chitra, Saksena from Matiman, Ambastha from Himavan, Nigram from Chitracharu, Karan from Arun, and Kulasastha from Atindriya. Bhanoo, the ancestor of Srivastava, immigrated to Kashmir where he became Raja of Srinagar and obtained the title of *Rajadhiraja* from Charu.

gupta, the Raja of Magadh (South Bihar). Vibhanu, the ancestor of Surajdhwaja, obtained this title from Raja Sursena of the Ikshwaku race because he helped him in performing a sacrifice. Vishwabhanu, the ancestor of Asthana, was honoured by the Raja of Benares and he presented to him *astha* or eight kinds of precious pearls and hence he was called Asthana, Virjawan, the ancestor of Balmiki, gained the name of Balmiki on account of his austerities and devout meditation in God. Mathurs, the descendants of Charu, are so called on account of their having settled at Mathura. The Gaur Kayasthas, descendants of Sucharu, are so called from Gaur or Gauda, the old capital of Bengal. The Sena dynasty was founded by this sub-caste; their ancestor Bhagadutta is said to have fought in the war of Mahabharata on the side of Duryodhana against Yudhishtira. Raja Lalasena was another famous king among them. The last of that dynasty was Raja Lakshmanian. Bakhtiar Khilji deposed the Gaur Kayastha dynasty. The Bhatnagar sub-caste derives the name from the residence on the bank of the Bhat river or the old town of Bhatner, the fort of which is of some historical interest having been at various times captured by Mahmud of Gaznavi, Tamur and Kamran, brother of Humayun. The Saksena sub-caste, literary "friend of the army" was given this title by the Srivastava Raja of Srinagar on account of their skill in war. One of their ancestors Surajchandra or Somadutta obtained the title of Kharua as a recognition of his honesty as treasurer to Kusa, one of the twin-sons of Rama and Sita; hence the Kharva sect of Saksena sub-caste. The other section called Dusra is so named because one of them accompanied Humayun, father of Emperor Akbar, during his refuge in Iran after his defeat by Sher Shah. Ambasthas are so called because of their worship of the goddess Ambaji. They have settled at Girnar hill. They are versed in the art of surgery, and there is a colony known as Kothar at Nagram in the Lucknow district, who have a great local repute. The Ambastha subject is also to be found in the Gaya and Patna districts of Bihar. There is a class called Ambastha who are Vaidya or physician in Bengal. In the Sruti already referred to (Manu X, 8), Ambastha is mentioned as descended from a Brahman and a Vaisya. Some say that this refers to the

referred to in Sarvadhikari's Hindu Law, 1922 Edition, page 834, says that upon a question being referred by the Maharaja of Benares the Pandits of Benares, Kashmere, Bengal and Bombay affirmed the view of the Padam Purana that the Kayasthas are descendants [of Chitrageeta and the offsprings of the grand-daughters of Brahma and Surjya and that the name 'Kayastha' is derived from their having sprung from the *kaya* or body of Brahma, who invested them with the profession of scribe and the duties of Kshatriyas, the pen being substituted for the sword. They also based their opinion upon the similarity of habits and customs and on religious authority. At page 375 it mentions the high posts occupied by Kayasthas as Nizams, Collectors or Captains under the Oudh Government and high titles being conferred upon them and their continuing to hold similar appointments under the British Rule. At page 73 it refers to the Kayasthas as warlike and gives instances of their having fought battles, such as the military deeds of Triloke Chand. In Vols. II and III it gives a number of instances of the military deeds performed by Kayasthas and their having taken part in the battlefields and having thereby acquired large territories and having been invested with titles of Rajas, Thakurs, Subedars, etc. According to Rajputana Gazetteer, the Kayasthas of Rajputana call themselves Rajdhana.

The research of the modern writers, as shown above, has led to the conclusion that the Kayasthas are not Sudras but belong to the three regenerate classes.

Sarvadhikari in his book on Hindu Law, 1922 Edition, page 633, has referred to Vyavastha No. 60 of 1861 of the Pandit of Sadar Dewani Adalat of North-Western Provinces then located at Agra. This Vyavastha contains the well-considered and authoritative opinion of the Pandit that the Kayasthas are Kshatriyas. We have been referred to the Kayastha Ethnology of the late Munshi Kali Prasad Srivastava, 1877, which quotes a number of Vyavasthas of the Pandits of Kashmere, Kashi, Mathura, Patna Mithila, Agra, Oudh, Central Provinces and Bengal given from time to time and extending over a large period. The book also refers to a number of decisions of the subordinate Courts of the United Provinces, Oudh and Behar (Patna), showing that the Kayasthas were held to belong the regenerate class, wear the

sacred thread and perform the marriage and other ceremonies according to the rules that govern the regenerate classes, widows do not re-marry and illegitimate children do not inherit.

I would, however, prefer to rest my judgment on the Smritis, the Puranas and other authoritative works and the independent research by eminent writers which I have already referred to. It is, however, important to notice that no contrary view of any Court in the United Provinces and Behar has been referred to us. This shows that it has been accepted without any controversy that the status of the Kayasthas as belonging to the twice-born caste has been accepted in those Provinces. Even Shyama Charan Sarkar whose Vyavastha is the basis of the solitary decision in the case of *Raj Coomar Lall v. Bissessur Dyal* (2) admits that the Kayasthas whether of Bengal or any other country are Kshatriyas. There is, therefore, no controversy that by origin the Kayasthas are Kshatriyas. Shyama Charan Sarkar, however, says that they were degraded to *sudradom* by non-observance of the Upanayana ceremony and by assuming the Sudra epithet of 'Das' instead of their own Kshatriya 'Varma'. It has already been shown that his opinion does not relate definitely to the Kayasthas of Bihar and other Provinces except that of Bengal and that, as a matter of fact, this is not so far as the Kayasthas of Behar are concerned. Even if it were so, these lapses referred to above would not cause any actual degradation or the loss of rights of the Kayasthas in matters of inheritance, marriage and adoption. The Sastras do not entail any such result by such deviation from the orthodox practices. The Dharma Sastras have laid down the rules of conduct, rites and ceremonies in the Acharya and Vyahara Kanda. If any twice-born fails to pay due regard to the precepts of Acharya and Vyahara Kanda or commits a breach thereof he can purify himself by the rules of expiation laid down in the *Prayaschitta* part; so long as he does not do so he may only be looked down upon but cannot be degraded to *sudradom* or the status of a Sudra so far as his civil rights are concerned. His caste for civil matters is that which he acquires by birth; he retains the caste of his father even if his mother be of an inferior caste. In the case of *Bhagwan*

Kuar v. Jogendra Chandra Bose (12) it was held that a Hindu does not cease to be so merely by occasional lapses in matters of diet and ceremonial observances from orthodox Hindu practice. The principle will equally apply where the question is whether the members of a regenerate class have ceased to belong to it by reason of such lapses. If the omission to wear the sacred thread were to cause degradation, the Banias and Thakurs who do not put on the sacred thread would have become Sudra whereas they admittedly belong to the Dwija class. As already shown by reference to *Yajnavalkya Mitakshara* and *Balambhatta* such an omission will only deprive a twice-born of his sacramental rights and he can regain that right by performing the *vratyastoma* ceremony.

It is not necessary to pursue the matter further. The reasons given by *Shyama Charan Sarkar* in his *Vyavastha* cannot cause degradation of the Kayasthas to *sudradom* and in any case the Behari Kayasthas are not Sudra, and I respectfully differ from the view taken in the case of *Raj Coomar Lall v. Bissessur Dyal* (2).

The Kayasthas of Behar are the descendants of *Chitrugupta* and belong principally to the sub castes of *Srivastava* and *Ambastha*; there are a few who belong to the other sub castes. All of them came down from Upper India and are governed by the laws and customs which prevail there; *Parbati Kumari Debi v. Jagadis Chunder Dhabal* (13) and *Rutcheputhy Dutt Jha v. Rejunder Narain Rai* (14). According to *Mitakshara* and *Viramitrodaya*, whose authority has been recognized by the Privy Council, they belong to the Dwija or regenerate class. Therefore, the rule prohibiting an adoption of a daughter's son, mother's sister's son and sister's son among the three regenerate classes will apply to them. The evidence in this case, particularly on behalf of the defendant, indicates that the family in question has been observing the ceremonies in connection with marriages, deaths and births according to the Vedic rites that obtain

in the case of the regenerate classes and priests of high order officiate those ceremonies. In the absence of direct evidence to the contrary the learned Subordinate Judge was not justified in holding that the parties belong to the Sudra caste and in refusing to apply the above rule prohibiting the adoption of a daughter's son. The general rule of Hindu Law cannot be disputed; but it may be varied by family custom. The plaintiffs did not specifically raise this legal objection to the validity of the adoption of *Newazi Lal* by *Hemnath*, the maternal grandfather, and the defendant was thus precluded from pleading custom varying the rule. There was no issue raised upon the point and the plaintiffs, therefore, cannot rely upon the general principle of prohibition: *Rup Narain v. Gopal Devi* (15). The only issue raised was "did *Hemnath* adopt *Newazi Lal* as his son as contemplated by the Hindu Law?" (*Issue No. 9*). This is an issue regarding the factum of adoption, and the plaintiffs say that *Newazi Lal* was not adopted according to the *Sastras*. On the other hand, the defendant asserts that *Newazi Lal* was duly adopted.

Newazi Lal is said to have been adopted at the time of his marriage which was performed by *Hemnath* in 1804. On 26th May, 1804, *Hemnath* executed a deed of *tamlaknama* appointing *Newazi Lal* as successor to his properties after his death. He died in January, 1805, leaving his widow *Dulari Kuer*, his daughter *Nand Kuer* and three grandsons by his daughter, namely, *Newazi Lal*, *Dharamlal* and *Ridhnath*. In his own paternal family his brother *Bishwanath* and his nephews *Mohan*, *Sohan*, *Tirloke Chand* and *Jagannath Sahay*, sons of his predeceased brother *Raghunath Singh* who had died in 1793, were alive. *Bishwanath* died on 17th March, 1806, leaving his widow *Gharbaro Kuer* and a daughter married to *Mahadeo Dutt*. Soon after the death of *Bishwanath*, *Tirloke Chand* and others, sons of *Raghunath*, instituted Suit No. 5 in the Provincial Court of *Azimabad* against *Musammât Gharbaro Kuer* widow of *Bishwanath*, *Musammât Dulari Kuer*, widow of *Hemnath* and *Newazi Lal*, alleging that the properties in dispute were acquired by the three bro-

(12) 30 I. A. 249; 31 C. 11; 7 C. W. N. 895; 13 M. L. J. 381; 84 P. R. 1903; 135 P. L. R. 1903 (P. O.).

(13) 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. O. J. 205; 29 I. A. 82 (P. C.).

(14) 2 M. I. A. 132; 2 Suth. P. O. J. 1; 1 Sar C. J. 161; 18 E. R. 251.

(15) 3 Ind. Cas. 382; 26 C. 780; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 19 M. L. J. 548; 93 P. R. 1909; 146 P. W. R. 1909; 68 P. L. R. 1910; 36 I. A. 103 (P. C.).

thers Hemnath, Bishwanath and Raghunath, father of the plaintiffs, and that they were jointly held by them, but that the defendants on the death of Bishwanath on 13th Chaitra 1213 wrongfully took possession of the properties and refused to give any share to the plaintiffs in that case.

Newazi Lal contested the suit on the ground that the properties were acquired by Hemnath and he had a right to those properties as his adopted son.

The Provincial Court by its judgment (Ex. H), dated the 12th December, 1812, dismissed the plaintiffs' suit upon the ground that it was not proved that the plaintiffs or their father Raghunath were co-parceners with Hemnath and had jointly acquired the properties in dispute. As to the plaintiffs' claim to succeed as a reversionary heir of Bishwanath, the Court observed that so long as the adoption and the *tamlknama* set up by Newazi Lal were not set aside the latter had a preferential claim. The Court, however, did not determine the question of adoption on the ground that the matter was directly pending in another suit in the Provincial Court of Azimabad instituted by Newazi Lal against Mahadeo Dutt, son-in law of Bishwanath on the 13th September, 1809. In that suit Newazi Lal sought to set aside a deed of gift, dated 2nd Baisakh 1216 (2nd April, 1809), executed by Gharbaro Kuer, widow of Bishwanath after the death of the latter. Newazi Lal claimed the properties as an adopted son of Hemnath, asserting that the properties belonged to Hemnath and that Bishwanath was merely a *farzidar* for Hemnath and hence the widow had no right to execute the deed of gift in favour of her son-in-law. The Court by its judgment (Ex. H-1), dated the 6th May, 1813, upheld the contention of Newazi Lal and decreed his claim. Newazi Lal had instituted several other suits in which he claimed properties which stood in the names of various persons on the ground that they were mere *farzidars* of Hemnath. These cases were also decided in his favour and were along with the aforesaid case of Mahadeo Dutt taken in appeal to the Sadar Dewani Adalat and were decided by the judgment of that Court, dated 3rd December, 1818, (Ex. H-2) in favour of Newazi Lal. The Sadar Dewani Adalat differing from the Provincial Court held that the properties were jointly acquired and Bishwanath had one-third interest therein. It, however, agreed with the Pro-

vincial Court in holding that the deed of gift executed by the widow of Bishwanath in favour of her son-in-law Mahadeo Dutt was a forged document and observed that the claim to the one-third share of Bishwanath would be adjudicated upon when it would be made by a proper heir of Bishwanath. The Sadar Dewani Adalat dismissed the appeal.

Mahadeo Dutt then appealed to the Privy Council, but subsequently withdrew the appeal and filed a deed of relinquishment, dated the 19th April, 1826, and set forth in the *Rubkari* (Ex. H-3) of the Sadar Dewani Adalat, dated the 22nd August, 1826. By this deed Mahadeo Dutt waived his claim to the properties in dispute admitting that they were the self-acquired properties of Hemnath and were purchased in the *farzi* name of Bishwanath and that Newazi Lal was adopted by Hemnath. He also stated that Newazi Lal remitted his claim for *wasilat* and costs and hence he filed the deed of relinquishment.

The judgment of the Sadar Dewani Adalat (Ex. H-4), dated the 20th January, 1838, shows that Nand Kuer, daughter of Hemnath was alive and in fact is said to have given Ridhnath her son, the defendant's ancestor, in adoption to Newazi Lal in Chaitra 1230 (1830) long after the aforesaid litigations. The widow of Hemnath was a party to the aforesaid litigation. The plaintiffs, therefore, contend that during the lifetime of Dulari Kuer and Nand Kuer, the mother and grandmother respectively of Dharam Lal, Newazi Lal and Ridhnath, they had no right to the properties of Hemnath nor were Dharam Lal and Ridhnath, the respective ancestors of the plaintiffs and the defendant, parties to those litigations, and hence they are not bound by the result of those litigations or anything said or done by the parties thereto.

As regards the judgments (Exs. H-1 and H-2), dated the 6th May, 1813, and 31st December, 1818, of the Provincial Court of Azimabad and of the Sadar Dewani Adalat respectively, it is urged that these decisions do not prove any actual adoption attended with necessary ceremonies, and, on the other hand, they show that proper ceremonies were not performed and the actual giving and taking, which is essential for a valid adoption, had not taken place. The judgment of the Provincial Court does not refer to the ceremonies at all. The judg-

ment of the Sadar Dewani Adalat refers to it in the following words:—

"Although it is not clear if all the necessary ceremonies in connection with the adoption of Rai Newazi Lal were performed according to the Sastras, yet from a perusal of the depositions of the witnesses as well as from the other circumstances of the case it is evident that Rai Hemnath Singh took Newazi Lal in his lap and adopted him in the presence of the audience, especially his near relatives, Rai Bishwanath Singh and others. As a matter of fact, on the death of Rai Hemnath Singh, Rai Bishwanath Singh placed the turban of succession on the head of Newazi Lal and the necessary ceremonies connected therewith were performed by Bishwanath himself as well as other relations and castemen. The *sapindi karam* and *kiria* (after death ceremonies) of Rai Hemnath Singh and Rai Bishwanath Singh were also performed by Rai Newazi Lal respondent. Hence there remains no doubt about the fact if Rai Newazi Lal has been adopted by Rai Hemnath Singh or not. With a view to the above facts there appears to be no reason to alter the decision of the Senior Judge of the Provincial Court of Azimabad, dated the 5th May, 1814."

As to what actually took place at the time of adoption it is to be found in the evidence of Tula Ram (Ex. 1-2) who was examined as a witness in both the aforesaid litigations:—

"The mother of Newazi Lal had been at first sitting behind the *purdah* (curtain) along with other ladies. At that time Hemnath Singh called her and obtained her permission, saying that he was going to adopt Newazi Lal as his son and that he had already obtained the permission of Ochoa Lal (father of Newazi Lal). The mother of Newazi Lal replied that she gave her consent out of her own free will."

At another place he said:—

"He took the bride (the girl to be married on the occasion to Newazi Lal) as well as Newazi Lal, the bridegroom on his lap in *janvasa* (place where the bridegroom's party stops) and said that he adopted Newazi Lal as his son and addressed the audience and told them to be aware thereof.....I did not see Ochoa Lal under the *mandwa* at the time when Rai Hemnath Singh adopted Newazi Lal as his son, on the performance of the ceremony in which *kus* (grass) and water are

used. It is possible that he may have come later on.....He may have gone there after the performance of the ceremony in which *kus* and water are used."

The plaintiffs rely upon the case of *Shoshinath Ghose v. Krishnasunderi Dasi* (16) and *Krishna Bhamini Dasi v. Braja Mohini Dasi* (17) and contend that a mere declaration by the adoptive father is not sufficient to create a valid adoption and that the actual giving and taking is essential for a valid adoption whether the parties belong to the three regenerate classes or are Sudra. They say that the evidence of Tula Ram, who was an accredited servant of Hemnath and was in charge of all important affairs and in fact properties were also purchased by Hemnath in his *farzi* name, and his presence at the adoption show that Hemnath simply obtained permission of the mother of the boy, took Newazi Lal on his lap in the *janvasa* (marriage canopy) and declared that he had adopted him as his son; that Ochoa Lal, father of Newazi Lal, was not present at the time and neither he nor his wife actually performed the ceremony of giving and that the permission given by the wife is not valid in law during the lifetime of her husband. Upon the evidence of Tula Ram given soon after the adoption the plaintiffs contend that the actual giving and taking was not proved and that the Sadar Dewani Adalat did not hold that a proper giving and taking ceremony had taken place but it only held that Hemnath took Newazi Lal on his lap and adopted him. It is conceded that it would not be reasonable to expect direct evidence of adoption and all the necessary ceremonies having been performed after a lapse of long time; but it is contended that this would not apply to the present case where the adoption was investigated and evidence was given when it was quite fresh and that evidence showed that the essential ceremony of actual giving and taking had not taken place. Accordingly, the plaintiffs contend that Newazi Lal did not become a legally adopted son of Hemnath and he did not cease to be the son of his own father Ochoa Lal. The plaintiffs also rely upon the *tamlaknama* of 1804 (Ex. Q)

(16) 7 I. A. 250; 6 C. 381; 7 O. L. R. 313; 3 Shome L. R. 281; 4 Sar. P. C. J. 191; 3 Suth. P. C. J. 812; 4 Ind. Jur. 589; 3 Ind. Dec. (N. S.) 248.

(17) 66 Ind. Cas. 38; 25 C. W. N. 403 at p. 408.

executed by Hemnath and contend that had Hemnath adopted Newazi Lal he would not have appointed him to be his successor after his death, for upon a valid adoption Newazi Lal would have become the son of Hemnath from the moment the adoption took place and would have become a co-parcener with him as his *aurasa* or a natural born son.

The plaintiffs further contend that their ancestor Dharam Lal was not a party to that litigation and that no title to the property had accrued to him at that time, inasmuch as both the widow and the daughter of Hemnath were living and hence the plaintiffs or their ancestor are not affected by any finding of the Court in that case.

These contentions are sound. The fact, however, remains that Newazi Lal took possession of the estate of Hemnath and remained in possession till his death on 24th *Asin* 1243 (1st October, 1835) and that Sona Kuer his widow entered into possession and occupation of the properties. This led to another litigation. Ridhnath the youngest brother of Newazi Lal alleged that he was adopted by Newazi Lal in *Chait* 1230 *Fasli* (1823) and set up a deed of inheritance, dated 9th *Jamad-us sani* 1251 A. H. (October 1835) said to have been executed by Newazi Lal. He obtained a *rubkari* in December 1836 from the Sadar Amin in respect of a certain sum of money which stood in the name of Newazi Lal. This was upheld by the District Judge. Accordingly, Sona Kuer instituted Suit No. 220 of 1836 in the Civil Court of the District of Bihar for declaring the adoption and deed of inheritance set up by Ridhnath to be false and invalid. The Court by its judgment, dated the 20th January, 1838, Ex. H (4), held that the deed of inheritance set up by Ridhnath was spurious and his alleged adoption by Newazi Lal was false; that the adoption had not taken place; that the mother of Ridhnath had no power to give him in adoption without having an authority from her deceased husband Choa Lal and that the necessary ceremonies, such as the performance of *homa*, the recitation of *mantras*, pouring of water and taking the child in the lap of the adopter, were not performed. The Court set aside the *rubkari*, dated the 17th November, 1836, and decreed the suit of Sona Kuer, the plaintiff.

Ridhnath appealed to the Sadar Dewani Adalat. The appeal was disposed of on compromise. Both Sona Kuer and Ridhnath filed *ekrarnamas* Exs. J (37) and J(38), dated the 19th August, 1839, in the said appeal, agreeing that both of them would jointly remain in possession of the properties and after the death of Musammat Sona Kuer, Ridhnath and his descendants would remain in sole possession thereof. Accordingly, both of them remained in possession of the properties, and after the death of Sona Kuer, Ridhnath remained in sole possession.

Dharam Lal was not a party to the litigation, but he intervened in the appeal in the Sadar Dewani Adalat and admitted both the adoptions: (1) of Newazi Lal by Hemnath and (2) of Ridhnath by Newazi Lal and disclaimed all connections with the properties. He, however, was not a party to the compromise between Ridhnath and Sona Kuer.

On behalf of the defendant it is urged that Dharam Lal having renounced his claim to the properties, he or his descendants the plaintiffs are estopped from claiming them. They are also estopped from disputing the adoptions, inasmuch as Dharam Lal admitted it in that case. The plaintiffs dispute this contention. They urge that Dharam Lal had no title to the properties at that time and his mother Nand Kuer being alive there was nothing which he could disclaim. The adoption was in spite of the admission set aside, and it was held that the adoption had not taken place. His admission was against truth and he or his descendants the plaintiffs are not estopped from relying upon the true fact that adoption had not taken place. He was not a party to the compromise entered into between Ridhnath and Sona Kuer. He was, therefore, not bound by the statement of Sona Kuer in that case.

Briefly the plaintiffs' contention is that the aforesaid litigations and the adoptions set up by Newazi Lal and Ridhnath did not affect the right of Dharam Lal to succeed to the properties after the death of their grandmother and mother. They also say that during their lifetime the possession of Newazi Lal or Ridhnath did not affect the right of the plaintiffs' ancestor which accrued only after the death of their mother and grandmother. This is true. But the possession of Ridhnath and his descendants would be adverse to

Dharam Lal and his descendants the plaintiffs after the death of the mother and the grandmother when the succession opened to the grandsons of Hemnath. The exact dates of the death of the widow and the daughter of Hemnath are not known. All that is known is that the widow of Hemnath was alive during the litigation between Tirloke Chand, herself and Newazi Lal which terminated with the judgment (Ex. H), dated the 12th November, 1872. Since then her name has not appeared in any litigation.

Nand Kuer, the daughter of Hemnath, is mentioned in the judgment (Ex. H-4), dated the 20th January, 1838, as having given her son Ridhnath in adoption to Newazi Lal. This is all that is known about her. She had at least three sons in 1805 when her father Hemnath died. One of the sons was married in 1804. She must have been much over 60 years in 1838 during the aforesaid litigation and, therefore, when the present suit was instituted in 1918 both she and her mother must have died when several twelve years had elapsed.

Now, Dharam Lal knew that Newazi Lal and Ridhnath set up their exclusive title to the properties based on their respective adoption. In fact, he admitted the adoption of the latter in the litigation with Sona Kuer which ended in 1839. He also knew that they were in possession of the properties by virtue of a claim adverse to him. Ridhnath and his descendants were solely recorded in the Government registers in respect of the properties in dispute; they have been dealing with the properties as their own and have been in possession thereof as sole owners; the documents are too numerous to mention.

Therefore, unless the plaintiffs prove that they and their ancestors were jointly in possession of the properties along with Ridhnath and his descendants their claim to a partition of the properties and to recover possession of their share therein is long barred by time. In fact, the plaintiffs or their ancestor could not succeed without having the adoptions of Newazi Lal and Ridhnath set aside and the suit for setting aside such adoptions is barred by limitation even if the said adoptions are invalid, *vide Mohesh Narain Munshi v. Taruck Nath Moitra* (18), *Jaga-*

(18) 20 C. 487; 20 I. A. 30; 6 Sar. P. C. J. 261; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330 (P. C.).

damba Chowdhraji v. Dakhina Mohan Roy Chaudhri (19) and *Vaithialinga Mudaliar v. Srirangath Anni* (20). In order to prove their joint possession the plaintiffs set up an *ekrarnama* or agreement (Ex. 1), dated the 14th November, 1811, entered into between the three brothers Newazi Lal, Dharam Lal and Ridhnath declaring their title to the properties and their joint possession and agreeing that Newazi Lal and after him Ridhnath would be in possession of the properties as *karta* or manager on behalf of Dharam Lal and his descendants.

The plaintiffs' case is that, as a matter of fact, neither Newazi Lal was adopted by Hemnath nor was Ridhnath adopted by Newazi Lal, but that the adoptions were set up in order to prevent the properties going to the brother and nephews of Hemnath. Accordingly, the plaintiffs say that Dharam Lal supported the adoption of Ridhnath and with a view to his not being permanently deprived of the inheritance the *ekrarnama* in question was executed. The plaintiffs' case, therefore, entirely rests upon the *ekrarnama*.

The Court below has held that the *ekrarnama* is not genuine and has given good reasons for this view. The Court says that the signature and seal of Newazi Lal on this document do not agree with his signature and seal on the admitted documents on the record; that the documents of 1811 were all written in the Persian language, but the *ekrarnama* is written in Urdu; that the description of the District as *Zila Gayaji* in the document is false, inasmuch as *Zila Gaya* did not come into existence until 1865 prior to which the District was called *Zila Bihar*. No good reason has been given for differing from the view taken by the Court below as regards this document.

Thus, the *ekrarnama* not having been proved, the plaintiffs have no other evidence to prove that they or their ancestors were in joint possession of the properties with Ridhnath or his descendants. Admittedly, for the last several generations the defendant and his ancestors have been in possession of the properties and their names have been (19) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705 (P. C.). (20) 92 Ind. Cas. 85; 48 M. 883; A. I. R. 1925 P. C. 249; L. R. 6 A. (P. C.) 169; 49 M. L. J. 769; 42 C. L. J. 563; 30 C. W. N. 313; 28 Bom. L. R. 173; (1926) M. W. N. 11; 52 I. A. 322 (P. C.).

successively recorded in public and private documents. The plaintiffs have failed to prove their possession over the properties in dispute and consequently their claim for partition or for the recovery of actual possession must fail.

As to their claim for receiving allowances from the estate, it is not denied that for the last several generations they received allowances. The plaintiffs say that they and their ancestors used to receive maintenance allowances from the estate on account of the arrangement arrived at between Dharam Lal and Riddhath the ancestors of the parties. The defendant admits that they used to receive money and help; but denies that this was done on account of any arrangement between the parties or as a matter of right but that the plaintiffs and their ancestors received money and help on ceremonial occasions in their family on account of their being servants of the estate.

The parties through the able assistance of their legal advisers and the suggestions made by the Court have arrived at a satisfactory solution by means of an amicable settlement. The defendant has allowed the plaintiffs to get property yielding a net income of Rs. 1,200 yearly after deducting Government revenue, cesses and collection charges. The terms of the settlement have been set forth in the sworn petition filed on behalf of the parties. The points involved in this case are, as this somewhat lengthy judgment will show, complicated. They were argued at great length and with ability at the Bar. We are satisfied upon a careful consideration of those points that the settlement arrived at is for the benefit of all the parties concerned and notably of the minor plaintiffs-appellants, and accordingly we accord our sanction to it as being for their benefit. We direct that the appeal be decreed in terms of the compromise petition which will be embodied in the decree of this Court as a part thereof.

An objection has been taken as to the item in the decree of the Court below regarding the Court-fee to be paid by the plaintiffs. This was the subject of issue No. 2 in the Court below. The Court below assessed *ad valorem* Court-fee upon the value of the properties in suit and accordingly directed the plaintiffs to pay

the deficiency. The plaintiffs appealed to this Court, but ultimately withdrew the appeal in view of the fact that they were permitted to sue *in forma pauperis*. They were also allowed to appeal as *paupers*. The litigation having terminated as indicated above, the question has been raised as to the correctness of the decision of the Court below regarding the Court-fee payable by the plaintiffs. It would seem that the view taken by the Court below is incorrect. The learned Subordinate Judge held that reading the plaint it was a suit pure and simple for partition, and the Court-fee originally paid by the plaintiffs was sufficient. Upon the objection, however, of the defendant and in consideration of the *ekrarnama* (Ex. 1) the Court changed its view and held that *ad valorem* Court-fee was leviable. In my opinion the Court-fee is leviable upon the construction of the plaint alone and consequently the plaintiffs were liable to pay Court-fee as in a partition suit. Accordingly, the plaintiffs, who were allowed to sue as *paupers*, are directed to pay the Court-fee calculated as above.

Bucknill, J.—I agree.

A. N. A.

Decree varied.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 144 OF 1925.

July 22, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Cargenven.

V. V. M. K. R. MUTHIAH CHETTIAR—
PETITIONER—APPELLANT

versus

DORAISWAMI PILLAI *alias* SUPPA
PILLAI—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 43—Sale by Official Receiver of insolvent's properties before vesting order—Sale, whether effective.

A sale by an Official Receiver of properties belonging to an insolvent, before the passing of a vesting order becomes effective when a vesting order is subsequently passed by virtue of s. 43 of the Transfer of Property Act. [p. 612, col. 2.]

Pinnamameni Basava Sankaram v. Garapati Narasimhulu (1), followed.]

Appeal against an order of the Court of the District Judge, Madura, in C. M. A. No. 28 of 1921, preferred against that of the Court of the District Munsif, Madura Town, in M. P. No. 222 of 1919,

in I. P. No. 29 of 1920, (I. P. No. 11 of 1911, Official Receiver's Court, Madura.)

Mr. C. A. Seshagiri Sastri, for the Appellant.

Mr. K. V. Srinivasa Iyer, for the Respondent.

JUDGMENT.—This appeal arises out of an application made by a petitioning creditor in I. P. No. 29 of 1920 to set aside the sale of the insolvent's properties held by the Official Receiver. One Solamalai Asari was adjudged an insolvent on the 12th July, 1911, and on 11th November, 1912, nine items of his properties were sold to one Virabhadra Konan. At the time of the sale the Court had not passed an order vesting the properties in the Official Receiver. Accordingly, the appellant put in an application, M. P. No. 222 of 1919, to declare the sale already held invalid and to order the Official Receiver to re-sell the properties after the Court had passed the vesting order. The learned District Munsif agreeing with the contention of the appellant declared that the sale was void and passed an order vesting the properties in the Official Receiver and directed him to sell the properties again. In appeal it was held that the application of the petitioning creditor was barred by limitation. But the High Court set aside this decision and remanded the case again to the District Court for disposal; the decision by the District Judge is the subject-matter of the appeal before us.

The learned District Judge has held that though the sale by the Official Receiver was void as no vesting order had been passed at that time, still when the District Munsif made the vesting order which he did in M. P. No. 222 of 1919 the provisions of s. 43 of the Transfer of Property Act became applicable and the sale which he held at first became valid. Section 43 says: "Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

It has been held by this Court in *Pinnamameni Basava Sankaran v. Garapati*

Narasimhulu (1) that in circumstances like the present the vesting order has retrospective effect and the sale held by the Official Receiver when he was not authorised to do so becomes effective as a result of the subsequent vesting order passed by the Court by virtue of s. 43 of the Transfer of Property Act; and this is, what has happened in this case. We, therefore, agree with the District Judge that the learned District Munsif had no power to order a re-sale as by the vesting order he passed he had cured the defect in the original sale.

It is argued that since the District Munsif has declared the original sale void by his order, s. 43 becomes inapplicable. We cannot agree. The sale was already void because the Official Receiver had no power to sell owing to the absence of the vesting order. We think that the subsequent vesting order makes the first sale valid.

We dismiss the appeal with costs.

V. N. V.

Appeal dismissed.

A. N. A.

(1) 99 Ind. Cas. 8; 50 M. 135; 51 M. L. J. 529; A. I. R. 1927, Mad. 1; 25 L. W. 128; 38 M. L. T. 92 (F. B.).

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 4, 1927.

Present :—Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Clyffe.

THE COMMISSIONER OF INCOME TAX, BOMBAY—APPELLANT

versus

THE WESTERN INDIA TURF CLUB LIMITED—RESPONDENTS.

Income Tax Act (XI of 1922), ss. 26, 55, 58—Finance Act (XIII of 1925), s. 7—Unregistered Association converted into limited Company—Rate of super-tax applicable on profits made prior to conversion.

Where an unregistered Association is converted into a limited Company, the rate of super-tax applicable to it, in respect of the profits of the Association for the year previous to that of the conversion, is the flat rate of one anna in the rupee appropriate to a Company. [p. 645, col. 1.]

In the matter of Begg Sutherland & Co., Ltd. (2), commented on.

Appeal from a judgment of the High Court, in Civil Reference No. 6 of 1926 Bombay, (Macleod, C. J., and Crump, J.), reported as 98 Ind. Cas. 226

dated the 9th April, 1926, delivered upon a reference made by the Commissioner of Income Tax, Bombay, under the Indian Income Tax Act, 1922, whereby the opinion of the Commissioner upon the questions raised by the case was overruled, and it was decided that the amount of an assessment to super-tax made upon the respondent Company was excessive.

FACTS.—The question arising in this appeal, shortly stated, is whether the rate of super-tax applicable to the income dealt with by the assessment was in the circumstances of the case the rate applicable to the income of an unincorporated Association of individuals, or the rate applicable to that of an incorporated Company.

The respondent Company is a Company incorporated under the Indian Companies Act, VII of 1913, as a Company limited by guarantee. The Company was registered on the 1st April, 1925, with the object of taking over, and did in fact take over, the assets, effects and liabilities of the Western India Turf Club.

The Western India Turf Club before the 1st April, 1925, was a members' club and unincorporated, and had been assessed to super-tax upon its total income as an unregistered firm or association of individuals not being a firm at the rates of duty prescribed for such a firm or Association by the enactment for the time being in force.

For the year of charge beginning the 1st April, 1925, the rate of duty prescribed for such a firm or Association was a scale rate rising from one to six annas in the rupee as provided by the Indian Finance Act, XIII of 1925, i. e., for the excess over the first fifty thousand one anna in the rupee, for the next fifty thousand $1\frac{1}{2}$ annas, for the next fifty thousand two annas and so on up to six annas.

By the said Act the rate of duty prescribed for an incorporated Company for the same year of charge was a flat rate of one anna in the rupee.

The Company after its incorporation on the 1st April, 1925, made for the purpose of super-tax for the year 1925-26 a return of the total income of the unincorporated club of the previous year 1924-25. Section 55 of the Indian Income Tax Act, 1922, prescribes that super-tax shall be charged, levied and paid 'in respect of the total in-

come of the previous years of (*inter alia*) any company, unregistered firm or other Association of individuals.

The Senior Income Tax Officer assessed the amount of the income of the previous year of the unincorporated club at Rs. 15,03,522, and no dispute arises in the case about the correctness of this figure.

Section 58 of the Indian Income Tax Act, 1922, made applicable to super-tax s. 26 of the same Act. The latter section is set out in the judgment of the Privy Council.

The Senior Income Tax Officer considered that the rate of super-tax applicable to the income in respect of which the assessment was to be made, namely, the income of the unincorporated club for the previous year, was the scale rate prescribed as abovestated for the income of an unregistered firm or unincorporated Association of individuals, and on this basis he determined, in pursuance of s. 23 of the said Act, the amount of super-tax to be Rs. 4,59,153.

The respondent Company, upon being served with a notice of demand, of that amount of super-tax, objected to the amount of the tax so assessed and appealed to the Assistant Commissioner under s. 30 of the said Act on the ground that the rate of tax applicable was not the scale rate which had been adopted, but the flat rate of one anna in the rupee applicable to the income of an incorporated Company. Upon the basis of this contention the super-tax payable would have been Rs. 90,845.

The Assistant Commissioner dismissed the appeal and confirmed the assessment under s. 31 of the said Act on the basis determined by the Senior Income Tax Officer.

The respondent Company thereupon, pursuant to s. 66 (2) of the said Act, required the Commissioner of Income Tax to refer to the High Court the questions of law arising out of the assessment, and the Commissioner accordingly drew up a statement of the case and submitted it with his own opinion thereon as required by the section to the High Court.

The questions for the opinion of the High Court are set out in the judgment of the learned Chief Justice; [see *In re the Indian Income Tax Act, 1922* (1)].

(1) 98 Ind. Cas. 226; 50 B. 648; 28 Bom. L. R. 1236; A. I. R. 1926 Bom. 539.

The opinion of the Commissioner upon the questions referred to the Court was as follows:—

"I am clearly of opinion that the profits made by the club in the year 1924-25 when it was not a limited Company have been rightly charged to super-tax at the scale rates of one to six annas and that the flat rate of one anna cannot be applied to these profits which are not those of a Company having been made prior to the conversion of the club into a limited concern. My answer to the questions is, therefore, as under:—

(i) The profits are liable to super-tax at the scale rates of one to six annas and not at the flat rate of one anna.

(ii) Section 26 is to be regarded as merely requiring the Company to take the place of the defunct firm for the purpose of the payment of the tax due from it on its profits earned prior to the conversion.

(iii) The club is rightly assessed to super-tax at the scale rates of one to six annas.

(iv) It cannot be assessed for the year in question at the flat rate prescribed for a company."

The reference made by the Commissioner of Income Tax came on for hearing in the High Court on the 9th April, 1926, before Sir Norman Macleod, C. J., and Mr. Justice Crump, and judgment was given on the same day overruling the opinion of the Commissioner of Income Tax and deciding in favour of the respondent Company the questions submitted in the case. The Court held that the rate of super-tax applicable was the flat rate of one anna in the rupee and awarded costs against the Commissioner.

Against this judgment and order the Commissioner of Income Tax preferred an appeal to His Majesty in Council upon leave granted by the High Court under s. 66-A, of the Income Tax Act (inserted by the Amending Act, XXIV of 1926)

The case in the Court below is reported as *In re the Indian Income Tax Act, 1922*, in 98 Ind. Cas. 226.

Messrs. Lowndes, K. C., and Reginald Hills, for the Appellant.

Messrs. A. M. Latter, K. C., and Raymond W. Needham, for the Respondents.

JUDGMENT.

Lord Chancellor.—The question raised by this appeal is a short one. The Western India Turf Club was originally an unregistered Association; but as from the 1st April, 1925, it was converted into a Company by being registered under the Indian Companies Act (VII of 1913) as a Company limited by guarantee, the object of the Company being to take over the assets, effects and liabilities of the Western India Turf Club. The question raised in these proceedings is, at what rate that Company should pay super-tax for the tax year commencing on the 1st April, 1925.

The enactment chiefly in point is s. 55 of the Indian Income Tax Act, XI of 1922. That section is in these terms:—

"In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, unregistered firm, Hindu undivided family or Company, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature."

On that section two questions may arise, which it is necessary to keep distinct.

First, the question may arise on what amount of income the tax-payer is to pay his super-tax. On that point the section provides that he is to pay super-tax in respect of the total income of the previous year. Strictly speaking, this company had no total income in the previous year, for it did not then exist; but that difficulty is removed by s. 26 of the same Act, which provides that—

"Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment."

It should be added that s. 26 is applied to super-tax by s. 58. The effect of those sections is that, for the purpose of assessment to super-tax, you must take the total income, not of the respondent Company itself, but of the predecessor-in-title of

the Company; and the income in this case has been assessed on that basis.

The second question which arises is, at what rate is the tax-payer to pay super-tax. With regard to that point, s. 55 provides that the tax-payer is to pay "at the rate or rates laid down for that year"—that is, for the year of assessment—"by Act of the Indian Legislature." In other words, for the purpose of ascertaining the rate of the tax you are referred to a Statute to be afterwards passed. That Statute was afterwards, passed, and it is Act XIII of 1925. It provides by s. 7, sub-s. (2) that—

"The rates of super-tax for the year beginning on the 1st day of April, 1925, shall, for the purposes of s. 55 of the Indian Income Tax Act, 1922, be those specified in Part II of the Third Schedule."

When one turns to Part II of the Third Schedule, one finds these rates specified, namely, "In respect of the excess over Rs. 50,000 of the total income (1) in the case of every Company, one anna in the rupee." Then follow other rates relating to corporations, individuals or Associations not being Companies, and some of those rates are calculated on a rising scale. What is the effect of that? It can only be that this particular tax-payer, being a Company falling within the first words of Part II of Sch. III, must pay at the rate there specified, namely, at the flat rate of one anna in the rupee.

The argument which has been used in favour of the appeal seems to involve the fallacy that liability to tax attached to the income in the previous year. That is not so. No liability to tax attached to the income of this Company until the passing of the Act of 1925, and it was then to be taxed at the rate appropriate to a Company.

With regard to the Allahabad case which has been cited [*In the matter of Begg Sutherland & Co. Ltd.*, (2)], it is sufficient to say that, if the question there decided should again arise, that decision will require further consideration.

For the reasons which they have given their Lordships are of opinion that this appeal fails; and they will humbly advise

His Majesty that it be dismissed with costs.

K. J. E.

Appeal dismissed.

Solicitor for the Appellant:—Solicitor India Office.

Solicitor for the Respondent:—Messrs. E. F. Turner & Sons.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 37 OF 1927.

November 14, 1927.

Present:—Mr. Justice Kulwant Sahay and Mr. Justice Macpherson.

ANANDILAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mahanth JAGARNATH DAS—

PLAINTIFF AND DURGA NAND MISSEER

AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious endowment—Mutt—Mahant—Agreement to transfer property—Absence of necessity—Agreement, whether 'lawful'—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.

A *mahanth* has no absolute right over the properties of the *sanghat*. He is a mere trustee and he can transfer the properties belonging to the *mutt* only for legal and justifying necessities of the *mutt*.

An agreement by a *mahanth* to transfer the property of the *mutt*, even if it is proved to be true, is not a lawful agreement which can be enforced under the provisions of O. XXIII, r. 3 of the Civil Procedure Code where there is no necessity for such transfer.

Appeal from an order of the Subordinate Judge, Gaya, dated the 28th January, 1927.

Mr. Brij Kishore Prasad, for the Appellants.

Messrs. Kailaspati and C. P. Sinha for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendants-appellants in the lower Appellate Court against an order of the Subordinate Judge refusing to record a compromise under O. XXIII, r. 3 of the Code of Civil Procedure.

The appellants purchased certain lands belonging to a *sanghat*. The plaintiff-respondent, who claims to be the *mahanth* of the *sanghat*, brought a suit for setting aside the conveyance on the ground that the defendant No. 6 who executed the conveyance was a mere *pujari* and had no

(2) 88 Ind. Cas. 239; 47 A. 715; L. R. 6 A. 333 Civ.; 23 A. L. J. 685; A. I. R. 1925 All. 535.

right to execute it. The suit succeeded in the trial Court and the defendants have filed an appeal which is pending before the Subordinate Judge. They filed an application before the Subordinate Judge stating that there had been a compromise between the *mahanth* plaintiff and themselves whereby the *mahanth* agreed to transfer the land in dispute to the appellants on receipt of a sum of Rs. 700. The *mahanth* denies the correctness of this allegation and says that he had never compromised the suit.

The learned Subordinate Judge has held that the agreement, even if it has been arrived at, between the parties is not a lawful agreement which can be recorded in law.

In my opinion he is right. The *mahanth* has no absolute right over the properties of the *sanghat* and cannot dispose of them. He is a mere trustee and he can transfer the properties belonging to the *mutt* only for legal and justifying necessities of the *mutt*. He says that there is no necessity to transfer this property and the agreement alleged by the appellants, even if correct, is not a lawful agreement which can be enforced. The order of the learned Subordinate Judge is, therefore, correct.

The result is that the appeal is dismissed with costs. The original appeal will now proceed.

Macpherson, J.—I agree.

B. K. P.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 517 OF 1926.

October 26, 1927.

Present :—Mr. Justice Devadoss.

THE TALUQ BOARD, DEVAKOTTAI—

DEFENDANT—PETITIONER

versus

V. S. P. CHOCKALINGAM CHETTI—

PLAINTIFF—RESPONDENT.

Madras Local Boards Act (XIV of 1920), s. 93—Profession tax—Chetti agent receiving fixed salary, whether liable to pay profession tax.

A Chetti agent receiving a salary and not carrying on any other business holds a salaried appointment and is not liable to pay profession tax under s. 93 of the Madras Local Boards Act.

Petition, under s. 25 of Act IX of 1887, for revision of the decree of the Court of the District Munsif, Devakottai, in S. C. S. No. 555 of 1925.

Mr. Rangaswami Iyengar, for the Petitioner.

Mr. A. C. Sampath Iyengar, for the Respondent.

JUDGMENT.—This is an application to revise the decree of the District Munsif of Devakottai decreeing the suit for a return of the amount collected as profession tax from plaintiff by the Taluq Board of Devakottai.

The contention of Mr. Rangaswami Iyengar for the petitioner is that the respondent resides within the limits and, therefore, is liable under the Act. Under s. 93 of the Local Boards Act persons who hold any appointment public or private or are in receipt of any pension or income from investments are exempted from paying profession tax. This proviso was evidently overlooked by the Taluq Board when it assessed the petitioner. The petitioner is only a chetti's agent receiving a salary and is not carrying on any other profession within the local limits of the Taluq Board of Devakottai. He is a resident of Palni and Mr. Sampath Ayyangar says that he has paid profession tax in Palni as he is liable under the District Municipalities Act to pay profession tax even though he is in receipt of only a salary. Whether he paid profession tax to the Palni Municipality or not is besides the point. The only question is whether the plaintiff comes within the proviso to s. 93. As he is holding only a salaried appointment he is not liable to profession tax under s. 93 of the Local Boards Act.

I dismiss the civil revision petition with costs.

V. N. V.

Petition dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 15, 1927.

Present :—Viscount Sumner, Lord Atkinson, Sir John Wallis and Sir Lancelot Sanderson.

Kumar BAIJNATH PRASAD SINGH

PLAINTIFF—APPELLANT

versus

KEDAR NATH GOENKA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Impartible estate—Alienability—Concurrent findings of fact—Non-interference on appeal—Practice of Privy Council.

In the absence of proof of custom restricting alienation, an impartible estate is alienable.
Protap Chandra Deo v. Jagadish Chandra Deo (1), followed.

Concurrent findings of the Courts in India on questions of fact (as, for instance, fraud and misrepresentation) will not be disturbed by the Judicial Committee on appeal.

Appeal from a judgment of the High Court, Patna (Dawson Miller, C. J., and Foster, J.), dated the 6th March, 1925, affirming that of the Additional Subordinate Judge, Monghyr, dated the 5th September, 1921.

FACTS—The suit out of which this appeal arises was instituted by the appellant before the Subordinate Judge of Monghyr to set aside a sale of an impartible estate known as the Khaira Raj which had been in the possession of the appellant's ancestors for several centuries and which was sold by the last male holder Kumar Guru Prasad Singh, the brother of the appellant, by a registered conveyance, dated the 15th of January, 1919, to Rai Bahadur Baijnath Goenka and others who together with the vendor were impleaded as defendants in the suit.

The sale was challenged on two main grounds, (1) that the Khaira Raj, which is an impartible estate governed by the rule of lineal primogeniture, was by custom inalienable, and (2) that Kumar Guru Prasad Singh was of dissolute habits and addicted to drink and drugs by reason whereof his mental capacity was impaired and he was incapable of managing his own affairs and that the purchasers taking advantage of his helpless condition and incapacity induced him by fraud and misrepresentation to execute the conveyance in question.

After recording evidence, both oral and documentary, the learned Subordinate Judge delivered his judgment on the 5th September, 1921. He held that the appellant had not established any custom prohibiting an alienation by the holder of the Raj. He also held that the charges of fraud and misrepresentation had not been proved. In the result the learned Subordinate Judge made a decree dismissing the suit.

Against his decree the appellant appealed to the High Court of Judicature at Patna, and on the 6th of March, 1925, that Court made a decree dismissing the appeal. The learned Judges were of opinion that the holder of the Khaira

Raj for the time being was the sole proprietor of it, and, therefore, had complete powers of alienation, that a custom preventing alienation had not been proved, and that the transaction of sale was valid and binding.

From the said decree of the High Court the appellant preferred an appeal to His Majesty in Council.

Their Lordships dismissed the appeal on the short ground that the question involved was covered by their recent pronouncement in *Protap Chandra Deo v. Jagdish Chandra Deo* (1). Their judgment (delivered through Viscount Sumner) is as follows:—

Messrs. De Gruyther, K. C., and Raikes, for the Appellant.

Messrs. Lowndes, K. C., and Dube, for the Respondents.

JUDGMENT.

Viscount Sumner.—Their Lordships are indebted to Counsel for having at the outset explained the difficulties that lie in the way of the appellant in bringing this appeal to a conclusion satisfactory to himself. In their Lordships' opinion the first part of the case is completely covered by the recent decision of their Lordships' Board in the case of *Protap Chandra Deo v. Jagadish Chandra Deo* (1) and, as to the second part, it relates to concurrent findings of the Courts in India on questions of fact, and their Lordships are, therefore, unable to entertain it.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

K. J. R.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. Watkins & Hunter.

Solicitors for the Respondents:—Mr. H. S. L. Polak.

(1) 102 Ind. Cas. 599; 54 I. A. 289; 29 Bom. L. R. 1136; 46 O. L. J. 136; 53 M. L. J. 30; A. I. R. 1927 P. C. 159; 25 A. L. J. 628; (1927) M. W. N. 513; 4 O. W. N. 650; 31 O. W. N. 943; 39 M. L. T. 1; 8 P. L. T. 623.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL NO.

87 OF 1925.

July 29, 1927.

Present.—Mr. Justice Madhavan Nair

and Mr. Justice Curgenvin.

KASIVAJJALA RAMASAMI AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus.

BODDU VEERANNA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Application by decree-holder for extension of time to file encumbrance certificate, whether step-in-aid of execution.

An application to amount to a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I of the Limitation Act should be one asking the Court to take some step in furtherance of the execution of the decree. [p. 649, col. 1.]

An application by a decree-holder for extension of time to file an encumbrance certificate is not a step-in-aid of execution within the meaning of the Article. [*ibid.*]

Kuppuswami Chettiar v. Rajagopala Iyer (1) and *Kasifi Mohammad Hamidudin v. Mohammad Ghouse Sahib* (2) relied on.

Abdul Kadir Rowther v. Krishna Malamal Nair (4) and *Ravur Munisami Naidu v. Pandala Muthial Naidu* (8), not followed.

Kunhi Mannan v. Seshagiri Bhaktan (5), distinguished.

Appeal against an order of the Court of the Subordinate Judge, Kistna at Ellore, dated the 6th of February, 1925, in A. S. No. 224 of 1924, preferred against that of the Court of the District Munsif, Kuvvur, dated the 19th of August, 1924, in E. P. Nos. 405 of 1924, (O. S. No. 854 of 1910 on the file of the Court of the District Munsif Tanuku).

Mr. P. Somasundaram, for the Appellants.

Mr. P. Venkataramana Rao, for the Respondents.

JUDGMENT.—The question for decision in this case is whether an application by a decree-holder for extension of time to file an encumbrance certificate cannot be said to be a step-in-aid of execution within the meaning of Art. 182, cl. (5) of the Limitation Act. In *Kuppuswami Chettiar v. Rajagopala Iyer* (1) it was decided that a statement by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction is not a step-in-aid of execution. Applying the principle of that decision we must hold that the present application does not amount to a step-in-aid of execution as "it does

not ask the Court to take any step-in-aid of execution." The decision in *Kasifi Mohammad Hamidudin v. Mohammad Ghouse Sahib* (2) is an express decision on the question before us. There it was decided that an application like the present one cannot be said to be a step-in-aid of execution. In that case, reliance was placed upon the decision in *Kuppuswami Chettiar v. Rajagopala Iyer* (1) and also on the decision in *Krishna Pattar v. Seetharama Pattar* (3) which following *Kuppuswami Chettiar v. Rajagopala Iyer* (1) again, held that the filing of a statement by a decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution. In *Kasifi Mohammad Hamidudin v. Mohammad Ghouse Sahib* (2) all the cases which have been now cited before us have been noticed.

Two decisions were specially relied upon by the appellant, namely, *Abdul Kadir Rowther v. Krishna Malamal Nair* (4) and *Kunhi Mannan v. Seshagiri Bhaktan* (5). No doubt the decision in *Abdul Kadir Rowther v. Krishna Malamal Nair* (4) to the effect that an application to adjourn the case for the production of evidence amounts to a step-in-aid of execution does support the appellant; but this case was subsequently dissented from in *Masilamani Mudaliar v. Sethuswami Aiyar* (6) by Ayling, J. The decision in *Kunhi Mannan v. Seshagiri Bhaktan* (5) in view of the special facts of that case does not support the appellants' arguments. There, it was found necessary that an order should be obtained from the Court for the purpose of proceeding with the execution of the decree and when the petitioner asked the Court to issue such an order it was held that the application containing that request amounted to a step-in-aid of execution. This case has been explained in the decision in *Krishna Pattar v. Seetharama Pattar* (3).

The decision in *Kuppuswami Chettiar v. Rajagopala Iyer* (1) has been followed not only in the two Law Weekly Cases already referred to but also in *Balaguru-*

(2) 98 Ind. Cas. 163; 24 L. W. 498; 51 M. L. J. 489; A. I. R. 1926 Mad. 1197.

(3) 98 Ind. Cas. 156; 24 L. W. 488; 51 M. L. J. 489; A. I. R. 1926 Mad. 1178; 50 M. 49.

(4) 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305.

(5) 5 M. 141; 2 Ind. Dec. (N. S.) 99.

(6) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115.

(1) 70 Ind. Cas. 324; 45 M. 466; (1922) M. W. N. 113; 42 M. L. J. 303; 15 L. W. 348; A. I. R. 1922 Mad. 79; 32 M. L. T. 27.

swami Naicken v. Guruswami Naicken (7) It would thus appear that our Court has fairly consistently held that an application to amount to a step-in-aid of execution within the meaning of Art. 182, cl (5) should be one asking the Court to take some step in furtherance of the execution of the decree. The only decision which appears to us to hold a contrary view is the one in *Abdul Kadir Rowther v. Krishna Malamal Nair* (4). *Ravur Munusami Naidu v. Pandala Muthial Naidu* (8) simply follows this decision. As we have already pointed out, *Abdul Kadir Rowther v. Krishna Malamal Nair* (4) has been dissented from in *Masilamani Mudaliar v. Sethuswami Aiyar* (6). The trend of the decisions of our Court is in support of the view held in *Kuppuswami Chettiar v. Rajagopala Iyer* (1). We think that decision so far as it relates to the point argued before us lays down the correct principle.

Lastly, it was brought to our notice that the decision in *Rajendra Lal Saha v. Abdul Karim* (9) is in favour of the appellant, but a perusal of that judgment makes it clear that no clear principle is enunciated in it. In these circumstances we hold, applying *Kuppuswami Chettiar v. Rajagopala Iyer* (1) that the decision of the learned Judge of the Court below that an application for extension of time to file an encumbrance certificate is not a step-in-aid of execution, is right and that the appellant's application is barred by limitation. This appeal is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

(7) 87 Ind. Cas. 989; 48 M. L. J. 506; A. I. R. 1925 Mad. 703.

(8) 33 Ind. Cas. 79.

(9) 76 Ind. Cas. 455; 27 C. W. N. 505; 37 C. L. J. 292; A. I. R. 1923 Cal. 572.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1324 OF 1924.

May 2, 1927.

Present:—Mr. Justice Devadoss and Mr. Justice Jackson.

PUPPALA PICHAYYA—DEFENDANT

—APPELLANT

versus

MITTAPALLI SARVAYYA AND OTHERS

PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Re-union between per-

sons not parties to division, legality of—Division in respect of some properties—Jointness in status in respect of undivided properties, whether possible.

Under the Hindu Law, a re-union in estate can take place only between persons who were parties to the original division. [p. 650, col. 1.]

Balabux v. Rukhmabai (1), *Basanta Kumar Singha v. Jogendra Nath Singha* (2), *Akshay Chandra Bhattacharya v. Hari Das Goswami* (3) and *Vishavanath Gangadhar v. Krishnaji Ganesh* (4), relied on.

Quere.—Whether there could be a division of some property among the members of a joint Hindu family and yet they could remain joint with regard to the other properties not divided between them. [p. 651, col. 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Bezwada, in A. S. No. 23 of 1923, dated the 16th April, 1924, preferred against that of the Court of the District Munsif, Nandigama, in O. S. No. 238 of 1921.

Mr. G. Lakshmanna, for the Appellant.

Mr. P. Satyanarayana Rao, for the Respondents.

JUDGMENT.—The only point for consideration in this second appeal is whether the 1st plaintiff, Sarvayya is entitled to the estate of Subbayya by right of survivorship. There were three brothers, Mangayya, Subbayya and Seshayya. They divided their properties in 1894. Seshayya was then a minor. He attained majority in 1896 and died in 1897. His widow adopted the 1st plaintiff, the only son of Subbayya. Subbayya is now dead. Sarvayya, the 1st plaintiff claims the estate of Subbayya, by right of survivorship. He put forward three contentions in the District Munsif's Court:—

1. That he was a *dwamushyayana* son of both Subbayya and Seshayya.

2. That at the partition of 1894, Mangayya separated from the family and Subbayya and Seshayya continued to be members of a joint Hindu family and,

3. That he and Subbayya entered into an agreement whereby they both became members of a joint Hindu family. All the three points were found against the 1st plaintiff by the District Munsif. On appeal the Sub-Judge agreed with the District Munsif in finding the first and second points against the 1st plaintiff but he held that he had re united with Subbayya and therefore, he was entitled to succeed to Subbayya's estate. The 3rd defendant has preferred this second appeal.

It is contended by Mr. Lakshmanna for the appellant that there could be no

re-union between persons who were not parties to a division. In other words a reunion can only be among persons who were once joint and who had become divided. In *Balabux v. Rukhmabai* (1) their Lordships of the Privy Council lay down the principle in the following terms:—"A re-union in estate properly so called can only take place between persons who were parties to the original partition. This appears to be the meaning placed on the well-known text of *Vrihaspati* in *Mitakshara*, Chap. II, s. 9:—"He who being once separated dwells again through affection with his father, brother, or paternal uncle is termed re-united." The text of *Yagnyavalkya* is "A re-united brother shall keep the share of his reunited co-heir who has deceased or shall deliver it to a son subsequently born." (See *Setlur's Hindu Law Books on Inheritance* page 57). *Vignaneswara* in commenting upon this text observes: "The effects which had been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener."

"Re-union cannot take place with any person whoever it be but only with a father, a brother, or a paternal uncle, as *Vrihaspati* declares 'He who being once separated lives again through affection with his father, brother or paternal uncle is said to be re-united.'" The literal interpretation of the text can lead to no other conclusion than that a person in order to become re-united with another must have divided the family property with the other. We are not concerned in this case with the question whether the persons enumerated by *Vrihaspati*, the father, brother or paternal uncle, exhaust the list of persons who could become re-united. The only question in this case is whether a person who had not divided the inheritance with a father, brother, or uncle can become re-united with any of them. It is admitted that the plaintiff was born only in 1896 and that he was not a party to the partition in 1894. In *Basanta Kumar Singha v. Jogendra Nath Singha* (2) it was assumed that a reunion could only be among persons who had become divided.

In *Akshoy Chandra Ehattacharya v. Hari Das Goswami* (3) Mr. Justice Mitra

observes "Re-union, the Sanskrit word being *samsrista*, implies a state of union or jointness, a partition and a subsequent state of jointness amongst co-parceners by mutual consent and through affection." The word used in the text is "*samsrista*".

In *Vishwanath Gangadhar v. Krishnaji Ganes* (4) it was held that "a reunion must be made by the parties or some of them who made the separation." It may be said that this decision was under *Mayukha Law* and is, therefore, no authority on a point of the *Mitakshara Law*. Chief Justice Couch after an examination of the *Mitakshara*, the *Dayabaga* and the *Mayukha* systems observed at page 75* "it appears to us that the meaning of the passage from *Vrihaspati* which is the foundation of the law is, that the reunion must be made by the parties, or some of them, who made the separation. If any of their descendants think fit to re-unite, they may do so; but such a union is not a reunion in the sense of the *Hindu Law*, and does not affect the inheritance."

The observation in *Lakshmibai v. Ganpat Moroba* (5) may be considered *obiter* as the evidence did not make out a reunion and the same remark applies to the observation in *Nand Krishore v. Bohra Net Ram* (6). No case contra has been brought to our notice by the respondent and the decision in *Balabux v. Rukhmabai* (1) governs this case. We find this point for the appellant.

Mr. Varadachari who appears for the 1st respondent wants to support the decision of the Sub-Judge on the ground that there was no division in status when some of the moveables were divided in 1894 and the brothers remained joint as regards the immoveable properties of the family and that under the law it is open to the members of a joint Hindu family to divide some of the family properties and remain joint with regard to the rest. Exhibit UU is the list prepared in 1894 at the time of the division of the property. Mr. Lakshmana read and translated to us a considerable portion of UU and we are satisfied that under UU all the three brothers Mangayya, Subbayya and Seshayya become divided. The statements in QQ and other documents by Mangayya and Subbayya that they were

(1) 30 C. 725 at p. 734; 7 C. W. N. 642; 5 Bom. L. R. 469; 30 I. A. 130; 8 Sar. P. C. J. 470 (P. O).
(2) 33 C. 371; 3 C. L. J. 98; 10 C. W. N. 236.
(3) 35 C. 721; 12 C. W. N. 511.

(4) 3 B. H. C. R. A. C. J. 69.

(5) 4 B. H. C. R. 150 at p. 165.

(6) 14 Ind. Cas. 237.

*Page of 3 B. H. C. R.—[Ed.]

members of a joint Hindu family were made in order to keep out the widow of Seshayya who would otherwise inherit his share. It was with that view that Seshayya's widow was made to adopt the only son of Subbayya and she was given some property for her maintenance and the rest of the property remained with Subbayya. Exhibit Y dated 25th June, 1898, does not help the 1st plaintiff. It is clear from Ex. UU that the immoveable properties were not divided by metes and bounds as the family was carrying on trade and it was necessary for the purpose of the trade that the immoveable properties should not be divided by metes and bounds. As we concur in the finding of the two Courts that there was a division in status in 1894 it is unnecessary to consider the cases relied upon by Mr. Varadachariar in support of his contention that there could be a division of some property among members of a joint Hindu family and yet they could remain joint with regard to the other properties not divided by them; such as *Gavrishankar Parabhuram v. Atmaram Rajaram* (7), *Raja Yarlagadda Mallikarjuna Prasad Nayudu v. Raja Yarlagadda Durga Prasada Nayudu* (8), *Mallikarjuna Prasada Naidu v. Durga Prasada Naidu* (9), *Muthusami Mudaliar v. Nallakulantha Mudaliar* (10), *Appovier v. Rama Subba Aiyar* (11), *Ajodhya Pershad v. Mahadeo Pershad* (12). We may remark in passing that some of these cases may require re-consideration in view of the present state of the law that an unambiguous unilateral declaration of intention of one co-parcener communicated to the other co-parceners is sufficient to create a divided status between him and the other co-parceners.

In the result we allow the second appeal, set aside the judgment and decree of the Sub Judge and restore that of the District Judge with costs here and in the Court below.

V. N. V.

Appeal allowed.

- (7) 18 B. 611; 9 Ind. Dec. (N. S.) 916.
 (8) 24 M. 147; 27 I. A. 151; 5 O. W. N. 74; 10 M. L. J. 294; 2 Bom. L. R. 945; 7 Sar. P. O. J. 761 (P. C.).
 (9) 17 M. 362; 6 Ind. Dec. (N. S.) 251.
 (10) 18 M. 418; 6 Ind. Dec. (N. S.) 640.
 (11) 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. C. J. 657; 2 Sar. P. O. J. 218; 20 E. R. 30.
 (12) 3 Ind. Cas. 9; 14 C. W. N. 221.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 523 OF 1924.

May 5, 1927.

Present :—Mr. Justice Devadoss and Mr. Justice Jackson.

V. V. RAJAHBHADDHAR MUDALIAR—
 PLAINTIFF—APPELLANT

versus

THIRUVENGADA MUDALIAR AND
 OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 53—
 Alienation partly without consideration, validity of—
 Setting aside alienation—Charge for consideration
 paid, whether can be given.*

When the question is whether an alienation was for the purpose of defeating or delaying the creditors, if it is proved satisfactorily that only a small portion of the consideration recited in the document did really pass, it is open to the Court to come to the conclusion that the transaction was intended to defeat or delay creditors. In such a case the proper order of the Court should be to set aside the transaction as a whole, because the transaction which is intended to defeat or delay creditors cannot be good in part and bad in part, and in so setting aside the alienation, the Court cannot allow a charge in favour of the alienee even to the extent of the consideration which actually passed.

When a person buys property or gets a mortgage of property for a consideration which is far short of that mentioned in the document, it cannot be said that he is a *bona fide* alienee or mortgagee.

Second appeal against a decree of the District Court, North Arcot, in A. S. No. 88 of 1923, preferred against that of the Court of the Subordinate Judge, Vellore, in O. S. No. 76 of 1921.

Mr. P. S. Narayanaswami Iyer, for the Appellants.

Mr. Viswanatha Aiyer, for the Respondents.

JUDGMENT.—The only point in the second appeal is whether the 1st defendant is entitled to a charge in respect of the amount of consideration for Ex. IV which was found to have passed. Exhibit IV was executed for a nominal consideration of Rs. 2,660 and the consideration found to have passed was only Rs. 1,044-15-0. More than Rs. 1,000 was not paid by the 1st defendant towards the discharge of certain debts due from his mortgagor. The District Judge has definitely found that Ex. IV was executed without consideration in part and presumably with intent to defeat or delay the creditors of defendants Nos. 2 and 3, viz., the plaintiffs. But he allows a charge in favour of the 1st defendant in respect of the consideration which he finds to have been paid. When the finding clearly is that the document was executed with

intent to defeat or delay the creditors, it cannot be said that the District Judge found the intent only on the part of the alienors and not on the part of the alienee. Mr. Viswanatha Iyer strongly urges that so far as his client was concerned there is no finding that he was a party to the conspiracy to cheat the creditors of the mortgagor. But the finding is in general terms and when it is found that a good portion of the consideration for the document was not paid by the 1st defendant he cannot be said in any sense to be a *bona fide* alienee for full consideration. When a person buys property or gets a mortgage of property for a consideration which is far short of that mentioned in the document, it cannot be said that he is a *bona fide* alienee or mortgagee. No doubt where there are no creditors to be defeated or delayed, the mortgagor or alienor could insist upon payment of the unpaid portion of the consideration. Where the question is whether the alienation was for the purpose of defeating or delaying the creditors, if it is proved satisfactorily that only a portion of the consideration recited in the document did really pass, it is open to the Court to come to the conclusion that the transaction was intended to defeat or delay creditors. The finding being clear on this point, it is not open to the 1st defendant to contend that he is a *bona fide* lender to the extent of the consideration found to have passed. In such a case the proper order of the Court should be to set aside the transaction as a whole, because the transaction which is intended to defeat or delay creditors cannot be good in part and bad in part. We may in this connection refer to *Punyam Viswanatha Reddi v. Galiraja Venkata Reddi* (1) to which one of us was a party.

The second appeal is allowed and the plaintiff's suit is decreed with costs throughout.

V. N. V.

A. N. A.

Appeal allowed.

(1) 99 Ind. Cas. 709; 25 L. W. 223; (1927) M. W. N. 1, A. I. R. 1927 Mad. 278.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1065 OF 1923.

April 18, 1927.

Present :—Mr. Justice Odgers and Mr. Justice Devadoss.

KULANDAI VELU PILLAI—PLAINTIFF—
APPELLANT

versus

VENKATARAYAR AND ANOTHER—

DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Deed—Document executed nominally, whether can be relied on as gift.

The executant of a document executed with one intention cannot by change of mind utilise that document for a transaction of a wholly different character. [p. 653, col. 1.]

When a document is executed nominally without any intention of conveying title in favour of any person, it cannot afterwards be used for the purpose of conveying title merely because one of them changes his mind and wants the document to be operative as a real transfer. [*ibid.*]

Second appeal against the decree of the Court of the First Additional Sub-Judge, Madura, in A. S. No. 8 of 1922 (A. S. No. 247 of 1921, District Court, Madura), preferred against that of the Court of the District Munsif, Tirumangalam, in O. S. No. 517 of 1920. (O. S. No. 987 of 1919, Periakulam, District Munsif's Court).

Mr. V. S. Vaz, for the Appellant.

Mr. A. S. Srinivasa Ayyar, for the Respondents.

JUDGMENT.

Odgers, J.—This was a suit brought by one Kulandavelu Pillai the adopted son of Muthukumara Pillai for the recovery of possession of the suit lands which as he alleged had been trespassed upon by the 2nd defendant in October, 1914. The appeal really hinges on the effect, if any, to be given to Ex. I. Exhibit I purports to be a sale deed, dated 8th June, 1899, executed by Muthukumara Pillai in favour of his son-in-law Ramaswami Pillai, the 1st defendant, and as alleged by the plaintiff was a *benami* sale-deed without consideration. It was executed for certain purpose set out in para. 5 of the plaint. The defence of the 1st defendant was that the sale-deed, Ex. I, was a perfectly valid deed and a proper price had been paid for the lands in question. The finding of the District Munsif is that no consideration was paid by the 1st defendant for Ex. I and that when it was executed it was intended only to be a nominal transaction. That being so, the learned District Munsif went on to find that in spite of these findings Ex. I could be used long afterwards, name-

ly, in 1910 to confer a good title on the 1st defendant, his son-in-law by way of gift or rather to give effect to a document which was originally a nominal transaction but which had ceased to be such and which had been given effect to either before or about the time of the adoption of the plaintiff. There is some evidence that the father-in-law Muthukumara Pillai did intend to benefit his son-in-law and his daughter in some way, for instance, he effected a change of *patta* with the Revenue Authorities and gave them possession of the lands. Exhibit I was executed, as found, with the intention of being a purely nominal transaction, that is to say, of having no legal effect. Can it then be said that the executant of the nominal transaction, by a change of intention can afterwards use it for a transaction which would be valid in law? In my opinion, there are several very obvious objections to the re-employment, if one may so call it, of a document of this description. There are evasions of the stamp law, the Registration law and the fiction that you are to regard the recitals in Ex. I as non-existent and as conferring what is practically a gift on the person to whom Ex. I is handed over. We have been shown no authority by which the executant of a document executed with one intention can by change of mind utilise that document for a transaction of a wholly different character. There is another very short objection to this second appeal and that is this, that this case was never set up in the pleadings or the issues but has apparently been found by both the lower Courts from motives of sympathy with the daughter and son-in-law of Muthukumara Pillai. It seems to me that such is out of place in a second appeal and we must strictly confine ourselves to the question of law that has been raised and for which, as I say, no authority has been cited. A case has been quoted by Mr. Vaz the learned Counsel for the appellant from *Bai Motivahoo v. Purshotam Dayal* (1) an expression of opinion of Sir Lawrence Jenkins on page 315* which is perhaps as near as one will get to anything in the reports. The cases on gift or long possession amounting to evidence of gift quoted by the learned Vakil for the respondents do not seem to me to have any bearing on the present case where the evidence given on the perfectly straightforward and simple case set up in

(1) 29 B. 306; 6 Bom. L. R. 975.

*Page of 29 B.—[Ed.]

the pleadings and the issues has been misdirected by both the lower Courts to this finding of a re-utilisation of Ex. I for giving it the effect of a gift deed. For these reasons, I think the second appeal must be allowed with costs throughout.

Devadoss, J.—I agree. I only wish to add that when a document is executed without the intention of conveying title by one person in favour of another, it cannot afterwards be used for the purpose of conveying title merely because one of them changes his mind and wants the document to be operative. When a document is once executed as a nominal document, that is to say, without intending to convey any title, it cannot afterwards be used for the purpose of conveying title.

V. N. V.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 227 OF 1924.

May 18, 1927.

Present :—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

JAGDIP SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

FIRANGI SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Stamp Act (II of 1899), s. 36—Document admitted after objection—Admissibility of document, whether can be questioned subsequently.

Once a document has been admitted in evidence the admission of such a document cannot be questioned whether the document was admitted with objection or without objection. The operation of s. 36 of the Stamp Act is not confined to cases where a document has been admitted without objection. [p. 654, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna, dated the 27th August, 1924.

Mr. N. C. Sinha (with him Mr. N. C. Ghosh), for the Appellants.

Mr. S. M. Mullick (with him Messrs. Muhammad Hasan Jan and S. Deyal), for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—The suit out of which the present appeal arises was instituted by the plaintiffs-appellants for partition of joint family properties, their share being 8 annas.

The defence of the defendants was that there had been a previous partition of all the joint family properties in *Assin*, 1329 and a fresh partition could not be effected. The learned Subordinate Judge has given

effect to the contention of the defendants and has dismissed the suit.

The learned Advocate for the appellants does not very properly contest the findings of the Subordinate Judge on the merits: in fact the evidence seems to be overwhelming in support of the findings of fact arrived at by the learned Subordinate Judge. The learned Advocate has, however, taken an objection to the effect that Ex. B which purports to be a list showing the allotments of the properties to the plaintiffs and the defendants is either a deed of partition or an award. If it is a deed of partition, the document is invalid for want of registration; if it is an award, it is invalid for want of stamp duty, and in either case the document is not admissible in evidence, and if this document is excluded no oral evidence is admissible.

Now looking at the document, Ex. B, it is clear that it is not a deed of partition, it is not a document executed by anybody, it is not signed by the parties to the partition, and it can in no sense be treated as a deed of partition. It may be treated as an award of the arbitrators who effected the partition and it ought to have been stamped with the proper stamp duty. But the document has been admitted by the learned Subordinate Judge in evidence and s. 36 of the Stamp Act provides that where an instrument has been admitted in evidence, such admission shall not, except as provided in s. 61, be called in question at any stage of the same suit or proceedings on the ground that the instrument has not been duly stamped.

It is contended that objection to the admissibility of the document was taken before the learned Subordinate Judge and s. 36 would apply only to cases where a document is admitted without objection. There seems to be no justification for this contention. Section 36 is quite clear that once a document is admitted in evidence, the admission of such a document cannot be questioned whether the document was admitted with objection or without objection. It is, therefore, too late now for the learned Advocate for the appellant to contend that the document cannot be used as evidence in this appeal.

The learned Advocate for the appellant then refers to a passage in the judgment of the learned Subordinate Judge where it is stated that the defendants stated before him that they were ready to take for them-

selves the share given to the plaintiffs and that the plaintiffs were at liberty to take the shares given to them and he says that such exchange ought to be made now. The offer was made to them in the Court below and the respondents refused to accept the offer. Now it is too late for them to compel the defendants to exchange the shares.

There is no substance in this appeal and it must be dismissed with costs.

Ross, J.—I agree.

A. N. A.

Appeal dismissed.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 294
OF 1927.

August 24, 1927.

Present :—Mr. Justice Baguley.

U SOE—PLAINTIFF—APPELLANT

versus

MAUNG NGWE THA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Malicious prosecution—Suit for damages—Plaintiff, whether bound to prove his innocence—Points to be proved by plaintiff.

In a suit for damages for malicious prosecution the plaintiff is not bound to prove his innocence. He is bound to prove only, (i) that he was prosecuted by the defendant, (ii) that the proceedings terminated in favour of the plaintiff, if from their nature they were capable of so terminating, (iii) that the prosecution was instituted against him without reasonable and probable cause, and, (iv) that it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect. [p. 655, cols. 1 & 2.]

Balbhaddar Singh v. Badri Sah (2), followed.

Padashim v. Maung Lun (1), not followed.

Mr. Shanmugam, for the Appellant.

Mr. Thet Tun, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for damages for false and malicious prosecution. The plaintiff-appellant, U Soe, was thugyi of Kyauktan, the most southern portion of Moulmein. This quarter appears to have been a hot bed of rice thieves, and special measures were taken against them. The Criminal Investigation Department with the aid of U Soe arrested many of them and they were sent up for trial. U Soe appeared as a witness for the prosecution. Many of them were convicted. After this the respondents, who were some of the witnesses for the defence in the case against the rice thieves, filed a petition

before the Sub-Divisional Magistrate, Moulmein, asking that action should be taken against U Soe under s. 110, Criminal Procedure Code, on the ground that he habitually harboured thieves and bad characters. The Sub-Divisional Magistrate opened proceedings which terminated in the release of U Soe. The respondents then made a further application in revision to the Sessions Judge, and the application was dismissed. U Soe then filed the present case against the respondents for Rs. 1,000 damages for false and malicious prosecution. The Township Judge gave him a decree for Rs. 450. An appeal was filed to the District Judge, who allowed the appeal and dismissed the case with costs in both Courts. It is against this appellate decree that the present appeal has been filed.

The District Judge allowed the appeal on one ground, namely that the appellant had failed to prove his innocence. In so doing he followed the decision of the late Chief Court of Lower Burma in *Padashin v. Maung Lun* (1). In this ruling it is laid down that in a case of this kind the plaintiff has to prove four points:—

(i) that he was innocent of the crime alleged;

(ii) that his innocence has been pronounced by a competent tribunal;

(iii) that there was a want of reasonable and probable cause for the prosecution; and

(iv) that the proceedings against him had been initiated in a malicious spirit, i.e., from an indirect motive and not in furtherance of justice.

This is the latest published ruling of the Chief Court of Lower Burma and no ruling of the Rangoon High Court on the subject has been published.

It can, however, no longer be considered good law. There is a recent decision of the Privy Council *Balbhaddar Singh v. Badri Sah* (2), which lays down the points which should really be proved by the plaintiff. They are:—

(i) that he was prosecuted by the defendant;

(ii) that the proceedings complained of terminated in favour of the plaintiff, if from

their nature they were capable of so terminating;

(iii) that the prosecution was instituted against him without any reasonable and probable cause; and

(iv) that it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect.

Viewed in this light it is clear that the learned District Judge, who had not the Privy Council ruling before him, erred in holding that the plaintiff must fail, because he had not proved his innocence. There is no doubt whatsoever that the plaintiff has proved by the production of the records of the Sub-Divisional Magistrate's Court that he was prosecuted by the defendants and that the proceedings terminated in his favour. It will then be necessary to see whether the prosecution was instituted without reasonable and probable cause, and that it was due to a malicious intention on the part of the defendants, and not with the mere intention of carrying the law into effect. The Township Judge in his judgment has found both these points in the plaintiff's favour. The lower Appellate Court has not come to any finding with regard to them, because in view of his finding with regard to the second point it was unnecessary. It seems to me that the trial Court was quite correct in its findings on these two points. It is possible, as has been suggested, that the plaintiff's record in the past may have contained one or two doubtful episodes, but at the time that the respondents filed their petition against him before the Sub-Divisional Magistrate he had definitely come out on the side of law and order. He had been assisting the Police in rounding up the rice thieves, who were infesting the village, and had procured the conviction of a number of them. Proceedings under s. 110, Criminal Procedure Code, have got to deal with a man's existing character and habits, not with anything he may have done in the more or less remote past. The defendants themselves had been witnesses for the defence in the rice theft case and *prima facie* one would look with suspicion on a case brought by them against one of the principal witnesses for the prosecution, charging him with being an habitual harbourer of thieves. In view of the judgments of the Sub-Divisional Magistrate and the Sessions Judge, it was, in my opinion,

(1) 29 Ind. Cas. 883; 8 L. B. R. 78; 8 Bur. L. T. 69.

(2) 95 Ind. Cas. 329; 30 C. W. N. 866; 1 Luck. 215; 24 A. L. J. 453; 3 O. W. N. 499; A. I. R. 1926 P. C. 46; 43 C. L. J. 521; 28 Bom. L. R. 921; (1926) M. W. N. 482; 51 M. L. J. 42; 29 O. C. 163; 7 P. L. T. 591 (P. C.).

clearly incumbent upon the defendants to show that they had reasonable and probable cause for filing their application to the Sub-Divisional Magistrate. They produced four witnesses to do so. The first witness, San Po, is a self-confessed thief, who was an approver in the rice theft case. He admits that he is on bad terms with the headman and kicked him in the presence of the Township Officer, for which he was convicted. He has also been sentenced to five years' rigorous imprisonment in a *da* cutting case and has been fined for another assault. He inspires no confidence.

The second witness, Bo Olet, was also arrested in the rice theft case. He has been convicted for another theft and confessed in the rice theft case, but apparently his confession was not believed, for he was discharged in it. He also has other convictions against him.

The third defence witness, Kwan Sone, also states that he was one of the rice thieves, although he was discharged in that case. He says that the headman lent him Rs. 50 to buy stolen rice, but there is nothing beyond his bare statement to prove it.

The fourth defence witness, Po Ti, is another approver in the rice theft case. He says that he does not know whether the headman knew of the dealings in stolen rice and he forgets whether he ever paid him anything in connection with the rice theft case.

In view of the fact that the defendants were all witnesses on behalf of the rice thieves themselves, I am quite unable to place any credence in their witnesses. I must hold that the defendants have failed to show that they had reasonable or probable cause for filing their application against the plaintiff, and I am in entire agreement with the learned District Judge who, when passing orders as Sessions Judge in the criminal revision case, stated that the action of the then petitioners came more out of hostility on their part to the headman than of any interest for the benefit of the public.

As regards the damages awarded by the Township Court, it seems to me that the Township Judge fixed them on a very moderate scale. I, therefore, set aside the decree of the District Court and restore the decree of the Township Court, giving the

plaintiff Rs. 450 as damages. The respondents will pay the appellant's costs on that amount throughout.

A. N. A.

Decree set aside.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1153 OF 1925.

June 23, 1927.

Present:—Mr. Justice Mukerji and
Mr. Justice Ashworth.

MOHAMMAD SHER KHAN AND
OTHERS—DEFENDANTS—APPELLANTS

versus

BHARAT INDU AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Co-owners—Abadi—Construction of building and transfer by co-owner in sole possession—Right of other co-owners to sue for joint possession—Transfer, effect of—Sole possession, whether confers title—Custom, validity of.

If co-owners of the *abadi* under some arrangement remain in separate possession of a certain site, this does not give the other co-owners a right to sue. But if the co-owners in possession construct a building on the site, the other co-owners may sue for demolition of the building and for joint possession, provided that they do so within a reasonable time. [p. 657, col 1.]

The right of co-owners to sole possession is a right which continues only so long as they possess themselves and such a right is consistent with the other co-sharers' title. If, however, the co-sharers transfer to a stranger, this amounts to a denial of the title of their co-owners and is inconsistent with that title. Such a transfer gives the co-owners a right to sue for a declaration that the transfer is invalid against them. It also gives them a right to sue for joint possession with the transferors and ejectment of the transferee; for the transferee gets no title to possession by the transfer. [p. 657, cols. 1 & 2.]

A custom whereby a co-owner can by reason of mere separate possession claim an absolute title is a custom which would be inconsistent with the very status of co-ownership and as such cannot be recognised. [p. 657, col 2.]

Second appeal from a decree of the Additional Subordinate Judge, Farrukhabad at Fatehgarh, reversing that of the Munsif, Farrukhabad.

Mr. Peary Lal Banerji, for the Appellants.

Dr. K. N. Katju, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-respondents. They sued for possession of a certain site in the *abadi*. The *abadi* is the unpartitioned property of the plaintiffs and defendants Nos. 1 to 3. Some years ago, defendants Nos. 1 to 3, who along with one Afzal-un-nissa Begum were at the time in

sole possession and occupation of the land, built two shops on it. The plaintiff brought a suit for recovery of joint possession on the ground that the building by their co-owners was unlawful. Their suit was dismissed by the trial Court. On appeal, however, they obtained a decree against defendants Nos. 1, 2 and 3, but failed to join as respondent Afzal-un-nissa Begum. The consequence was that they never succeeded in executing the decree.

In the present suit their failure to execute that decree was pleaded as somehow barring the plaintiffs from bringing the present suit. The trial Court allowed this objection. The lower Appellate Court has rejected it and given the plaintiffs a decree for joint possession. The present suit is based on the fact that the defendants Nos. 1 to 3 have transferred the site along with the buildings to defendant No. 4, a stranger. Their plea is that the sale to a stranger has constituted a new cause of action.

The law on this subject does not appear to us open to doubt. If co-owners of the *abadi* under some arrangement remain in separate possession of a certain site, this does not give the other co-owners a right to sue. But if the co-owners in possession construct a building on the site, the other co-owners may sue for demolition of the building and for joint possession, provided that they do so within a reasonable time. In this case it must be held that the defendants Nos. 1 to 3 were entitled to occupy the site and the buildings in sole possession. The plaintiffs had failed in the previous litigation to get a decree against Afzal-un-nissa Begum, and as her right, could not be separated from that of defendants Nos. 1 to 3, this in effect meant that the plaintiffs had failed to disturb the sole possession of the defendants Nos. 1 to 3 of the site and of the buildings. That litigation, however, merely affirmed in the defendants a right to retain possession. It gave them no right to transfer possession to a stranger. The right of co-owners to sole possession is a right which continues only so long as they possess themselves and such a right is consistent with the other co-sharers' title. If, however, the co-sharers transfer to a stranger, this amounts to a denial of the title of their co-owners and is inconsistent with that title. Such a transfer gives the co-owners a right to sue for a declaration that the transfer is invalid against them. It also gives them a right to sue

for joint possession with the transferors and ejectment of the transferee; for the transferee gets no title to possession by the transfer. Again the transferors by reason of the transfer and delivery of possession to the transferee must be deemed to have left the plot vacant. The co-owners thereupon acquire a right to joint possession and the transferors can no longer plead a right to separate possession in contravention of which right they have themselves acted.

A plea of custom was set up by the defendants. We agree with the lower Appellate Court that a custom whereby a co-owner can by reason of mere separate possession claim an absolute title is a custom which would be inconsistent with the very status of co-ownership and as such cannot be recognised.

For the foregoing reasons we consider that the decision of the lower Appellate Court was correct and dismiss this appeal with costs.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 283 of 1926.
October 19, 1927.

Present :—Mr. Justice Devadoss.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL REPRESENTED BY
THE EXECUTIVE ENGINEER,
GODAVARI HEAD WORKS DIVISION,
DHOWLESWARAM—PETITIONER
versus

S. RANGASWAMI & Co., MADRAS—

RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70—Agreement to deliver coals free on rails—Consignment under freight system—Consignee paying freight charges to Railway—Suit by consignee against contractor for recovery of freight paid, maintainability of.

The defendant entered into a contract with the Executive Engineer of Godavari for the supply of a certain quantity of coal, to be consigned from a colliery in Bengal. The agreement was that the coal should be supplied free on rails at Rajahmundry. The consignments of coal were received under freight system under which the consignee was to pay the freight. No freight was paid at the time the coal was taken delivery of, but after some months the Railway Administration wrote to the Government of Madras to pay the amount of freight and the amount was paid by the Government. In a suit for recovery of the amount of freight paid by the Government to the Railway Administration from the contractor:

Held, (1) that when the coal was brought to Rajahmundry without paying the freight, it was open to the Executive Engineer to have rejected the coal as under the terms of the contract the delivery was to be free of charges at Rajahmundry; and not having done that, he was not entitled to claim from the defendant the amount of freight which he paid, since his right extended only to rejecting the coal and not to claim any charges that he chose to pay to a third person, namely, the Railway Administration; [p. 658, col. 2.]

(2) that the Executive Engineer or the Secretary of State was in no way interested in paying the freight on behalf of the defendant and that neither s. 69 nor s. 70 of the Contract Act applied and the suit was liable to be dismissed. [*ibid.*]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Rajahmundry, in S. C. S. No. 223 of 1925.

Mr. P. Venkataramana Rao, Government Pleader, for the Appellant.

Mr. N. Chandrasekhara Iyer, for the Respondents.

JUDGMENT.—This is an application to revise the decree of the Subordinate Judge of Rajahmundry dismissing a suit by the Secretary of State for a sum of money said to be due by the respondent to the petitioner. The main contention urged by Mr. Venkataramana Rao, the learned Government Pleader, is that the respondent did not pay freight for the coal supplied and the petitioner is entitled to recover it from the respondent. The facts are, the respondents Rangaswami & Co., Madras, entered into a contract with the Executive Engineer of Godavari for the supply of a certain quantity of coal. The coal was consigned from a colliery in Bengal and the contract was that the coal should be supplied free on rails at Rajahmundry. The consignments of coal were received under freight system under which the consignee was to pay the freight. No freight was paid at the time the coal was taken delivery of but after some months the Railway Administration wrote to the Government of Madras to pay the amount of freight. After some correspondence the amount was paid by the Government. This suit is brought for the purpose of recovering the amount of freight paid by the Government to the Railway Administration from the respondent. The question is, whether the Secretary of State is entitled to recover this amount from the respondent.

Mr. Venkataramana Rao strongly contends that his case comes within s. 69 or 70 of the Contract Act, that the respondent was bound to pay the freight and inasmuch

as he did not pay the freight he is bound to make good the amount to the plaintiff. The finding of the Subordinate Judge is that the amount of freight was not paid by the respondent to the Railway Administration. The question is not whether the respondent paid the freight to the Railway Administration or not, but whether he is liable to the plaintiff for the freight. Under the contract the respondent was to deliver the coal free on rails, that is to say, without Government having to pay anything for freight. When the coal was brought to Rajahmundry without paying the freight, it was open to the Executive Engineer to have rejected the coal as under the terms of the contract the delivery was to be free of charges at Rajahmundry; not having done that, he is not entitled to claim from the respondent the amount of freight which he paid, for his right extended only to rejecting the coal and not to claim any charges that he chose to pay to a third person, namely, the Railway Administration. Section 69 of the Contract Act says that a person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other. The contention of Mr. Venkataramana Rao is, that the Executive Engineer was interested in paying the amount which the defendant was bound to pay to the Railway Administration. I am unable to accept this contention. The Executive Engineer or the Secretary of State was in no way interested in paying the freight on behalf of the defendant, because under the contract the defendant was to pay the freight and deliver the coal free on rails at Rajahmundry. If he did not choose to do so, the Secretary of State was in no way interested in seeing that the amount was paid. Therefore, s. 69 has no application to the present case and s. 70 cannot apply as it cannot be said that the plaintiff did anything lawfully for the defendant and the defendant had the benefit of it. As I said, the right of the plaintiff was to have rejected the coal when it was not delivered free on rails. All this trouble has arisen owing to the fact that at the time of delivery the Executive Engineer or the person responsible for it overlooked the fact that freight was payable. The mere fact that owing to oversight or senselessness of the plaintiff's officers certain amount of money was collected from him, is no ground for making the respondent liable for the

amount. At best, the plaintiff was only a volunteer so far as this payment is concerned and, therefore, is not entitled to recover it from the respondent.

There is no other point in the case. The civil revision petition is dismissed with costs.

V. N. V.

A. N. A.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 649 OF 1926.

October 28, 1927.

Present.—Mr. Justice Reilly.

APPU L. R. M. LAKSHMANAN OHETTI

REPRESENTED BY HIS AUTHORISED AGENT R.

GOPALA AYYANGAR—PLAINTIFF—

PETITIONER

versus

THE MUNICIPAL COUNCIL, TRICHINO-

NOPLY, REPRESENTED BY ITS PRESENT

CHAIRMAN RATNEVELU TEVAR—

DEFENDANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 354 (2)—Wrong assessment—Suit for refund, whether lies.

Sub-s. 2 of s. 354 of the Madras District Municipalities Act was intended to provide real protection to the Chairman and the Municipal Council and its effect is that, when they have proceeded in the matter of assessment in accordance with the Act, no suit will lie against them for recovery of the amount of assessment collected even if their actual decision is wrong.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes at Trichinopoly, in S. O. S. No. 3336 of 1925.

Mr. R. Kesava Iyengar, for the Petitioner.

Mr. P. Venkatramana Rao, for the Respondent.

JUDGMENT.—I agree with the learned Small Cause Court Judge that the petitioner's suit is barred by s. 354 (2) of the Madras District Municipalities Act. The allegations in the plaint are consistent with the provisions of the Act having been complied with the substance and effect. It is alleged that when the petitioner appealed against his assessment, no order on his appeal was communicated to him. That, if so, was discourteous. But there appears to be no provision in the Act or the rules under it requiring the decision on such an appeal to be communicated formally to the appellant. Apart from that alleged defect

in procedure the petitioner complains that "he has been assessed most arbitrarily without reference to facts and figures." Mr. Kesava Ayyangar argues for him that no assessment which is incorrect does in substance and effect comply with the provision of the Act, that an incorrect assessment has no legal basis. If that argument is accepted, then s. 354 (2) of the Act is no protection against a suit of any person who is not in complete agreement with the Municipal Council about the justice of his assessment. I have no doubt that the subsection was intended to provide real protection to the Chairman and the Council and that its effect is that, when they have proceeded in the matter of assessment in accordance with the Act, no suit will lie against them even if their actual decision is wrong. A disappointed assessee certainly cannot escape the bar against his suit by describing the action of the Council or the Chairman as arbitrary or by using any other strong language.

This petition is dismissed with costs.

V. N. V.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 541 OF 1926.

November 10, 1927.

Present.—Mr. Prideaux, A. J. C.

Muzammatt BANI BAI—DEFENDANT—

APPELLANT

versus

MAHADEO—PLAINTIFF—RESPONDENT.

Practise—Decree for relief not sought, legality of—Suit for lambardari haq—Decree for muccadami haq.

Where a plaintiff claims a certain amount as lambardari haq he cannot be given a decree for the amount as muccadami haq.

A Court should not grant a relief which is not sought or by the plaintiff nor find a case which has not been tried.

Appeal against the decree of the Additional District Judge, Wardha, dated the 22nd July, 1926, in Civil Appeal No. 54 of 1926.

Mr. M. B. Niyogi, for the Appellant.

Mr. A. R. Bobde, for the Respondent.

JUDGMENT.—The plaintiff in this suit claimed from the defendant his lambardari haq for the years 1331 to 1333 Fasli.

The case was tried and a decree was given in favour of the plaintiff for Rs. 58-6-6. On appeal it was discovered that it was not the *lambardari haq* which the plaintiff could claim but the *muccadami haq* quite a different thing. The lower Appellate Court's order-sheet of 15th May, 1926, runs:

"As regards ground No. 1, Mr. Karode urges that his claim to five per cent. is based on being a *muccadam* and not a *lambardar*, though the point was not made clear in the lower Court. The lower Court allowed *lambardari haq* on the ground that it was allowed in a previous suit, but that point will not be *res judicata* as the right is a recurring one. Mr. Gole admits that if plaintiff is allowed *muccadami haq*, the account per year is correct, and he would then contend only about interest. He wants time to state whether the plaintiff was *muccadam* during the three years in suit."

The order-sheet of the next hearing runs:—

"Appellant by Mr. Gole. He admits that plaintiff and his father were *muccadams* for the three years in suit. The only question for argument is whether *muccadam haq* should be allowed or not."

It is contended for the appellant (defendant) here that under s. 192 of the Land Revenue Act the remuneration of the *muccadam* has to be fixed by the Tahsildar and recovered by the *lambardar* from the proprietors of the *mahal* or *patti* for which he is appointed, and it is argued that the Civil Courts cannot take cognizance of the case. It is further contended that under s. 229, cl. (p) of that Act any claim in connection with the office or remuneration of the *muccadam* is not cognizable by a Civil Court.

It does not seem to me necessary to enter into these contentions; for it appears to me that the suit should be dismissed on the ground that it was brought for recovery of the *lambardari haq*; it was not for the recovery of the *muccadami haq* which has been decreed by the lower Appellate Court. This change in the case in the lower Appellate Court has prevented suitable issues being raised in the trial Court; and if a plaintiff is so careless as to make a mistake of this nature, although he may be repeating only a mistake made in previous proceedings, he has only himself to blame if his case fails. The relief decreed is not the relief sought; the case found by the

lower Appellate Court was not the case tried; and under these circumstances I think that the plaintiff's claim should be dismissed with costs.

I set aside the decree of the lower Appellate Court and dismiss the case with costs.

G. B. D.

Appeal allowed.

A. N. A.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 480 of 1926.

October 19, 1927.

Present:—Mr. Justice Devadoss.

MUNISWAMI MUDALI AND ANOTHER.

—DEFENDANTS—PETITIONERS

versus

MEENAKSHI AMMAL—RESPONDENT.

Practice—Petition "recorded"; whether amounts to disposal.

A Court should either allow or dismiss a petition presented to it. An order simply stating "petition will be recorded" is no order at all and should not be passed on any petition.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Vellore, in J. A. No. 898 of 1925, in O. S. No. 417 of 1924.

Mr. P. S. Narayanaswami Iyer, for the Petitioners.

Mr. A. Ramachandra Ayyar, for the Respondents.

JUDGMENT.—This is an application to revise the order of the District Munsif of Vellore. The order is "petition will be recorded." This is no order at all. Such an order should not have been passed on any petition. The District Munsif should have either allowed the petition or dismissed it. The order is, therefore, set aside and he is directed to hear the petition on the merits and dispose of it.

Costs of this application will abide the result.

V. N. Y.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 947 OF 1927.

October 12, 1927.

Present:—Mr. Justice Devadoss.

MANIYAM GODI NARAPPA NAIDU

—DEFENDANT—PETITIONER

versus

PAPUDESU NARAYANASWAMI NAIDU

—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 10—Suit for dissolution of partnership—Pendency of appeal—Second suit for recovery of money received by defendant, trial of, whether should be stayed.

A suit for dissolution of partnership was dismissed by a Sub-Court on the ground that there was no partnership till a particular time. Pending an appeal to the District Court, the plaintiff sued in the District Munsif's Court to recover certain sums of money, as having been received by the defendant which ought to be paid to him. On an application by the defendant for stay of trial of the suit in the Munsif's Court pending the disposal of the appeal in the District Court:

Held, that there was no possibility of a conflict of decrees, as the main questions in the two suits were different, and that there was no necessity for stay of the second suit.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the District Munsif, Chittoor, in I. A. No. 850 of 1927, in O. S. No. 691 of 1925.

Mr. A. C. Sampath Ayyangar, for the Petitioner.

Mr. B. Somayya, for the Respondent.

JUDGMENT.—This is an application to revise the order of the District Munsif refusing to stay the trial of the suit which was ready for judgment. The contention of Mr. Sampath Ayyangar is that there is an appeal pending in the Chittoor District Court (A. S. No. 252 of 1925) and, therefore, under s. 10, Civil Procedure Code, the District Munsif is not competent to try this case, because the very same matter is the subject-matter of the appeal. The plaintiff in the Sub-Court suit who is the respondent to this petition sued to have a partnership dissolved. The Subordinate Judge dismissed this suit on the ground that there was no partnership till the year 1923. In the Munsif's Court he sues for the recovery of certain sums of money as having been received by the defendant which ought to be paid to him. The suit in the Munsif's Court was filed after the disposal of the suit in the Subordinate Judge's Court. The contention that there will be a conflict of decisions if this suit is allowed to be decided does not appeal to me for, in the suit in the Munsif's Court the plaintiff sues for specific sums of

money and in the Sub-Court the main issue was whether there was a partnership or not. If that point is decided in plaintiff's favour, the Subordinate Judge or the District Court will direct accounts to be taken. In the taking of accounts any decision in regard to particular items will be taken into consideration. That being so, I do not think that the decision in this suit would in any way conflict with the decision that may be ultimately arrived at in the appeal. In this view I dismiss the civil revision petition with costs.

V. N. V.

*Petition dismissed.***NAGPUR JUDICIAL COMMISSIONER'S COURT.**

SECOND CIVIL APPEAL No. 483 OF 1926.

September 30, 1927.

Present:—Mr. Prideaux, A. J. C.

FADALILAL—DEFENDANT—APPELLANT

versus

ROOCHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, whether implies promise to pay—Contract Act (IX of 1872), s. 12.1

An acknowledgment of debt implies a promise to pay and though an acknowledgment is required by s. 19 of the Limitation Act to be made before the expiry of the period of limitation, a promise under s. 25 of the Contract Act may be made after the period. [p. 663, col. 1.]

Appeal against the decree of the Additional District Judge, Narsinghpur, dated the 8th July, 1926, in Civil Appeal No. 2 of 1926.

Dr. Sir H. S. Gour, for the Appellant.

Mr. N. G. Bose, R. B., for the Respondents.

JUDGMENT.—The plaintiffs sue for Rs. 876 7. Their case is that on 23rd July, 1923, Rs. 1,300 were due by the defendant to them on old accounts. The plaintiffs intended suing and got a plaint drafted, but the defendant then agreed to execute a *sarkhat* for Rs. 670 and to secure it by the pledge of gold ornaments already held by the plaintiffs on old pledges, and to execute another *sarkhat* for Rs. 630, pay all the expenses which the plaintiffs incurred in preparing their suit and to pay interest at 12 per cent. per mensem. The defendant, therefore, executed the *sarkhats* Exs. P. 2 and P. 3 on 23rd July, 1923. He did not

redeem the ornaments mentioned in Ex. P. 2 and these were sold, fetching Rs. 668. The balance due on the two *sarkhats* with interest came to Rs. 876-7.

The defendant's story was that he executed the first *sarkhat* Ex. P. 1 without understanding the accounts. This was for Rs. 1,025. He also executed the other two *sarkhats* Exs. P. 2 and P. 3 at the plaintiffs' shop as the defendant's brother told him that he had made an account of his own debts with the plaintiffs and that to meet the plaintiffs' wishes the defendant should go and execute them. The defendant further contended that the claim was time-barred and also that he is not liable to pay interest at higher rate than the rate of interest originally agreed upon between the parties.

These allegations were denied and the case went to trial on the following issues:—

1. Did the defendant on 23rd July, 1923, promise to pay Rs. 1,300 due on old account to plaintiffs and execute the *sarkhats* for Rs. 670 and Rs. 630?

2. Did he agree to pay interest at 12 per cent. per mensem?

3. Did he agree to pay the costs of any plaint as alleged?

4. If so, what are those costs?

5. Did the defendant execute the *sarkhat* for Rs. 1,025 without understanding the accounts?

6. Did he sign the *sarkhats* of Rs. 670 and Rs. 630 under any mistake?

7. Does any of these facts, if proved, entitle the defendant to go behind the settled accounts?

8. To what relief, if any, are the plaintiffs entitled?

The trial Court held that the defendant executed the two *sarkhats*, that he agreed to pay interest at 12 per cent. per mensem and agreed to pay the costs of the plaint which amounted to Rs. 20. As regards the *sarkhat* for Rs. 1,025, the first Court found that the defendant failed to prove that he executed them without understanding the accounts and that the other two *sarkhats* were signed under any mistake. Dealing with the amount due, the trial Court finds that the defendant did promise to pay Rs. 1,300 and that for this amount *sarkhats* for Rs. 670 and Rs. 630 were executed; but the agreement being oral could not help the plaintiffs under s. 25 (3) of the Contract Act, unless the acknowledgments (Exs. P. 2 and P. 3) could be in-

terpreted to be those "agreements in writing and signed" by the defendant. The Court finds that an unconditional acknowledgment such as Exs. P. 2 and P. 3 has always been held to imply a promise to pay, but that as held in *Ratanlal v. Anwar Khan* (1) such an implied promise to pay is not a contract within the meaning of s. 25 (3) of the Contract Act. A portion of the claim evidenced by the first *sarkhat* for Rs. 1,025 was held time-barred. The Judge writes:—

"If the acknowledgments, Exs. P. 2 and P. 3, could be interpreted to mean 'an express promise to pay in writing,' in other words if they could be interpreted to constitute a contract within the meaning of s. 25 (3) of the Contract Act, I would be inclined to decree the plaintiffs' claim, disregarding the fact that at least a portion of it consists of a time-barred debt [*vide, David Sutherland Clark v. Mrs. Rose Crimshaw* (2)]. But as the facts are, the acknowledgments cannot be interpreted to mean 'written promises to pay' and, therefore, cannot form the basis of a suit [*vide Beohar Raghuir Singh v. Udechand* (3)]. The plaintiffs have not chosen to base their claim on accounts, in spite of a written application of the defendant filed on 9th November, 1925. They have expressly based their claim on an agreement, which it has been shown above cannot help the plaintiffs inasmuch as it was not 'in writing' the acknowledgments Exs. P. 2 and P. 3 also having been held above as not forming a contract within s. 25 (3) of the Contract Act. The defendant has had no chance of showing how the whole amount of the first *sarkhat* Ex. P. 1 was time-barred on the date of that *sarkhat*. Under the circumstances plaintiffs' claim in so far as it relates to the accounts under Exs. P. 3 and P. 2 cannot succeed."

But the plaintiffs' claim for Rs. 23-13, i. e., Rs. 20 for the plaint costs and interest, was decreed and further, finding the defence false, the first Court gave the plaintiffs Rs. 75 as compensation under s. 35-A of the Civil Procedure Code.

On appeal the Additional District Judge, Narsinghpur, holds that there was a new contract between the parties on 23rd July, 1923, the old debt being wiped off on that date. The fact that the liability under the *sarkhat* dated 24th July, 1920, forms the consideration for the compromise sued upon

(1) 53 Ind. Cas. 527; 2 N. L. J. 261.

(2) 73 Ind. Cas. 652; A. I. R. 1923 Lah. 4813; 32 Ind. Cas. 321.

(3) 11 C. P. L. R. 65.

does not prevent the compromise being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence. It was held that the new contract is enforceable, that the suit is not one for recovery of an old debt but for the recovery of money due under an agreement of compromise. It was held that no part of the plaintiffs' claim is beyond time and the appeal was allowed, the cross-objections being dismissed. Against that decision the present appeal has been lodged by the defendant.

It is argued for the appellant that on 24th July, 1920, when Ex. P. 1, the *sarkhat* for Rs. 1,025 was executed, Rs. 920 then due were barred by time. It is argued that once a debt is barred by time, it ceases to operate as any consideration and that it can only be proved by a new contract as provided for in s. 25 of the Contract Act, that is under s. 19 of the Limitation Act, and any compromise under s. 25 of the Contract Act must be registered.

For the respondents (plaintiffs) it is contended that Ex. P-1 for Rs. 1,025 is not a mere acknowledgment as ornaments were pledged: it is a contract; and within three years two other *sarkhats* Exs. P-2 and P-3 were executed on the 23rd July, 1923. There is a promise to pay. *Maniram v. Seth Rupchand* (4), *Ratanlal v. Anwar Khan* (1) *Sitaran v. Nandram* (5) and *Chunilal Ratanchand Gujrati v. Laxman Govind Dube* (6) are relied on. As to there being no consideration, it is contended for the respondents that the forbearance to sue is sufficient: *Mahalinga Nadar v. Ganapathi Subbien* (7). The second two *sarkhats*, it is pointed out, were executed within three years of the first, and the suit is filed within three years of the date of the second two.

There is no doubt that acknowledgment of debt implies a promise to pay, and though an acknowledgment is required by s. 19 of the Limitation Act to be made before the expiry of the period of limitation, a promise under s. 25, Contract Act, may be made after the period. There is no doubt that in the present case the defendant did promise to discharge his

old debt by the execution of the two new *sarkhats*, and it seems to me that the lower Appellate Court is right in holding that there was a new contract between the parties on 23rd July, 1923. The *sarkhats* were given, the consideration for the same being the old debt due on the plaintiffs, forbearance to sue, and I think the case can be termed to be one for recovery of money due under a compromise. I agree with the Court below that the claim is in time and dismiss the appeal with costs. The appellant will pay the respondents' costs.

G. R. D.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 308 of 1926.
October 19, 1927.

Present:—Mr. Justice Devadoss.

BATOHU CHINA VENKATARAYADU
AND OTHERS—PETITIONERS

versus

THE MAHARAJA OF PITHAPURAM AND
OTHERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 125, 192—Civil Procedure Code (Act V of 1908), O. XXI, r. 58, whether applicable to proceedings in execution of rent-decree—Mortgage prior to Act, whether prevails over purchase in execution of rent-decree.

Order XXI, r. 58, Civil Procedure Code, is applicable to proceedings in execution of rent-decrees under the Madras Estates Land Act. [p. 664, col. 1.]

A mortgage right acquired over a holding before the passing of the Madras Estates Land Act is saved by s. 125 of the Act as against a purchaser in execution of a rent-decree. [*ibid.*]

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise the order of the Court of the Revenue Divisional Officer at Cocanada, dated the 11th September, 1925, and passed in E. P. No. 113 of 1924.

Mr. K. Kameswara Rao, for the Petitioners.

Mr. A. Krishnaswami Iyer, for the Respondents.

JUDGMENT.—This is an application to revise the order of the Revenue Divisional Officer of Cocanada, dismissing the claim petition of the petitioner. The Divisional Officer held that O. XXI, r. 58, Civil Procedure Code does not apply to execution proceedings under the Estates Land Act. Under s. 192 the provisions of the Code of Civil Procedure are made applicable,

(4) 2 N. L. R. 130 at p. 133; 4 O. L. J. 94; 8 Bom. L. R. 501; 10 O. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 33 O. 1047; 33 I. A. 165 (P. C.).

(5) 78 Ind. Cas. 234; A. I. R. 1925 Nag. 9 at p. 11.

(6) 63 Ind. Cas. 923; 46 B. 24; 23 Bom. L. R. 606; A. I. R. 1922 Bom. 183.

(7) 27 M. 528; 31 M. L. J. 445.

excepting a few, to proceedings under the Estates Land Act, and there is no express provision which exempts O. XXI from applying to proceedings in execution of rent-decrees. In the absence of specific provisions to the effect that a claim petition is not to be entertained by a Revenue Court, I am not prepared to hold that an application under O. XXI, r. 58 cannot be made to the Revenue Court. It is not contended for the respondent that the rent-decree in this case is in the nature of a mortgage-decree. No doubt, a claim petition is not competent when a mortgage-decree is being executed.

The petitioner had a mortgage right over the holding before the passing of the Estates Land Act and any right acquired before the passing of the Estates Land Act in the holding is saved by s. 125 of the Act. The petitioner filed a suit in 1907 on two mortgages and obtained a decree before the passing of the Act, and he, therefore, had the mortgagee's right on the date of application over the property which was sought to be put up for sale. It is suggested on behalf of the respondents that the petitioner became the owner of the equity of redemption before the decree in favour of the respondents in 1919 and, therefore, he being the owner of the holding the landlord was entitled to bring it to sale. That question would depend on the question whether the petitioner became the owner by purchase in Court and as that matter has not been investigated, it is not possible to express any opinion on the point. I, therefore, set aside the order of the Divisional Officer and direct him to restore the claim petition to file and dispose of it according to law. Costs of this application to abide the result.

V. N. V.

A. N. A.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 819 OF 1927.

September 6, 1927.

Present:—Mr. Justice Reilly.

V. ARUMUGAM PILLAI—PETITIONER

versus

V. KANDASAMI PILLAI—RESPONDENT.

Practice—Application for leave to sue in forma pauperis—Defendant declared *ex parte* appearing later—Right to take part in proceedings.

Where a defendant who is declared *ex parte* in proceedings for leave to sue in forma pauperis appears

later on and wants to take part in the case, he is entitled to do so at the stage which it had reached, provided that his intervention at that stage does not delay the proceedings. Where evidence has been closed it would not be proper to allow him to call fresh evidence unless the Court is satisfied that he had good reason for not appearing earlier.

Petition under s. 115 of Act V of 1908, and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge, Coimbatore, dated the 27th July, 1927, and made in I. A. No. 391 of 1927, in O. P. No. 104 of 1926.

FACTS.—On an application to sue *in forma pauperis* a defendant who was served and was absent was declared *ex parte*. While the proceedings were going on, he applied to be allowed to take part in the proceedings and to set aside the *ex parte* order but his application was dismissed. A revision petition was filed against the said order of dismissal.

Mr. Krishna Bharathi, for the Petitioner.

Mr. Balasundaram Ayyar, for the Respondent.

JUDGMENT.—There is no sufficient reason to interfere with the Subordinate Judge's order. There was indeed no need for the petitioner to act the order that the inquiry into the original petition would proceed *ex parte* so far as he was concerned, set aside, if, as is now explained for him, he wanted only to take part in the case at the stage which it had reached. When he eventually did appear he was entitled to take part in the proceedings and is still entitled to do so, provided that his intervention at this stage does not delay the proceedings. For instance, if the evidence had been closed, it would not be proper to allow him to call fresh evidence unless he had satisfied the Subordinate Judge that he had good reason for not appearing earlier. On that point, the Subordinate Judge was not satisfied, and I see no sufficient reason to differ from him.

This petition is dismissed with costs.

V. N. V.

A. N. A.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 183 OF 1926.

January 27, 1927.

Present :—Mr. Findlay, J. C.

SADASHEO RAMJI BENDE—PLAINTIFF

—APPELLANT

versus

GOPALA PATIL—DEFENDANT

—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 62—Acquisition of portion of holding by Government—Omission of tenant to apply for reduction of rent—Tenant, whether liable for full rent.

Failure on the part of a tenant, a portion of whose holding has been acquired under the Land Acquisition Act, to apply under s. 62 of the C. P. Tenancy Act for reduction of rent is not a ground for passing a decree against him for the whole rent especially where it is admitted that the whole rent is not, in reality, leviable from him in view of the diminution of the holding.

Appeal against the decree of the District Judge, Nagpur, dated the 15th December, 1925, in Civil Appeal No. 197 of 1925.

Mr. D. T. Mangalmurti, for the Appellant.

Mr. M. D. Khandekar, for the Respondent.

JUDGMENT.—I have heard Counsel for the appellant in this case but found it unnecessary to call on to the respondent's Pleader to reply. It is perfectly clear to my mind that the present plaintiff-appellant has mistaken his remedy in the present case. It is not denied that portions of fields Nos. 64, 67 and 68 were acquired by Government in 1923, and it is equally clear from the lower Appellate Court's judgment that the rent of the holding has been accordingly proportionately reduced.

The present plaintiff-appellant for some reason or other, which it is difficult to understand, urges that it was for the defendant to take the initiative in having the rent reduced under s. 62 of the Tenancy Act, but it is perfectly clear that it was also open to the landlord to initiate proceedings under the said provision. As a matter of fact, para. 71 of the Land Acquisition Manual lays down the proper procedure to be followed in a case like the present and, if there was any failure on the part of the Land Acquisition Officials to take the necessary steps, it was open to the present plaintiff-appellant to initiate the necessary proceedings under s. 62 of the C. P. Tenancy Act. I know of no reason why it was peculiarly incumbent, on the

tenant to move in the matter, and, in any event, neither law nor equity would justify this Court in decreeing the plaintiff-appellant's claim against the defendant-respondent when it is admitted and clear that the whole rent is now not, in reality, leviable from him in view of the diminution of the area of his holding.

I, therefore, see no reason to interfere and dismiss the present second appeal. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

A. N. A.

Appeal dismissed.

**MADRAS HIGH COURT.
FULL BENCH.**

APPEAL AGAINST ORDER NO. 442 OF 1924.

September 1, 1927.

Present :—Sir William Phillips,

Officiating Chief Justice,

Mr. Justice Beasley and Mr. Justice

Anantakrishna Ayyar.

VEERARAGHAVACHARIAR

—APPELLANT

versus

THE ADVOCATE-GENERAL OF
MADRAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Scheme—Provision for liberty to apply for directions or alterations, whether ultra vires.

In a scheme settled by the Court under s. 92 of the Civil Procedure Code the reservation by the Court to a person or persons of liberty to apply for a relief which will come within s. 92 of the Code is *ultra vires*; but if such reservation does not offend, in this way or against any other provision of law it may be useful or advisable for carrying out the provisions of the scheme already framed and would be *intra vires*. [p. 671, col. 1.]

Abdul Hakim Baig v. Mahomed Buirammuddin (1), *Ryali Brahmayya v. Venkataswamy Narayanamurthy* (14), *Ayinaravilli Narayanamurthy v. Bulusu Achayyasasthulu* (15) and *Majeti Antayya v. Lingambhotla Venkata Ramayya* (16), approved.

Sadupadhya Umeshanand Ojha v. Ravaneshwar Prosad Singh (9) and *Muhammad Waheb Hussain v. Abbas Hussain* (20), commented upon.

Appeal against the order of the Court of the Subordinate Judge, Chingleput, dated the 6th December, 1924, and made in M. P. No. 150 of 1924, in O. S. No. 30 of 1921.

This appeal came on for hearing on the 10th and 11th of January, 1927, before Odgers and Krishnan, JJ., and their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

Odggers, J.—In O. S. No. 30 of 1921, on the file of the Subordinate Judge of Chingleput a scheme was settled on 3rd January, 1923, for the Devasthanams, and shrines connected therewith of Sri Adikesavaperumal and Sri Bhashyakarlu Swami in Sriperumbudur. The scheme, *inter alia*, in paras. 99 and 100 provided as follows:—

"99. It shall be competent to the Advocate-General or the Collector of the District or the *dharma-karthas* or either of them or any five worshippers to apply to the Court (1) to modify or delete any rule hereby promulgated, (2) framing additional rules for the management of the Devasthanam and securing due administration of, or the protection of, the Devasthanam property, (3) for regulating the conduct of business in the Devasthanam and the worship in the shrines and the celebration of *utsavams*, (4) with reference to the framing of the budget, (5) for sale of broken or useless jewels or items of stock for re-making or converting them or for the purchase of new ones, either by way of addition or by way of replacement."

"100. It shall be competent to the Advocate General or the Collector of the District or any five worshippers to apply to the Court for the removal of any *dharma-kartha* who is charged as (1) subject to any of the disqualifications provided in r. 21, (2) guilty of misconduct, whereby his continuance as *dharma-karta* will be injurious to the Devasthanam, giving assignment of such misconduct."

In M. P. No. 150 of 1924, dated 31st July, 1924, in the above suit the Advocate-General moved to modify the scheme as there were disputes between the two trustees appointed under it. This was opposed. The first point taken before us is that the Subordinate Judge made no final order on the petition, but only gave a tentative expression of opinion and that, therefore, no appeal lay. To my mind the objection must fail. The Subordinate Judge says in para. 6, "In these circumstances I should think the scheme requires an amendment" and in para. 8, "The scheme will be amended accordingly." This clearly shows that the Subordinate Judge had made up his mind to amend the scheme. It is said for the appellant that either s. 92, Civil Procedure Code, is a bar to an application of this

sort by the Advocate-General in a scheme suit or that the suit came to an end with the settling of a scheme. The Court, therefore, had no jurisdiction to entertain the application of the Advocate-General and the clauses in the scheme giving him leave to apply are *ultra vires*. There is a direct authority for this view in *Abdul Hakim Baig v. Mahomed Burramuddin* (1) where Devadoss, J., says at page 583*, "When a scheme is settled, the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme" and again at page 584*, "when s. 92, Civil Procedure Code, directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be *ultra vires* of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme." Wallace, J., was of the same opinion and says at page 590*, "I am of opinion that s. 92 was intended to be enforced whenever any of the reliefs mentioned in it are asked for, whether or no a scheme has already been framed under it," though (at page 591*) he concedes that this conclusion will compel worshippers to bring suits even for the most petty alterations in the original scheme, but that will only be for such alterations as are within the mischief of s. 92.

In a similar case in *Runganatha Thathachariar v. Krishnaswami Thathachariar* (2) Oldfield and Venkatasubba Rao, JJ., held that no appeal would lie from an order directing the proper authorities to fill up a vacancy among trustees since it was not an order in execution of a decree.

There is no doubt that if the decision in *Abdul Hakim Baig v. Mahomad Burramuddin* (1) is right, this appeal must be allowed, but we are by no means satisfied that it is so. There seems no reason on principle why worshippers and others interested should be driven to a separate suit every time an alteration in a temple scheme is

(1) 95 Ind. Cas. 720; 49 M. 580; (1926) M. W. N. 226; A. I. R. 1926 Mad. 559.

(2) 75 Ind. Cas. 189; 47 M. 139; 18 L. W. 237; (1923) M. W. N. 664; A. I. R. 1924 Mad. 369.

*Pages of 49 M.—[Ed.]

required or why the well-known advantages of reserving "liberty to apply" so often availed of in England should not be applied here. Subrahmanya Ayyar and Davies, JJ., in *Prayag Dossji Varu v. Tirumala Srirangacharlavaru* (3) thought that s. 539 of the old Civil Procedure Code conferred on Courts in this country the same powers as were possessed by the Court of Chancery at the time of its enactment, e. g., the power to appoint additional trustees even though such appointment involved a departure from the arrangement contemplated in the constitution of the trust.

The learned Judges also held on the authorities that the High Court possessed in the matter of administration of public religious charities "the same practically unlimited jurisdiction as the Court of Chancery." On appeal to the Privy Council *Prayag Dossji Varu v. Tirumala Srirangacharla Varu* (4) the Judicial Committee themselves settled a scheme which (cl. 10) reserved liberty for the Vicharanakarthas or any person interested to apply to the District Court, with reference to the carrying out of the directions of the scheme.

In *Sevak Jeranchod Bhogilal v. Dakore Temple Committee* (5) the Privy Council had confirmed a temple scheme of which cl. 20 ran as follows:—"The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay," c.f., the same case in *Shankarlal Purshotham Gor v. Dakore Temple Committee* (6). In *Sakharam Daji Ganpule v. Ganu Raghu Guroo* (7) a scheme had been settled in 1897 and the question whether the present suit (brought long after) was barred by s. 92 (2) was answered in the affirmative but the Court said it was open to any one interested to apply to the Court which framed the scheme to supplement or modify it. It was not suggested that a separate suit was necessary and that though no liberty

to apply is reserved under the scheme such a reservation can be always implied.

Further in *Manadananda Jha v. Tarakananda Jha* (8) the Court in framing a scheme had given liberty to any person interested to apply to the District Court with reference to the carrying out of the directions of the scheme and also to the High Court for any necessary modification of the scheme. Mookerjee, J., said:—"The principle on which these clauses were inserted in the decree was explained by this Court in the following passage of its judgment in the case of *Sadupadhya Umesha-nand Ojha v. Ravaneswar Prasad Singh* (9):—

"The authority of the Court to amend the scheme from time to time has not been and cannot possibly be questioned. As was pointed out by Mr. Justice Subrahmanya Ayyar in the case of *Prayag Dossji Varu v. Tirumala Srirangacharlavaru* (3) which was subsequently affirmed by the Judicial Committee in *Prayag Dossji Varu v. Tirumala Srirangacharla Varu* (4) there is ample authority for the proposition that a Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as exigencies of the case may require. Reference need only be made to the decisions in *Attorney-General v. Bovell* (10), *Attorney-General v. Bishop of Worcester* (11), *Major of Lyons v. Advocate General of Bengal* (12) and *Browne's Hospital v. Stamford* (13)."

Finally a Bench of three Judges of this Court in O. S. No. 527 of 1924, (the Triplican Temple case) sanctioned (cl. 36) liberty to apply under certain conditions. With this body of authority against the view taken in *Abdul Hakim Haig v. Mahomed Burramuddin* (1) and with the express authority of the Privy Council in two cases mentioned above, where the power to reserve liberty to apply appears to have been assumed without question or hesitation, we are not prepared to follow the ruling in *Abdul Hakim Baig v. Mahomed Burram-*

(3) 28 M. 319; 15 M. L. J. 133.

(4) 30 M. 138; 11 C. W. N. 442; 9 Bom. L. R. 588; 17 M. L. J. 236; 2 M. L. J. 119; 34 I. A. 78 (P. C.).

(5) 87 Ind. Cas. 313; 22 L. W. 246; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; 49 M. L. J. 25; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. J. J. 623; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.).

(6) 91 Ind. Cas. 47; 28 Bom. L. R. 309; A. I. R. 1926 Bom. 179.

(7) 60 Ind. Cas. 924; 45 B. 683; 23 Bom. L. R. 125.

(8) 76 Ind. Cas. 220; 37 C. L. J. 281; A. I. R. 1924 Cal. 330.

(9) 43 Ind. Cas. 772.

(10) (1840) 1 Ph. 762; 4 Jur. 548; 41 E. R. 822; 65 E. R. 506.

(11) (1851) 9 Hare 328; 21 L. J. Ch. 25; 16 Jur. 3; 18 L. T. (o. s.) 86; 68 E. R. 530; 89 E. R. 474.

(12) (1876) 1 A. C. 91; 45 L. J. P. C. 17; 34 L. T. 77; 24 W. R. 679.

(13) (1889) 60 L. T. 288.

muddin (1) unless it is confirmed by the Full Bench. We have, therefore, decided to refer the following question to the Full Bench:—"In a temple scheme settled by the Court where liberty to apply is reserved to a person or persons (a) to ask for directions as to carrying out the scheme or (b) to move the Court for alterations or modifications of the scheme—is this reservation *intra vires* of the Court or is a separate suit necessary either under the provisions of s. 92, Civil Procedure Code, or on the ground that the suit has come to an end and the Court, therefore, *functus officio*" [as decided in *Abdul Hakim Baig v. Mahomed Burramuddin* (1)]

Krishnan, J.—I agree.

The appeal was heard on the 15th and 16th August, 1927, in pursuance of the aforesaid Order of Reference to a Full Bench, by the Officiating Chief Justice, Mr. Justice Beasley and Mr. Justice Anantakrishna Ayyar.

Messrs. T. M. Krishnaswami Ayyar and T. E. Ramabhadrachari, for the Appellant.

Messrs. P. R. Ganapati Ayyar, Watrap S. Subrahmanya Ayyar, T. R. Srinivasa Ayyangar, T. Rangachari and R. Purshottama Ayyangar, for the Respondents.

The case stood over for consideration till the 18th of December, 1927, on which date the Court expressed the following

OPINION.

Phillips, Offg. C. J.—The question that has been referred for our opinion is: "In a temple scheme settled by the Court where liberty to apply is reserved to a person or persons (a) to ask for directions as to carrying out the scheme or (b) to move the Court for alterations or modifications of the scheme—is this reservation *intra vires* of the Court or is a separate suit necessary either under the provision of s. 92, Civil Procedure Code, or on the ground that the suit has come to an end and the Court, therefore, *functus officio*?"

This question has been decided by a Bench of this Court in *Abdul Hakim Baig v. Mahomed Burramuddin* (1) where it was held that the provision in a scheme for an application being made for relief specified in s. 92, Civil Procedure Code, was *ultra vires*. The same view was also taken by another Bench of this Court in *Ryali Brahmayya v. Venkatacharya Naray-*

anamurthy (14) and in *Ayinailli Narayanamurthi v. Bulusu Achayyasasthula* (15). Spencer and Srinivasa Ayyangar, JJ., came to the same conclusion although in that case the observation was purely *obiter*. In *Majeti Antayya v. Lingambhotla Venkata Rammayya* (16) Madhavan Nair, J., and myself were inclined to take the same view, but it was unnecessary for the purposes of that case to decide the question. *Prima facie* a direction by the Court that future proceedings with reference to a trust should be held before it by means of an application would appear to be *ultra vires* in view of s. 92, Civil Procedure Code. That section prescribes that in the case of breach of a trust created for public purposes of a charitable or religious nature a suit has to be filed either by the Advocate-General or by persons who have obtained his sanction. The section specifically indicates that the remedy is by way of a suit subject to certain conditions and consequently any provision which says that the same remedy may be obtained by means of an application without conditions to the Court would appear to be *ultra vires*. It is pointed out in *Prayag Dossji Varu v. Tirumala Srirangachariavaru* (3) by Subrahmanya Ayyar, J., that the Courts in this country have been given under s. 53J of the Civil Procedure Code (corresponding to the present s. 92) the same powers as were possessed by the Court of Chancery at the time of its enactment, and this view was upheld in *Rama Das v. Hanumantha Row* (17). It does not necessarily follow from this that the procedure to be adopted when exercising this power must be the procedure prescribed for the Court of Chancery in England. On the contrary, in cases relating to public trusts s. 92 of the Civil Procedure Code definitely lays down the procedure to be adopted before the jurisdiction of the Court can be invoked. Similarly in England under Sir Samuel Romilly's Act and the Charitable Trusts Act a certain procedure is laid down and that procedure is different from the procedure in this country, for the Attorney-General is allowed to proceed

(14) 94 Ind. Cas. 554; 50 M. L. J. 409; A. I. R. 1926 Mad. 557.

(15) 85 Ind. Cas. 188; 20 L. W. 687; 47 M. L. J. 714; A. I. R. 1925 Mad. 411.

(16) 95 Ind. Cas. 5; (1926) M. W. N. 283; A. I. R. 1926 Mad. 655.

(17) 12 Ind. Cas. 449; 36 M. 304; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

in the matter of these trusts by means of a petition—a procedure which has been substituted for the previous method of proceeding by information. As against this view it was contended by Mr. Rangachariar that the Courts have power to insert such provisions in a scheme and he bases his argument on two grounds: (1) In Administration suits and other similar suits the Court has always power to give leave to apply and even in some cases where such leave is not expressly reserved it may be implied; and (2) The Privy Council has on two occasions sanctioned the insertion of a similar provision in schemes approved by it. The principle upon which the Court reserves leave to apply is based on the fact that in certain suits the Court is unable to give a complete judgment upon all the points connected with the case, or even if it is not unable to do so it thinks it advisable that the decision should be deferred. In all such cases, naturally leave to apply, at a later date is either expressly given or possibly may be implied, but when the Court has finally decided any question there can be no ground for granting leave to put in an application to modify this final conclusion, for the final conclusion has become a decree and an application to modify it would be an application to set aside the decree. When, therefore, the Court has definitely framed a scheme for a religious institution under s. 92, Civil Procedure Code, and has decided that certain things shall be done under the scheme it can hardly be said that this is not a final adjudication of all the questions arising in the suit in connection with such scheme and consequently one cannot infer that anybody could, as of right, apply for modification of the scheme. Reference may be made to *In re Jarvis's Charity* (18), where it was held that when a petition was presented for the appointment of a new trustee the certificate of the Charity Commissioners under the Charitable Trusts Act was essential. That certificate is similar to the sanction of the Advocate-General, referred to in s. 92. The ground of that decision was that a final order had already been made and, therefore, the petition on which it was made cannot be said to be actually pending. It was held in *Attorney-General v. Bishop of Worcester* (11) that a scheme having been framed might be sub-

(18) (1859) 62 D. R. 315; 1 Dr. & Sm. 97; 127 R. R. 36.

sequently altered but it was recognized that such alteration must be effected on an application by the Attorney-General—the procedure prescribed for such matters in England. The mere fact that the Court will allow a modification of the scheme does not necessarily show that modifications can be carried out in this country by procedure other than that prescribed by s. 92.

So far as the authority of the Privy Council is concerned, I am inclined to think that too much weight may easily be attached to the two cases relied on by Mr. Rangachariar. The first is the *Tirupathi Temple case, Prayag Dossji Varu v. Tirumala Srirangacharlavaru* (3). The judgment of this Court in that case does not give us much assistance in the present case, but in the appeal from this Court, the judgment in which is reported as *Prayag Dossji Varu v. Tirumala Srirangacharla Varu* (4), the Privy Council with a few modifications approved the scheme framed by the Madras High Court and that scheme contained the following two provisions:—

“Clause 10. Liberty for the Vicharanakartha and any person interested to apply to the District Court with reference to the carrying out of the directions of the scheme.

Clause 11. Liberty for the Vicharanakartha and any person interested from time to time to apply to the High Court for any modification of this scheme that may appear to be necessary or convenient.”

The words “or convenient” were added by the Privy Council. Clause 11 certainly supports Mr. Rangachariar's view that the Privy Council approved of a direction to apply to the Court by a petition for modification of the scheme. However, when we peruse the report more carefully it appears that this appeal was heard *ex parte* and the scheme appears to have been finally settled “with the assistance of the learned Counsel engaged.” The question of the validity of cls. 10 and 11 was not raised before their Lordships and cannot be said to have been decided. The other case relied on is the *Dakore Temple case*. This went before the Privy Council and is reported as *Sevak Kirpa Shankar Daji v. Gopal Rao Manohar Tambekar* (19). In that case the scheme prepared in the lower Court was

(19) 17 Ind. Cas. 441; 24 M. L. J. 199; 12 M. L. T. 448; (1912) M. W. N. 1106; 16 C. L. J. 610; 15 Bom. L. R. 13 (P. C.).

approved with a few modifications. Reliance is placed mainly on cl. 20 of the scheme which says that the provisions of the scheme may be altered, modified, or added to by an application to His Majesty's High Court of Judicature at Bombay; but we find there is also a cl. (12) which directs the Committee to make rules for various purposes, which rules have to be sanctioned by the District Court of Ahmedabad, so that they may have the same force as if they were part of the scheme, sub-cl. 7. Therefore, after the case left the Privy Council further rules had to be framed and sanctioned by the District Court, and apparently under cl. 20 alterations or modifications might be made by the High Court of Bombay. That this is the intention of their Lordships appears from the report in *Sevak Jeranchoo Bhogilal v. Dakore Temple Committee* (5). Apparently rules had been framed under the scheme and were sanctioned by the District Court. Against the order of the District Court an appeal was filed in the High Court and from there the case was taken to the Privy Council. It was then held that it was wrong to consider the order made by the District Judge sanctioning the rules as one under s. 47, Civil Procedure Code, and, therefore, no appeal lay to the High Court and similarly no appeal lay to His Majesty in Council; but it was suggested that the High Court had power conferred upon it by cl. 20 of the scheme to alter, or modify, or add to the rules sanctioned by the District Judge on an application made to it with that object, but it had no other power. The scheme, therefore, as it left the Privy Council, was not final and further orders were necessary in the District Court and in the High Court before the scheme took its final shape. In the circumstances of these two cases which I have analysed, can it be said that the Privy Council has decided that a provision for persons interested to apply for modification of the scheme is not *ultra vires*? To do so would, I think, be stretching case-law too far. The point was never raised, much less decided, but in certain circumstances and without contest the Privy Council has given its sanction to such a rule in the *Tirupathi Temple* case. The rule in the *Dakore Temple* case appears to be one framed before the final shaping of the scheme. I am, therefore, of opinion that in neither of these cases can it be said that the Privy Council is of the opinion that

such a clause is *intra vires*. We have, therefore, the opinion of several Judges of this Court that such a rule is *ultra vires* and, on the other side, there is the very vague authority of the decisions of the Privy Council.

In Patna and Calcutta a different view has been taken. In *Sadupadhya Umesha-nand Ojha v. Ravaneswar Prosad Singh* (9) it was held by the Calcutta High Court that power might be given to amend the scheme on an application—a power which should even include the removal of a member of the temple committee. In *Muhammad Waheb Hussain v. Abbas Hussain* (20) the Patna High Court held that not only was such a rule *intra vires* but that it was necessary that it should be inserted. Both these cases seem to treat the suits as administration actions, but although they may deal with questions relating to the administration of the trust fund, certainly not every suit under s. 32 can be called an administration suit. A suit may be for the removal of a trustee and the decree may be passed accordingly, but this certainly cannot be said to be an administration suit. The question of administration very frequently arises and it is for the Court to decide in what manner the administration shall be carried out, but it does not follow from that that the Court should assume to itself the administration of the trust, which it in fact does if it makes rules providing for applications to be made by trustees and others interested in the trust for varying or modifying the scheme already framed. If there is leave to apply in such suits, it necessarily implies that the suit is pending, and, therefore, once a suit has been filed for settling a scheme and liberty to apply is given in the scheme the suit should be deemed pending for ever and ever, for it is always possible that some person interested may make an application. This principle, therefore, of reserving liberty to apply in temple suits appears to me to be based on wrong premises. It should only be done when the Court is unable, or for good reasons thinks it advisable not to finally determine any question arising for its decision but to leave such decision for a future date. Unless there is some ground of this sort the decision must necessarily be final and, therefore, an order that such

(20) 71 Ind. Cas. 280; 4 P. L. T. 326; A. I. R. 1929 Pat. 420.

final decision can be altered by a mere application would seem to be *ultra vires*. I may observe here that the question put to us is a double question and the answer to the two parts of the question must be different. The first is "Where liberty to apply is reserved . . . to ask for directions as to carrying out the scheme . . ." So far as this is concerned this may well be *intra vires* unless it contravenes the provisions of s. 92, Civil Procedure Code, for the assistance of the Court is asked merely to carry out what it has already ordered, and if such assistance can be given without contravening the provisions of s. 92, there can be no objection to such a rule being framed, but when permission is given to apply to the Court for alteration or modification of the scheme it appears to me that this at once offends against s. 92. The scheme having been framed, any modification or alteration of it is in effect a new scheme and the power to frame a scheme is given only subject to the conditions specified in s. 92. I will, therefore, answer the question put to us by one joint answer, namely, that the reservation by the Court to a person or persons to apply for a relief which will come within s. 92 of the Civil Procedure Code is *ultra vires* but that if such reservation does not offend in this way or against any other provision of law it may be useful or advisable for carrying out the provisions of the scheme already framed.

Beasley, J.—I agree.

Anantakrishna Ayyar, J.—I also agree.

V. N. V.

A. N. A.

Reference answered.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1405 AND 1406 OF 1924.

March 23, 1927.

Present:—Mr. Justice Srinivasa Iyengar.

THE RAJA OF VIJIANAGARAM—

—PLAINTIFF—APPELLANT

versus

JORREGALA GANGADU AND ANOTHER—

DEFENDANT—RESPONDENTS.

Inam—Service inam granted partly for public service.—Resumption, legality of—"Kattu kaluva service", whether public service—Grant by two persons—One alone, whether entitled to revoke.

A service inam granted in part for performance of a public service cannot be resumed merely on the ground that the services are no longer required.

Where two persons having interest in a particular property make a grant of the same for the purpose of securing certain services, it is not competent to one of them alone without the concurrence of the other to cancel or revoke the grant.

A grant for *kattu kaluva* service is a grant of a public nature.

Second appeals against the decrees of the District Court, Vizagaptam, in A. S. Nos. 7 and 9 of 1924, preferred against those of the Court of the District Munsif, Chodavaram, in O. S. Nos. 622 and 623 of 1922 respectively.

Messrs. S. Srinivasa Iyengar and S. Venkatesa Iyengar, for the Appellant.

Mr. Y. Suryanarayana, for the Respondents.

JUDGMENT.—I am not persuaded that the judgment of the lower Appellate Court in this case is wrong. In the plaint itself the grant has been stated by the plaintiff-appellant to partake at least in part of a grant for *kattu kaluva* service. Such service has, in the decision referred to and relied upon in the Courts below, been held to be a public service. If the grant was originally made for public service, that is, in other words, service to the villagers and not for private service to the *zemindar* himself, it follows that the plaintiff cannot resume the *inam* on the ground that he does not need any longer the service to be performed to him. Though the lower Appellate Court has found that it was a grant in lieu of wages on the footing that it was a grant at any rate partly for public service to be performed for the villagers, it follows that the plaintiff has no right by himself to resume a land terminating the service. Again in this case the ground on which the argument was put forward was that ever since the Permanent Settlement, the plaintiff has had cast on him and also has undertaken the duty in respect of the irrigation of the village but whatever may be the rights and obligations of the landlord as between himself and the Government under the terms of the Permanent Settlement, it does not follow that the landlord is entitled to put an end at his pleasure and without the concurrence on the part of the villagers to certain services which have been provided for by the grant. It is not sug-

gested that the villagers in whose favour or for whose benefit the services are to be performed have agreed to the resumption of the grant. There is also one other aspect which I might advert to. The grant, it is admitted, was made before the Permanent Settlement. It was made by the villagers. It is said that the grant could not have been made without the consent of the landlord. Assuming for argument that the zemindar was also consenting party to the grant being made, it then follows that two persons having interest in particular property made a grant of the same for the purpose of securing certain service. If both of them joined in making the grant it does not hold to logic or reason that one of them should be entitled to cancel or revoke the grant and resume the *inam* merely at his pleasure and without the concurrence of the other party who was also a grantor. No doubt, if there had been such a condition in the grant itself or if it was pleaded and found, such a thing may be considered. But that is not the case. On the finding of both the Courts below that the service for which the grant was originally made by the villagers was at least partly of a public nature, it follows that the resumption claimed could not be supported. The lower Courts were right in their judgment. The second appeal fails and is dismissed with costs.

SECOND APPEAL No. 1406 of 1924:—Following my judgment in the connected Second Appeal No. 1405 of 1924 this second appeal is dismissed with costs.

V. N. V.

A. N. A.

Appeals dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 395
OF 1927.

October 28, 1927.

Present:—Mr. Justice Broadway.

TARA CHAND, MINOR, THROUGH Musammam
GUJRI—APPLICANT—PETITIONER
versus

HARNAM SINGH AND ANOTHER—OPPOSITE
PARTY—RESPONDENTS.

Trusts Act (II of 1882), ss. 49, 61—Trustee—Investment of funds—Jurisdiction of Court to interfere with trustee's discretion on summary petition.

A District Judge has no jurisdiction to interfere with the discretion of a trustee in the investment of trust funds on a summary petition. He can do so only in a properly instituted suit.

Petition for revision of the order of the District Judge, Amritsar, dated the 27th March, 1927.

Mr. J. M. Mackey, for the Petitioner.

Mr. Dev Raj Sawhney, for the Respondents.

JUDGMENT.—Tara Chand minor acting through his mother Musammam Gujri moved the District Judge of Amritsar under ss 61/49 of the Indian Trusts Act II of 1882 asking that Sardar Harnam Singh, a trustee, should be ordered to deposit certain trust money in the Imperial Bank of Amritsar or otherwise to invest it in some approved securities. The learned District Judge held that he had no jurisdiction to interfere with the discretion of the trustee except on a properly instituted suit and the petition was dismissed.

Against this order of dismissal the minor through his mother has come to this Court in revision and it has been urged that the District Judge had jurisdiction. It was pointed out that under s. 49 of the Indian Trusts Act, the District Judge, as the principal Civil Court of original jurisdiction in Amritsar was empowered to control the discretionary powers conferred on a trustee on suitable occasions arising and that the District Judge could function on a petition. In this view I am unable to agree. Section 49 appears in Chapter V and deals with disabilities of trustees. This section gives the District Judge power to control the actions of a trustee when it becomes necessary to do so. In the following Chapter VI, provision is made for the rights and the liabilities of beneficiaries and under s. 61 it has been enacted that a beneficiary has a right to compel a trustee to perform any particular act or to restrain him from committing any contemplated or probable breach of trust. The learned Counsel who appeared for the petitioner admitted that the beneficiary could not move the Court under s. 61 in a summary manner. In my judgment the view taken by the learned District Judge is correct and is in consonance with Civil Revision No. 864 of 1926 decided by Mr. Justice Coldstream on the 30th of November, 1926.

I, therefore, dismiss this petition with costs.

R. L.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 59 OF 1927.

June 21, 1927.

Present:—Mr. Justice Allanson and
Mr. Justice Sen.

BAJIT MIAN AND OTHERS—ACCUSED—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 307—Jury trial—Non-direction, when amounts to misdirection—Disagreement with verdict of Jury—Reference to High Court, when necessary—Discretion of trial Judge.

It is only when the non-direction of a Jury is such that there are grounds for thinking that the Jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection. [p. 675, col. 2.]

Section 307 of the Criminal Procedure Code gives a discretion to the Judge in the matter of reference and it is only when he disagrees with the verdict of the Jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion his failure to submit the case is not a subject for interference by the High Court on appeal. [p. 676, col. 1.]

Bran Khan v. Emperor (4), followed.

Empress v. Guruvadu (2), distinguished.

Where a Judge stated that, although he still thought that the conviction of the accused was possibly against the weight of evidence, he had modified his original view and was satisfied that the accused took part in the crime, and that there was thus no reason why a reference should be made and accepted the verdict and convicted the accused:

Held, that the case was not a fit one for reference under s. 307 of the Criminal Procedure Code. [p. 676, col. 2.]

Criminal appeal from a decision of the Additional Sessions Judge, Bhagalpur, dated the 15th February, 1927.

Mr. W. H. Akbari, (with him Mr. S. Hussain), for the Appellants.

Mr. C. M. Agarwala, Assistant Government Advocate, for the Respondent.

JUDGMENT.

Sen, J.—In this case there were four persons charged under s. 395 of the Indian Penal Code. Of these four, Madhu Mian has been acquitted the Judge accepting the unanimous verdict of the Jury in his favour. As regards the other three accused, the Jury by a majority of four to one, were of opinion that they were guilty under s. 395 of the Indian Penal Code. The learned Additional Sessions Judge took time to consider the verdict and finally passed an order accepting the verdict and convicting the accused Bishu Tatwa, Bajit Mian and Baijnath Jolaha under the said section

and sentencing them to rigorous imprisonment for four years each. This appeal is on behalf of two of the three accused so convicted and sentenced, namely Bajit Mian and Baijnath Jolaha.

There are two grounds urged. The first is that having regard to the view of the learned Additional Sessions Judge that the verdict was against the weight of evidence he should have submitted the case to the High Court under s. 307 of the Code of Criminal Procedure. The second is that even if in the opinion of this Court the learned Additional Sessions Judge was not bound to make a reference under s. 307, the order of conviction and sentence should be set aside inasmuch as the verdict of the Jury was the result of misdirections on some of the most important issues in the case.

I propose to deal with the second ground first. It is necessary to consider some of the facts of the case in order to appreciate the arguments advanced under this head by learned Counsel appearing for the appellants. The dacoity in question is alleged to have taken place on the night of the 17th August, 1926, in village Basaita in the house of one Mahadeo Gangota. Mahadeo Gangota was sleeping on the *osara* of the southern room of his house. After midnight he was roused by someone striking him with a *lathi* whereupon he entered the room opening on to the *osara* where his sons, Chedi, the first informant in the case, and Harihar were. The dacoits effected an entrance into the room and dragged out Mahadeo and Chedi into the *angan*. Mahadeo thereafter, entreated the dacoits to let him go offering to make over a *hasuli* to them. He went into the southern room, brought out a *hasuli* belonging to his wife, which had been hidden in the bedding, and made it over to the dacoits. Chedi in the meantime had effected his escape and ran into the fields. After the *hasuli* had been handed over, the dacoits began to intimidate Mahadeo's wife, *Musammatt* Surji, and tried to extract information from her as to where her valuables were hidden. They lighted a fire, threatened to burn her if she did not comply with their requisition, and even went to the length of scorching her leg in the fire they had lit for the purpose. Ultimately, when they discovered that there was not much else to be had from the house they retreated after taking such other small articles as they could get hold of,

Chedi remained out in the fields the whole night. In the morning he sought out the village *chaukidar* and, with him and one Bhutan Gangota, proceeded to Kishunganj *thana* where he arrived at 6 p. m. on the 19th August, 1926. It happened, however, that there was no one at the *thana* who had power to institute a case. There was only a literate constable in charge of the *thana* who made an entry in the station diary and sent on Chedi and his companions with a copy of this entry to village Lachmipur. They reached Lachmipur at 11 p. m. and there the writer head constable drew up a regular First Information Report. A great deal of the argument advanced in this Court turns upon this First Information. Chedi while lodging the First Information Report stated that he himself did not know who the dacoits were. All that he could say was that his father had said that there were eight dacoits in all, that they were speaking Urdu and that all of them were young. He added, "I could not see on account of darkness if they had applied anything to their faces."

Later on, however, there appears to have been some development inasmuch as *Musammatt Surji* is alleged to have identified Bajit, Baijnath and also Bishu Tatwa, the last named with particular reference to his gold topped teeth. It may be noted that in view of his evidence, given in the course of the trial the question naturally arose as to whether if *Musammatt Surji* had so definitely recognised the three accused, their names would not have been stated in the First Information Report lodged by Chedi. It was suggested on behalf of the prosecution that it was just possible that Chedi had not come back home from the fields before going to the Police Station to lodge the First Information. "This theory, however, as appears from the charge to the Jury administered by the learned Additional Sessions Judge, could not stand for a moment. In point of fact Chedi, it is suggested in the charge, must have come home and had a consultation with his father and mother and seen what damage the dacoits had done to the house and the yard, and having so apprised himself of the main facts and circumstances connected with the dacoity he must have proceeded to the Police Station to lodge the First Information. The learned Additional Sessions Judge makes special reference to

the fact that Chedi, having been away in the fields most of the time when the dacoits were in the house, could not possibly have given the details of the occurrence and of the damage done to the house, etc., of his own knowledge had he not returned to the house first and then proceeded to the Police Station. In all these matters it is perfectly clear that the learned Additional Sessions Judge made a full and fair and adequate charge to the Jury finally conveying his opinion to the Jury that "It is impossible to believe that Chedi had no talk with Mahadeo and *Musammatt Surji* before he left the village. He must have had, because he himself was not present throughout the occurrence and many of the details given in the First Information Report must, and could only, have been derived from his parents."

Learned Counsel, appearing for the appellants, contends, however, that this dogmatic expression of the Judge's own opinion would rather take away from its weight and convincingness; the better course, and in fact the only proper course, for the learned Additional Sessions Judge was to place the direct evidence on the subject. He points out a passage from the deposition of *Musammatt Surji* in which she said, "Chedi also came back. One Bhutan of Lower Lowngaon came with him. Chedi went to the *thana*. It was about midday when he left." He also points out a passage from the deposition of Chedi in which he said, "I have known Bishu Tatwa for 10 years or so. I have known Bachhu and Baijnath for about five years. I have known Bajit Mian for the last four years. I went to see them occasionally at the *hat* or on the road I recognised them by their voices. They were Bajir, Bisu, Baijnath and Madhu, the accused. I asked why they were maltreating us but they went on shouting 'stop, you *sala* or we will kill you.'

On the strength of these two passages, one in the deposition of Chedi and the other in that of *Musammatt Surji*, learned Counsel contends that if the Judge had put these statements before the Jury which constituted the direct evidence in the case, instead of giving his inference in a dogmatic manner as above mentioned, the Jury would have been in a position from such direct evidence to come to right conclusions on the question as to whether the omission of the names from the First Informa-

ation would not sufficiently establish the innocence of the accused in regard to any part in the dacoity in question. In other words, instead of telling the Jury that it was impossible to believe that Chedi had not returned home before proceeding to the *thana* the learned Additional Sessions Judge should have given the Jury *Musamm*at Surji's evidence to the effect that Chedi did come as a matter of fact and that he, therefore, had sufficient opportunity to know the names of the accused. Further, he argues that the evidence of Chedi himself that he had actually recognised the accused, if put to the Jury, would have led them at once to view with very great suspicion the First Information Report, the absence from which of the names of the accused would in that case be perfectly unaccountable.

A third contention which he raises is that the learned Sessions Judge was equally dogmatic in that portion of the charge where he discussed the question as to whether such a dacoity did actually take place or not. He expresses the definite opinion that a dacoity had in fact occurred at the place and on the date as alleged. The learned Additional Sessions Judge observed, "It is impossible to believe that his son would, if no dacoity had taken place at all, have lodged the First Information on which the present case was instituted."

He also said :

"It seems to me impossible not to believe that a dacoity was actually committed and that a reasonably veracious account has been given of what the dacoits did at Mahadeo's house."

After having so delivered the charge on the subject of the occurrence itself the learned Sessions Judge proceeded to remark that the real question at issue, however, was whether the four persons in the dock were among the dacoits. This according to the learned Counsel for the defence is denying the Jury the right to form their own judgment on the question as to whether a dacoity did take place as alleged. Having failed to infect them with his own belief so dogmatically expressed, it was not to be wondered that the learned Additional Sessions Judge was eventually surprised at the verdict of the Jury against all the accused.

These are the main objections on the ground of misdirection to the Jury. Barring these features which in his opinion are

objectionable though perfectly unintentional, learned Counsel concedes that the charge is, as it reads, a charge for acquittal and the learned Additional Sessions Judge has clearly and unambiguously expressed his opinion that on the evidence adduced in the case it would hardly be possible to bring the charge home to the accused. It is difficult to judge from the heads of charge to the Jury which must necessarily be an abstract, and not a verbatim report of the summing up of the Court, as to whether the passages in question in the deposition of *Musamm*at Surji and Chedi were or were not placed before the Jury [*Eknath Sahay v. Emperor* (1)]. But the learned Additional Sessions Judge, in my opinion, has not merely in a dogmatic manner expressed his belief in the matter of Chedi's return home and also in the matter of Chedi's supplying himself with material facts for the First Information from his parents. In one portion of his summing up he observes, "It is not reasonable to suppose and *there is evidence to the contrary*, that *Musamm*at Surji did not communicate to her son before he left the village all that she knew of the occurrence and in particular of the identity of the dacoits."

The "evidence to the contrary" may certainly refer to the evidence of *Musamm*at Surji that Chedi came back home before going to the *thana*. I am, therefore, constrained to think that there is no substance in the contention that by omitting to refer to any material evidence in the case the Court prevented the Jury from arriving at the right conclusion. As I have already observed the summing up of the learned Additional Sessions Judge from beginning to end is so clearly in favour of acquittal that it would be straining too much to say that the Jury did not receive adequate assistance from the Court. It is only when the non-direction is such that there are grounds for thinking that the Jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection. I fail to see any such non-direction in the summing up.

Nor do I think that there is much force in the contention put forward that the opinion expressed by the learned Additional

(1) 35 Ind. Cas. 657; 1 Pat. L. J. 317; 17 Or. L. J. 353; 2 P. L. W. 343.

Sessions Judge that a dacoity in fact took place as distinguished from his opinion that it was highly doubtful whether the accused took part in it would amount to a misdirection. If any thing, it would, in my opinion, more pointedly refer to the innocence of the accused notwithstanding the fact, as it seems to have been established by the evidence, that a dacoity had taken place. The result, therefore, is that I do not think that there is any occasion for this Court to interfere on the ground of misdirection.

It remains now to consider the other contention, namely, that in the circumstances of this case the learned Additional Sessions Judge should have made a reference under s. 307 of the Code of Criminal Procedure. There are three things which appear clearly from the provisions of s. 307 and from the rulings thereon. First, it is entirely within the discretion of the Judge as to whether he should make a reference or not. Secondly, a reference is called for when the Judge "is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court" and he shall in that event submit the case accordingly, recording the grounds of his opinion. Thirdly, the Judge must disagree with the verdict of the jurors or of a majority of them. In the present case the learned Additional Sessions Judge took time to consider whether the case should be referred to the High Court under s. 307 of the Code of Criminal Procedure. He did so, as he states in his order, on a count of the fact that at the time he had a suspicion that the methods adopted by the Police had been reprehensible. Subsequently, he made a more careful study of the Police diaries and found that his suspicion was not well-grounded. Accordingly, he modified his original view and felt satisfied that the appellants had taken part in the offence charged against them. In these circumstances he recorded an order as follows:—

"Although, therefore, I still think that possibly the conviction of Bajit and Baijnath is against the weight of evidence on the record, I have modified my original view and am satisfied that these persons took part in the crime. There is thus no reason why a reference should be made to the High Court. I accept the verdict and convict the accused."

It is to be noted that although he was originally minded to dissent from the verdict, at the moment of the order he was certainly not in a position to dissent from it. On the contrary, he had fully satisfied himself as to the guilt of the accused. I fail to see how in these circumstances it could be a fit case for reference under s. 307. Learned Counsel for the appellants, however, urges that inasmuch as there was still some doubt in his mind as to whether the conviction of Bajit and Baijnath was not against the weight of evidence on the record the only course left to him was to submit the case to the High Court. Reliance is placed on the case of *Empress v. Guruvadu* (2) in which it is laid down that the discretionary power to refer cases under s. 307 should always be exercised when the Judge thinks that the verdict is not supported by the evidence inasmuch as a failure to do so results in the conviction of persons on evidence as to the sufficiency of which the Court is doubtful. The facts of that case, however, were different. The learned Sessions Judge in that case being doubtful as to whether the verdict was justified by the evidence thought that it was not incumbent upon him to send the case to the High Court observing that "probably there would be an appeal." The High Court in that case pointed out that the learned Sessions Judge should have remembered that there was no appeal on the facts when once the trying Court had accepted the verdict and based its conviction thereon; thus there was not justification for the failure to submit the case to the High Court on the ground that probably an appeal would be preferred. Another case upon which strong reliance has been placed is the case of *Saroda Charan Mistri v. Emperor* (3). In that case the Jury brought in an unanimous verdict of guilty under s. 302 of the Indian Penal Code in respect of one of the accused and under s. 328 of the Indian Penal Code in respect of the other accused. The learned Judge observed that there was no justification for the differentiation of the cases of the two accused and that if the accused were at all guilty they would then both be certainly guilty of murder. On this point,

(2) 13 M. 343; 2 Weir 389; 4 Ind. Dec. (N. S.) 951.

(3) 87 Ind. Cas. 606; 41 O. L. J. 320; A. I. R. 1925 Cal. 795; 26 Cr. L. J. 1006.

therefore, there appeared to be a clear, full and complete dissent on the part of the learned Judge from the verdict of the Jury. The other point involved in the case was as to whether or not the two accused knew that the drug they were administering to the deceased was poison. They had been given that drug by a third person as a medicine. The case of the defence was that the accused did not know while they administered the drug that they were administering poison. The Jury unhesitatingly rejected the case of the defence as to such absence of knowledge. The learned Judge was inclined to think that he would rather give the accused the benefit of the doubt. But ultimately when passing the order he observed that considering that the Jury had unanimously brought in a verdict of guilty he did not think he was justified in pressing "the slight doubts" that still remained in his mind to the extent of referring the case to the High Court under s. 307 of the Criminal Procedure Code. With reference to the last mentioned point the High Court came to the conclusion that the disagreement of the learned Judge with the Jury was not such a complete dissent as to lead him to consider it necessary for the ends of justice to submit the case to the High Court. But with reference to the former the High Court held that there was such a clear and complete dissent as to the liability of the two accused under the same section that he was obviously unable to do justice to the accused by accepting the verdict and, therefore, there was no option left to him but to refer the case to the High Court under the provisions of s. 307. The present case bears some resemblance to the case of *Sarda Charan Mistr v. Emperor* (3), in so far as it relates to "the slight doubts" that still remained in the mind of the Court. Such doubts have been expressed by the learned Judge in the words: "Possibly, the conviction of Bajit and Baijnath is against the weight of evidence on the record." In the next sentence, however, he observes, "I have modified my original view and am satisfied that these persons took part in the crime."

This takes the case completely beyond the scope of the provisions of s. 307 of the Code of Criminal Procedure. But it cannot be said that he disagrees with the verdict. Nor that he is clearly of opinion

that it is necessary for the ends of justice to submit the case to the High Court. This principle has been affirmed in the later case *Eran Khan v. Emperor* (4), which lays down that "s. 307 quite clearly gives to the Judge a discretion in the matter, and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion, his failure to submit the case is not a subject for interference by this Court on appeal."

In this connection it would be well to remember the principle laid down in one of the earliest cases of Jury trial in India: "If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of assessors," *Queen v. Sham Bagdee* (5). In the present case it was unexpected that the Jury should have returned a verdict of guilty by a majority of four to one. But the jurors are entitled to their own view of the case and the rule of law is not to disturb their verdict unless it be for special reasons and under special circumstances. The principle underlying that rule is well-expressed as follows: "We adhere generally to this principle, notwithstanding our large discretionary powers, first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature, and secondly, because any undue interference may tend to diminish the sense of responsibility which it is desirable that a Jury should cherish," *Reg v. Khanderav v. Rajirav* (6).

The appeal must be dismissed and the convictions and sentences affirmed.

Allanson, J.—I agree.

A. N. A.

Appeal dismissed.

(4) 74 Ind. Cas. 950; 50 C. 658 at p. 662; 24 Cr. L. J. 838; A. I. R. 1924 Cal. 47.

(5) 13 B. L. R. Ap. 19; 20 W. R. Cr. 73.

(6) 1 B. 10; 11 Mad. Jur. 215; 1 Ind. Dec. (N. S.) 7.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 172-B OF 1927.

September 17, 1927.

Present:—Mr. Hallifax, A. J. C.

NARSINGHDAS MAHWARI—ACCUSED

—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Revision—Finding of fact—Interference—Mere mistake of law—No injustice—Interference, whether legal—Appellate Court—Alteration of charge, legality of—Penal Code (Act XLV of 1860), ss. 379, 409, 417, 420, 511—Theft, criminal breach of trust, criminal misappropriation and cheating, distinction between—Sentence, reduction of, when justifiable.

A Court of Revision has no right to disturb a finding of fact, even if it arrives at a different conclusion on an evaluation of the evidence. [p. 678, col. 2.]

It is not the duty of the Court of Revision to correct mere mistakes in law, which have no more effect than mistakes in grammar or spelling. The power of interference in revision is to be used only for the purpose of correcting injustice not mere illegality. [p. 679, col. 2.]

It is open to the Appellate Court to alter a charge to one under a different section and it should do so if another section applies to the facts, provided the accused knew all the facts alleged against him. [*ibid.*]

The distinction between theft, criminal breach of trust, criminal misappropriation and cheating is that in theft, the original taking is without honesty and without the consent of the owner and in criminal breach of trust it is with both. In obtaining property by cheating, the taking is dishonest but with the consent of the owner and in criminal misappropriation it is honest but without the consent of the owner. [*ibid.*]

A sentence of one year's rigorous imprisonment and a fine with further rigorous imprisonment for four months in default of payment of it, though legal under s. 420, Penal Code, is illegal, if the finding is altered in the Appellate Court to a conviction of attempting to cheat punishable under ss. 417 and 511 read together, under which the longest term of imprisonment that could be imposed substantively is six months and the longest that could be imposed in default of payment of fine is a month and a half. [p. 678, col. 2.]

A Court is not bound to reduce a sentence unless it appears to be heavier than the facts proved against the accused warrant, especially when the Courts below express the opinion that it is not so, even though the facts constitute a different offence for which the sentence passed is not a legal one. [p. 679, col. 2.]

Application for revision of a decision of the Sessions Judge, Amraoti, in Criminal Appeal No. 261 of 1927, dated the 12th July, 1927.

Mr. R. R. Jayvant, R. B., for the Applicant.

Mr. G. P. Dick, for the Opposite Party.

ORDER.—This, like most applications for revision in criminal cases, is nothing

more than a second appeal in which no question of law whatever is raised but every finding of fact in which the Courts below concurred is attacked, not as obviously mistaken but on the ground that an evaluation of the evidence by this Court should and would lead it to a different conclusion. Even if that did happen, this Court would not have even the right to disturb the decisions at which the Appellate Court has arrived. It happens further that in this case the learned Sessions Judge did fall into a very obvious mistake of law in respect of the sentence, but that has passed unnoticed and was not mentioned in the application for revision.

The sentence maintained in the Sessions Court was one of rigorous imprisonment for one year and a fine, with further rigorous imprisonment for four months in default of payment of it. That sentence is perfectly legal under s. 420 of the Penal Code, under which it was passed, but in the Sessions Court the finding was altered to a conviction of attempting to cheat, punishable under ss. 417 and 511 read together. The longest term of imprisonment that could be imposed substantively under these two sections combined is six months, and the longest that could be imposed in default of payment of fine is a month and a half.

Now, though the applicant had no right to ask that the whole of the evidence should be examined by this Court for the third time, that has been done and it is found, as might be expected, that it leads inevitably to the inferences of fact which two Courts have already drawn from it. They are these. The accused, a cotton broker, had in his possession a number of bales of cotton belonging to the complainant. On the 25th of January the bales were weighed and found to consist of 129 *akhas*. (The *akha* is a unit, which has not been defined in the case, but seems to include both weight and quality.)

The bales were in two lots or stacks, one of 43 units and the other of 86. The accused made three entries in his *nakal baki* or day book, all in the name of the complainant, of 43 units, 74 units and 12 units. It is in respect of the 12 units of the last item that he has been found to have committed an offence. After the weighment he told the complainant's servant, who had not checked it, that the total amount was 117 units, which was 12 short of the truth. The servant doubted this and asked for the

tak patti or weighman's tally, which the accused declined to give him, saying it was not necessary. The servant came back shortly afterwards with a friend and the accused repeated to them both the statement that the quantity of cotton was only 117 units and again declined to show them the weighman's tally.

On the 27th of January, two days after the weighing, the accused sold the lot of 43 units and credited the complainant with the price in his *khataoni* or ledger. Five days later, on the 1st of February, he sold the other lot of 86 units and credited the complainant with the price of 74 only. What entry was made at that time in respect of the remaining 12 units is uncertain, though it is clear that it was not a credit entry in favour of the complainant. (Before the ledger was produced in this case the page on which the entry of the 74 units appeared was removed and another substituted for it, showing the same entry and another just below it of the price of the 12 units, which was also credited to the complainant.)

During the next two or three weeks the complainant several times asked the accused for satisfactory evidence that his cotton had not amounted to more than 117 units, as he felt sure it had, and he asked in particular for the bill for ginning it which was with the accused, but the accused put him off from time to time by various falsehoods. On the first two occasions he said the bill had not yet reached him, on the third that he had already sent it by the hand of a messenger and on the fourth that it was lost. Eventually on the 22nd of February he gave the complainant a written receipt for the full amount of the cost of ginning his cotton, stating in it that the cotton consisted of 117 units. The complainant then went to the purchaser of the cotton, as he ought to have done and quite possibly had done earlier, and ascertained that 129 units had been sold as his.

The offence constituted by these facts is undoubtedly criminal breach of trust. There is no question of a mere attempt any more than there would be in a case of theft in which the stolen property was recovered or restored. The learned Sessions Judge seems to have been aware that s. 409 of the Penal Code really fitted the facts, but to have refrained from applying it because it was not mentioned in the

charge. A perusal of Chap. XIX of the Criminal Procedure Code would have shown that this could and should have been done. The accused knew all the facts alleged against him, and probably knew nothing at all about the difference between the various sections that have been mentioned.

As this ignorance is not confined to accused persons it may be useful to state compendiously an easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust. That depends on whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner.

Now it is not the duty of this Court sitting in revision to correct mere mistakes in law which have no more effect than mistakes in grammar or spelling. The power of interference in revision is to be used only for the purpose of correcting injustice not mere illegality. For that reason, even if the view of the Sessions Court that the facts constituted no more than an attempt to cheat were correct, I should refuse to reduce the sentence in this case unless it appeared to be heavier than those facts warranted. A Magistrate and a Sessions Judge have expressed the opinion that it is not so, and I agree with them. But the real illegality in the case is in not passing the sentence under s. 409 of the Penal Code, and if any interference is required at all it would be to alter the finding to one of an offence punishable under that section. That however would be a matter for an academy of law, not for a Court of Law.

I decline accordingly to interfere at all with the decision of the Sessions Court, by altering either the finding or the sentence. To leave them both will do as little harm and to correct one of them as little good as to do the same thing in regard to a word that appears in the record with two different spellings.

G. R. D.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 827 CF 1926.

June 1, 1927.

Present:—Mr. Justice Ashworth.

SRIPAT NARAIN SINGH AND OTHERS—

ACCUSED—APPLICANTS

versus

GAHBAR RAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 440—Revision—Omission to hear party—Second application, whether maintainable—Review—Duty of Counsel to see that application is placed before some Judge—Attempt to have application heard by another Judge, impropriety of—Penal Code (Act XLV of 1860), s. 427—Mischief—Complainant, whether bound to prove his title.

No party has a right to be heard before any Court exercising its powers of revision under the Criminal Procedure Code although the Court may, if it thinks fit, hear any party either personally or by Pleader. [p. 680, col. 2.]

The fact that the Pleader for a party was not heard when a Court was exercising such powers is not, therefore, a ground for a second application for revision or for a review. [p. 681, col. 2.]

Kohna Ram v. Emperor (1) and *Ram Nihore Umar v. Emperor* (2), distinguished.

It is a good practice to hear Counsel in criminal references in matters of importance, but whether a matter is a matter of importance must be left to the discretion of the Judge hearing the reference. [p. 681, cols. 1 & 2.]

An application for review must come before the Judge who passed the decision which is to be reviewed, and the Counsel for review should ask that the application be put before the Judge who decided the matter. It is contrary to all propriety that a Counsel should put in an application for review and attempt to get it heard by another Judge by styling his application as an application in revision. [p. 681, col. 2.]

Obiter—A person accused of having committed mischief cannot be allowed to put the complainant who is admittedly in possession of the thing in respect of which mischief was committed, to proof of his title. [*ibid.*]

Criminal reference made by the Sessions Judge, Ghazipur.

Messrs. S. C. Goyle and A. P. Pandey, for the Applicants.

JUDGMENT.—This is an application for revision of an order of a Magistrate of the First Class of Ghazipur, dated the 4th October, 1926, convicting the applicant of an offence under s. 427, Indian Penal Code, and sentencing him to pay a fine of Rs. 10. The application in revision is based on the ground that the Deputy Magistrate before convicting the applicant of the offence of mischief was bound to find that the property in respect of which the mischief was alleged to be committed belonged to the complainant.

The matter has already been up in revision before this Court on a reference from

the Sessions Judge of Ghazipur. It appears that when the matter was up before me on the reference from the Sessions Judge a *vakalatnama* had been filed by Mr. Pandey. Mr. Pandey was not called upon by me to argue or appear in the case. It is possible that I was not even aware of any Pleader having been engaged by the applicant. The reference by the Sessions Judge impugned the order of the Magistrate on precisely the same ground as that order is being impugned by the present application in revision. The consequence is that this application in revision is calling in question on certain grounds an order of a Magistrate which order was previously considered on a reference from the Sessions Judge impugning that order on precisely the same grounds. In these circumstances it is clearly for the applicant in respect of the present application to show reason why the application is maintainable.

Mr. Goyle who, though not appearing in respect of the previous application, appears on behalf of the applicant to argue the present application gives as the reason why, notwithstanding the matter having been already decided, this application in revision should and must be entertained the following. He says that Mr. Pandey had a right to appear in respect of the previous application, and consequently the decision on the previous application was bad because he was not called on to appear. He further adds that he has a right in law to appear, at any rate, to support the present application. Now s. 440 of the Criminal Procedure Code is very explicit on the matter. That section runs, "No party has any right to be heard either personally or by Pleader before any Court when exercising its powers of revision." It goes on to provide that the Court may, if it thinks fit, when exercising such powers hear any party either personally or by Pleader. Mr. Goyle maintains that this rule of law has been rescinded by a rule of practice in this Court. He refers to the case of *Kohna Ram v. Emperor* (1). That decision has no application to the present contention. It does not deal with the matter of an applicant being heard or not being heard by the mouth of his Counsel. It is however cited by Mr. Goyle in order to show that, though a matter has been up in revision and decided

(1) 68 Ind. Cas. 32; 45 A. L. J. 775; 28 Cr. L. J. 496; 4 U. P. L. R. (A.) 162; A. I. R. 1922 All. 503.

it may be brought up in revision again and the Court must decide it again. His contention, if allowed, would require this Court to hear an application in revision 100 times over. But the decision is no authority, for such a contention. In that case the Sessions Judge had reported a conviction for the purposes of enhancing the sentence. A Judge of the High Court entertained the revision and threw it out. Subsequently the applicant put in another application in revision to the effect that the conviction of the Magistrate was wrong in law. It was held that the application called in question a different matter to that dealt with by the Sessions Judge. The matter up before the High Court was clearly a new one and one that had never been up before. The case has no bearing on the present case. I have only been able to obtain two decisions bearing on the present matter at all. One is *Ram Nihore Umar v. Emperor* (2). In that decision Richards, J., said, "The Court is willing, as a rule, to get the help and assistance of legal gentlemen as *amicus curiae*" and refers to s. 440. This remark is very far from being authority for holding that the clear provision of s. 440 of the Criminal Procedure Code has been overlaid by any established practice that Counsel will be heard in revision cases. Each case must depend on the merits. Where a Sessions Judge has written a complete order setting forth his view and a reply has been submitted by the Magistrate concerned and the facts are clear beyond all doubt, it will not be my practice to call upon Counsel to appear even if they have filed an affidavit. Such a practice would be in direct conflict with the provisions of s. 440 which leaves me a discretion. It would also prevent revisional references being decided in Chambers. I see no reason for believing that in an ordinary case any particular Counsel is likely to present the case better than the Sessions Judge. Another decision is *Queen Empress v. Haradhan* (3). In that case it was held that in matters of importance the Calcutta High Court has always heard Counsel in criminal references. This is merely a statement of the practice of the Calcutta High Court but I consider that it is a good practice, and one which may usefully be followed in

this Court. Whether a matter is a matter of importance must be left to the discretion of the Judge hearing the reference.

This application is really in effect an application in revision. It has been put in the form of another application in revision in order to avoid an objection that no review lies under the Criminal Procedure Code. I am not prepared to say that a Judge of this Court cannot review his judgment or decision. But it appears to me very clear that the application for review must come before the Judge who passed the decision which is to be reviewed. The application by Counsel for review in such a case should ask that the application be put before the Judge who decided the matter. It is contrary to all propriety that he should put in an application for review as if it could be heard by another Judge. By styling this application "an application in revision" this is what Mr. Goyle attempted to do.

This application was ordered by a Judge of this Court to be put up before me on certain grounds stated by him. The ground taken by him is that I could not have been aware that the present applicant was represented in the revision from the Sessions Judge. It is probable that I was not aware, and it is possible that if I had been aware I would have heard Mr. Pandey. But the case once having been decided the mere fact that I did not exercise a discretion to hear Counsel is no ground for a review. Before a review could be permitted, there would have to be shown some strong reason for altering the decision. No reason is shown in the present application. It merely reiterates the view which I hold was a wrong view of the Sessions Judge. The Magistrate had found that the applicant had pulled down a wall in the possession of another person for a long time without the slightest excuse for believing that the wall belonged to him (the applicant). When accused of mischief instead of saying that the wall was his or that he had believed it to be his, he said that the wall had fallen down, that he had nothing to do with its being pulled down, and then tried to put the complainant to proof that the wall was his. My brief order on the first application that possession is *prima facie* proof of title, and that the Magistrate had evidence on which he was justified in finding that the accused was out of possession, concludes the matter. In the view of the Sessions

(2) 10 Ind. Cas. 740; 8 A. L. J. 237; 12 C. L. J. 231.

(3) 19 C. 380; 9 Ind. Dec. (N. S.) 693.

Judge a total stranger may come and knock down the wall of my house, and when accused of mischief demand that I should produce my title deeds to prove that it was my wall.

The present application in revision is, however, rejected by me on the ground that the matter has been decided, and that there was no flaw in the previous decision. The contention of Mr. Goyle that there was a flaw because applicant's Counsel was not heard is rejected. Also his contention that he must be heard in this case is rejected. The application is dismissed.

A. N. A.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 620 OF 1927.

November 14, 1927.

Present:—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Ross.

PARMOD BAN BEHARI SARAN —
ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 405—Criminal breach of trust—No proof of conversion—Delay in remittance—Explanation available, effect of.

In a prosecution for criminal breach of trust delay in making remittance to the head office of moneys received, according to departmental rules is a circumstance to be taken into consideration and it may be, if there is no explanation, *prima facie* evidence of dishonesty. But where an explanation is available mere delay in making the remittance in the absence of proof of conversion or falsification of accounts is nothing more than evidence of breach of departmental rules. [p. 683, col. 2]

Criminal revision from an order of the Sessions Judge, Muzaffarpur, dated the 2nd of August, 1927, modifying that of the Sub-Divisional Magistrate, Motihari, dated the 21st of June, 1927.

Messrs. S. P. Varma and P. Misra, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

ROSS, J.—This is an application by one Parmod Ban Behari Saran formerly Station Master of Ghorasahan on the Bengal and North-Western Railway who has been con-

victed of criminal breach of trust in respect of two sums of money, and has been sentenced to four months' rigorous imprisonment on each charge and also to pay a fine. There were originally three charges and on all of them the petitioner was convicted by the Magistrate, but the learned Sessions Judge, on appeal found that the second charge was not proved. The application is, therefore, concerned only with two charges the first of which is in respect of a sum of Rs. 168-13-0 and the second in respect of a sum of Rs. 234-11-0.

The first charge relates to freight of a consignment of sacks of betel nuts which was received by the petitioner at Ghorasahan Station on the 27th of August, 1926. The case for the prosecution is that the freight for this consignment amounting to Rs. 168-13-0 was paid on the 30th of August and was never remitted to the Head Office at Gorakhpur. The defence is that the freight was paid not on the 30th of August but on the 2nd of September and was remitted to Gorakhpur on the following day. The learned Sessions Judge has not placed reliance upon the merchant's account book tendered in proof of payment on the 30th of August and he says that the charge depends principally upon whether the prosecution has succeeded in showing that the money was not sent to Gorakhpur on the 3rd of September. Now it is common ground that on the 3rd of September a sum of Rs. 1,086-5-0 was remitted to Gorakhpur. The only evidence which could have shown directly what this sum was composed of would have been the cash book, but that evidence has disappeared and no secondary evidence of the contents of the cash book has been produced. It was stated by the learned Assistant Government Advocate that there was secondary evidence of the entries in cash book, but by some mistake it was not put on the record. The prosecution, therefore, fell back upon the entries in the Foreign Inward Delivery Book and the Local Goods Delivery Book from which could be ascertained what sums of money had been received on the 2nd of September and, consequently, ought to have been remitted to Gorakhpur on the 3rd, and they also relied upon a note made by Mr. Baker, an Inspector of Railway Accounts (Ex. 24-a) compiled from these books; and from these sources a statement was prepared by the learned Magistrate which accounts for this

sum of Rs. 1,086-5-0 except as to Rs. 31-13-0. There are, therefore, two defects in the proof given by the prosecution. In the first place, it has not correctly and fully accounted for this sum of Rs. 1,086-5-0. There was admittedly a sum of Rs. 31-13-0 which remained unaccounted for and, consequently, the calculation made by the Magistrate for aught we know, may have proceeded on a wrong basis altogether. Secondly, the evidence does not show that sums were actually remitted to Gorakhpur, but what sums under the rules ought to have been despatched, and it is idle to offer this as proof that a particular item admittedly received was not included in that remittance. The fact seems to be that the evidence on which alone this charge could have been established has disappeared and the proof is consequently incomplete.

The other charge relates to a sum of Rs. 234-11-0 on account of freight of a consignment of sacks of salt. This is charged as a temporary misappropriation. According to the prosecution the freight was paid for this consignment on the 19th of May and admittedly the money was remitted to Gorakhpur by the petitioner on the 24th of June. The petitioner's case was that the freight on the consignment was not paid until the 23rd of June. Some of the entries in the Foreign Inward Delivery Book have been altered and it is impossible to say what they are intended to represent; but the date of the receipt of the goods has not been changed and there is no reason to suspect that it was not correctly entered as the 21st of May. If that be so, then the evidence of the merchant's books that the money was disbursed on the 19th of May does not amount to proof that the payment was actually made on that date. The learned Sessions Judge has stated the arguments for and against relying on these books and, as I understand his judgment, he came to no definite conclusion. At all events the merchant had admitted before the Police that he was uncertain whether he had made the payment himself or through his *gomashta* and it is quite possible, if his books are accepted, that the money was actually disbursed on the 19th of May, to his *gomashta*, although the goods were not ready for delivery till the 21st of May. But it is quite clear that the money could not have been paid on the 19th. What the Courts below have proceeded upon in coming to the finding of fact on this point is, first the impro-

bability that perishable goods like salt would have been left lying at the station for a month, and secondly, that no demurrage was charged. Now there is nothing to show that salt is so perishable as all that, and, in this case, there is a peculiar circumstance, namely, that the goods had been assigned by the original consignee to another purchaser. This may have led to some enquiry by the authorities at the station in order to satisfy themselves that the delivery was being made to, the proper party and it is possible that this caused delay and would equally excuse demurrage. There is no evidence on this point, but the fact of the assignment, to which the learned Sessions Judge has not alluded to in this connection, is evidently a relevant fact in connection with this charge. A further question is whether even if the facts be accepted as stated by the prosecution, they would amount to proof of criminal breach of trust. The learned Assistant Government Advocate relied on the decision in *Emperor v. Tulshidas Chhaganlal* (1), where money had been retained for more than three months. But in that case there were facts which clearly distinguish it from the present. The accused in that case after being dismissed by his master, had made a claim on his master for a sum of Rs. 9 on account of wages and had admitted liability to the extent of only Rs. 10 or Rs. 11 notwithstanding the fact that he had previously received and not accounted for the subject-matter of the charge which was a sum of Rs. 107-9-9. This act in itself was a clear denial in his possession of the money and was, therefore, direct evidence of conversion. In the present case there is nothing to show that the petitioner had converted the money to his own use. There was no falsification of accounts. The delay in making the remittance is a circumstance to be taken into consideration and it may be if there is no explanation, *prima facie* evidence of dishonesty. But here there is the circumstance that there had been an assignment of these goods and, therefore, a possible explanation of the delay. In these circumstances it does not seem to me that the mere delay in making the remittance is evidence of anything more than a breach of the departmental rules.

I think, therefore, that neither of these charges has been established, and I would

(1) 8 Bom. L. R. 951; 5 Cr. L. J. 5.

allow this application and set aside the conviction and sentence and direct that the petitioner be acquitted and released from bail. The fine if paid, will be refunded.

Jwala Prasad, J.—I agree.

B. K. P.

A. N. A.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 669 OF 1927.

September 8, 1927.

Present:—Mr. Justice Boys and Mr.

Justice Iqbal Ahmad.

EMPEROR—APPELLANT

versus

BABU RAM—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 417—Security proceedings—Order setting aside order to furnish security, whether order of acquittal—Appeal by Local Government, maintainability of—Evidence in security proceedings—Evidence of Police Officers of suspicion and of general repute, admissibility of.

The terms 'conviction' and 'acquittal' are wholly inapplicable to orders under s. 118 of the Code of Criminal Procedure. An order of a Sessions Judge setting aside an order of a Magistrate directing a person to furnish security for good behaviour is not, consequently, appealable under s. 417 of the Code. [p. 684, col. 2.]

In security proceedings the evidence of Police Officers should not be discarded altogether as of no value to prove bad character, although it has to be received with caution. [p. 684, col. 2. p. 685, col. 1.]

Suspicion in the mind of a witness is not admissible evidence in such proceedings although evidence of general repute is admissible. [p. 685, col. 1.]

The allegations in s. 110 of the Criminal Procedure Code can only be proved by direct evidence of people who have knowledge of facts to which they depose with the exception that in regard to all other clauses except cl. (f) of s. 110, a witness may give evidence of general repute. [p. 685, col. 2.]

Evidence of general repute is not hearsay evidence but direct evidence given on the basis of the witness's own knowledge of a fact. [*ibid*]

Criminal appeal from an order of the Additional Sessions Judge, Moradabad.

The Government Advocate, for the Crown.

Mr. Saila Nath Mukerji, for the Opposite Party.

JUDGMENT.—This is an appeal on behalf of the Local Government against an order of a Sessions Judge setting aside the order of a Magistrate calling upon the opposite party to furnish security for good behaviour for a period of one year. A preliminary objection is taken that no appeal lies, and the importance of the objection

lies in the fact that if no appeal lies, then the Local Government can only apply to this Court in revision, and the ordinary principle governing interference by this Court on the revisional side will be applicable; in other words, we shall have to be satisfied that the lower Court has erred, and erred prejudicially to the opposite party on some question of law, or has so grossly erred in the principles which it has applied to the weighing of the evidence that interference is called for.

We are of opinion that the objection must be sustained. Under s. 417 of the Code of Criminal Procedure the Local Government is only given the right of appeal against an acquittal. It is unnecessary to do more than to mention the sections to which we have been referred. They are as follows:—Sections 118, 406, 417 and 423 of the Code. We think that there cannot be the least doubt that the terms "conviction" "and acquittal" are nowhere applied throughout the Code to an order under s. 118, and that they are, in fact, wholly inapplicable. We think that this point is so clear that it is unnecessary to discuss it in greater detail; nor, in our view, does it require the support of authority. We may, however, mention that there are cases reported as *Queen-Empress v. Phulla* (1), *Ali Mahomed Khan v. Tarak Chandra Banerji* (2), *Chand Khan v. Empress* (3), which all bear on this point and favour the view that we have stated.

We have, therefore, limited our consideration of this case by the principles ordinarily applicable to cases heard on the revisional side. We have had placed before us the judgment of the learned Additional Sessions Judge, and it has only been possible, apart from the weight of the evidence, from the learned Government Advocate to make one serious criticism of that judgment. The learned Judge has in dealing with the prosecution witnesses excluded altogether from consideration the evidence of seven Police Officers holding that the evidence of such Police Officers "is of no value to prove bad character." In this we think that he is clearly wrong if he means that it is not entitled to consideration at all as being prejudiced evidence. If he had said that it must be received with caution, he would, of

(1) A. W. N. (1898) 127.

(2) 1 Ind. Cas. 336; 13 C. W. N. 420; 9 Cr. L. J. 278.

(3) 9 C. 878; 4 Ind. Dec. (N. S.) 1236.

course, have been right, and with a little more caution than would be necessary in the case of ordinary witnesses who might *prima facie* be supposed to be independent, such as *zemindars* and other persons of respectable position unconnected with the prosecution of offences or charges of this nature. The learned Judge having then, in our view, been wrong in, as it were, cutting right out of the record this evidence, the next question that we had to ask from the learned Government Advocate was whether he was prepared to say that the evidence of those seven witnesses was so valuable that, if considered, it would turn the scale. We did not understand him to be prepared to describe that evidence in those terms, but we were invited to look at it, and we are not prepared to hold that there is anything so striking about it that it would justify us in reweighing the whole of the evidence on the record. There are a succession of statements that the accused is reputed to be a habitual thief, robber and dacoit, but in at least some of the cases the evidence is also weakened by the Police Officer being allowed to state that the opposite party in this case was "suspected" by him to be a bad character. It has been laid down a number of times that suspicion in the mind of a witness is not admissible evidence. There is nothing in the evidence of these witnesses so startling as to justify us in embarking on the course of reweighing the whole of the evidence. Again, however, for our personal satisfaction we have considered some of the evidence for the defence with a view to seeing whether it was strikingly of such a nature that the learned Judge's reliance on it was not guided by the exercise of a judicial discretion. It would be quite impossible to hold that of the first half a dozen witnesses whom we have read. They are men of position, and most of them had opportunities of knowing about the accused, and they speak to his good character. We could only reject that evidence by holding that they were deliberately committing perjury, and there is no ground for any such aspersion. The worst that can be said against them is that their sympathies are with the accused, because he has become a religious leader. It may be so, and quite probably is so, but there remains the fact that these persons who are respectable and hold responsible positions are prepared to testify to the good conduct of the accused since he left Jail. We see no reason, therefore, to be

drawn into a reweighing of the whole of the evidence on the record. There is nothing in the evidence of the half a dozen witnesses whom we have examined on both sides to suggest that the Judge was wrong in his estimate, and we see no reason for interference.

Before we leave this case we think we should draw attention to the notice that was framed under s. 112 of the Code of Criminal Procedure. It is a long rambling production which covers more than a full page of printed foolscap. It refers only to cl. (a) of s. 110. It refers to burglaries and extortion neither of which terms occur in cl. (a) at all. It charges the opposite party with committing thefts, and does not charge him with that with which he should be charged, being "by habit" a thief. It tells him that he has been "strongly suspected" to have committed thefts etc. We have already noted that "suspicion" is not a legitimate basis for findings under s. 110. A witness may have suspicion against a person in respect of whom he is giving evidence, but if he has, he ought to be able to give the grounds for that suspicion, and the value of the facts stated can then be weighed by the Magistrate. The evidence which he can give of general reputation is a totally different matter. A witness can come into Court and say, "This man is by general reputation a habitual thief." Whether his evidence is worth anything will depend upon his position, his partiality or impartiality, and whether the defence have by cross-examination been able to show that the witness has no real grounds for saying that he has knowledge of the general reputation of the man in the dock. There should really be little difficulty in prosecuting these cases if the Police and the Magistrate keep clearly in view the terms of the various clauses of s. 110 and the provisions of s. 117 (4) of the Code of Criminal Procedure, and if they bear in mind that the allegations in s. 110 can only be proved by direct evidence of people who have knowledge of facts to which they depose with the exception that in regard to all other clauses except cl. (f) of s. 110, a witness may say "I know the general reputation of the man to be so and so." Such evidence of general reputation does not offend against the rule against hearsay evidence. This is not hearsay. It is direct evidence given on the basis of the witness's own knowledge of a fact—the fact that people are talking

about this man in a certain way, the fact he has such and such a general reputation.

For the reasons we have given above we see no reason to interfere with the order of the learned Additional Sessions Judge setting aside the order of the Magistrate. The appeal as it has been described, that is, the application in revision, as we have held that it should be, is dismissed.

The bail bond will be discharged.

A. N. A.

Appeal dismissed.

ODUH CHIEF COURT.

CRIMINAL REFERENCE No. 42 OF 1927.

December 2, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

CHANDRIKA SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Land Revenue Act (III of 1901), s. 147—Citation to appear, legal nature of—Disobedience, whether offence—Penal Code (Act XLV of 1860), s. 174.

A citation to appear issued under s. 147 of the U. P. Land Revenue Act, 1901, is not a mere invitation but an order to the defaulter to appear at the time and place named therein within the meaning of s. 174 of the Penal Code and intentional disobedience of it is an offence under that section. [p. 686, col. 2.]

Ram Bali Singh v. Emperor (1), followed.

Emperor v. Bhirgu Singh (2), dissented from.

Case reported by the Sessions Judge, Sitapur, dated the 1st October, 1927.

Mr. A. P. Sen, for the Applicant.

Mr. H. K. Ghose, for the Opposite Party.

JUDGMENT.

Stuart, C. J.—This is a reference from the learned of Sessions Judge, Sitapur, suggesting that the conviction of Chandrika Singh should be set aside and that the fine paid by him should be refunded. Chandrika Singh is a *zemindar* in the Sitapur District. In the month of July, 1927, he was late with his land revenue instalment. He owed the Crown Rs. 344. In consequence, the Tahsildar of Sitapur issued a citation upon him under the provisions of s. 147, Local Act III of 1901 (Land Revenue Act) directing him to appear at the Sitapur Tahsil on the 12th July, 1927. He did not appear on that date, but he remitted on the 12th July, 1927, a sum of Rs. 160 and three days later he paid up the balance. The Tahsildar, however, thought fit to prosecute him under the

provisions of s. 174 of the Indian Penal Code and the Deputy Magistrate who tried the case convicted him under that section and fined him Rs. 50. The learned Sessions Judge has submitted this reference upon the ground that there is considerable doubt as to whether such a conviction is legal and also upon the ground that, in any circumstances, as the man paid Rs. 160 on the date fixed for his appearance and the balance three days afterwards, the fine was excessive. I note at the beginning that we agree with the learned Sessions Judge on the second point. We consider that if an offence were committed by the applicant it was of a technical and venial nature. Upon the facts there is no reason to find that he was contumacious in his disobedience and it is my intention, in event of upholding his conviction to suggest the reduction of the fine to the nominal fine of Re. 1.

The point of law before us is one that requires our close consideration in view of the fact that there is a complete difference of opinion on it between the late Judicial Commissioner's Court of Oudh and a Bench of the Hon'ble High Court of Allahabad. In 1910 a Bench of the Judicial Commissioner's Court consisting of Mr. Chamier (now Sir Edward Chamier) and Mr. Evans decided in *Ram Bali Singh v. Emperor* (1) that a citation to appear issued under s. 147 of Local Act III of 1901 is an order to the defaulter to appear at the time and place named therein within the meaning of s. 174 of the Indian Penal Code and that intentional disobedience of it is an offence under that section. The decision in question does not contain full reasons. It is in the main a decision construing the words. There has been a recent decision in the Allahabad High Court, *Emperor v. Bhirgu Singh* (2), in which a Bench of the Hon'ble High Court consisting of Mr. Justice Dalal and Mr. Justice Boys decided that the issue of a citation to appear to an alleged defaulter under s. 147 of Local Act III of 1901 does not involve him in any legal liability to attend, and that non-compliance with it does not render him guilty of an offence under s. 174 of the Indian Penal Code. The view taken by these two learned Judges is shortly that

(1) 5 Ind. Cas. 805; 13 O. C. 55; 11 Cr. L. J. 250.

(2) 99 Ind. Cas. 60; 49 A. 205; 24 A. L. J. 1001; 28 Cr. L. J. 28; A. I. R. 1927 All. 122; L. R. 81 A. 41 Cr.

the ordinary meaning of the word "citation" is that it is rather in the nature of an invitation to appear than of an order to attend. They thought that the meaning of the word "citation" as used in s. 147 of Local Act III of 1901 was similar to the meaning of the word 'citation' as used in the present ss. 235 and 283 of Act XXXIX of 1925 corresponding to s. 199 of Act X of 1863 and s. 250 of the same Act and s. 69 of Act V of 1881.

In deciding the question referred to us, I propose to look first at the wording of s. 147 the words of which are as follows:—

"When an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within a time therein stated, or a citation to appear, may issue".

There is nothing in the section to prevent both "the writ of demand" and "the citation to appear" being issued simultaneously. I note first that the words used are "a citation to appear". The words used are more than "a citation". There can be no doubt as to the fact that the Board of Revenue considered that this section gave them the authority to order a person to appear, for the form of the citation to appear is as follows:—

"Whereas a sum of Rs.....on account of arrears of instalment in respect of.....is due against you, you are hereby directed (*hidayat*) that in case the entire arrears aforesaid and process-fee in respect of this summons are not paid immediately you should appear before this Court at... ..on..... Failure to attend shall be punishable under s. 174 of the Indian Penal Code".

The citation is headed in the vernacular '*sammons hazri*.' It is true, as the learned Judges of the Allahabad High Court have stated, that the construction placed upon the section by Board of Revenue is immaterial and the declaration that failure to attend is punishable criminally is also immaterial in so far as the consequences of neglect to attend are concerned. But the words are of importance as showing that the Board of Revenue, on the assumption that they have authority to direct a defaulter to attend in person, clearly are exercising that authority. If they do not have the authority to order him to attend, the fact that they assert such authority is immaterial; but if they have authority to order him to attend the words used in the

form place beyond any reasonable doubt the fact that they do so order him. This carries me on to the question as to whether the words "citation to appear" are or are not to be construed as an order to appear. The learned Judges composing the Bench of the Allahabad High Court to whose decision I have already referred have not laid the same stress which I lay on the words "citation to appear". They have laid stress rather on the word "citation" standing alone, and they have said that the ordinary meaning of the word "citation" is in the nature of an invitation to appear rather than of an order to attend. I do not know whence they derived that meaning. I have been unable to discover in Stroud's Judicial Dictionary any definition of the word "citation". The learned Judges of that Bench do not appear to have wished to look at the legal meaning of the word so much as the ordinary meaning of the word. For the ordinary meaning of the word I have referred to the 1926 Edition of Webster's New International Dictionary. The word 'citation' is derived from the Latin word *citatio* which is formed from the Latin verb *citare*, to cite. Webster gives the following meanings:

(1) An official summons or notice given to a person to appear, as before a Tribunal of Justice; hence, any summons; the paper containing such summons or notice.

(2) Act of citing a passage from a book, or from another person, in its own words; also, the passage or words cited; quotation; specific, *Law*, a reference to decided cases, or books of authority.

(3) Enumeration; mention; as, a *citation* of facts."

I am unable to discover from this that the word "citation" necessarily would ever mean an invitation. It is a summons or notice. I do not say that citation is necessarily an order to appear. I should prefer to consider it as a notice or an order to do something. The word 'summons' to which the learned Judges of the same Bench have made reference at length is also not necessarily an order to appear. A man may be summoned to appear, or he may be summoned to do an act which does not involve appearance. The word "summons" used by itself will not convey an indication as to whether appearance is or is not required. Similarly I should interpret the word "citation", and on this view proceed to consider the analogy which

the learned Judges have drawn from the procedure under the testamentary law in India.

The citation to which they refer are: first the citation under s. 235 of the present Act XXXIX of 1925 which states that Letters of Administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse Letters of Administration; and the second citation to which they refer is the citation mentioned in s. 283 of the same Act where in application for Probate or Letters of Administration the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or Letters of Administration issues. That section continues that the citation shall be fixed up in a conspicuous part of the Court house and also in the office of the Collector of the District and otherwise published or made known in such a manner as the Judge or the District Delegate issuing the same may direct. The ordinary method of publishing citations of this nature is by notice in a newspaper. Now it is to be noted that on the forms of these citations as used by this Court (and by most others) the citation is in the first place a notice. It is issued frequently not upon persons by name. It has a legal effect. Persons interested in the matter of the Probate or Administration, who have had an opportunity of seeing such a notice, are bound by their omission to object upon the date fixed. The citation is not only a notice, but it is a notice involving consequences in event of subsequent inaction. It is not "a notice to appear" but it is considerably more than an invitation. A refusal to accept an invitation involves no consequences. An omission to object after receiving this notice involves the consequence that consent is presumed. I look upon the use of the words "citation to appear" in s. 147 as meaning an order to appear. Why the word "citation" was used in this portion of Local Act III of 1901 I am in no position to decide. I should not go so far as to consider that any subtle meaning was indicated by the use of the word. It is, I think, too much to attribute significance to the use of individual word by the draftsman.

Why the word "citation" used in this Chap. VIII, whereas the word 'summons' is issued in s. 93 in Chap. IX, is possibly because Chap. VIII, is concerned with the purely fiscal act of collecting land revenue, which is in no sense a judicial or a *quasi* judicial act, and Chap. IX, is concerned with the procedure of Revenue Courts and Revenue Offices when exercising judicial or *quasi* judicial functions. Under Chap. VIII, the Tahsildar and the Collector are collecting revenue. They are not performing judicial functions. Under Chap. IX the Court of the Tahsildar and the Courts of the Assistant Collector and the Collector are directed to use a certain procedure in exercising judicial and *quasi* judicial functions. It may have been that the draftsman of the Act considered that an order to a person to appear before a Revenue Officer exercising fiscal functions was best called a citation to appear and that an order to such a person to appear before a Court exercising judicial or *quasi* judicial functions was best called a summons to appear. I am not in a position to decide the point and personally I consider it of very little importance. After giving full consideration to the views of the learned Judges composing the Allahabad Bench, I am unable to accept those views and accept the views of Sir Edward Chamier and Mr. Evans in the Oudh case. I, therefore, find that s. 147, when it gives a revenue official exercising fiscal functions authority to issue a citation to a defaulter to appear, gives him authority to order that person to appear, before him, and the person is obliged to appear before him if so ordered, under the penalty laid down by s. 174 of the Indian Penal Code which is in the following words:—

"Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place or time.....shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both".

These are the penalties for disobedience to obey an order of a public servant legally empowered to issue the order. The section continues that if the order comes

from a Court of Justice the imprisonment may extend to six months and the fine may extend to one thousand rupees. I am satisfied that Chandrika Singh was legally bound to attend in person. I am satisfied that he intentionally omitted to attend and I consider that he was rightly convicted. I consider however that his offence was not of a serious nature and I propose that, while his conviction should be upheld, his fine should be reduced to Re. 1 and that the balance of Rs. 49, if paid by him, should be refunded.

Pullan, J.—In expressing my agreement with the judgment just delivered I have very little to add. Section 174 of the Indian Penal Code prescribes the penalty for omission to attend in obedience to a summons, notice, order or proclamation by a person who is legally bound to attend. The word "citation" is not used in the Penal Code and as far as I am aware the word had not at that time been imported into any Indian Statute. The word was introduced from the English Law in the old Indian Succession Act and Probate and Administration Act and is there used in a technical sense. These Acts have now been combined in the Indian Succession Act, XXXIX of 1925, and the word appears in ss. 235 and 283. In neither case is it used to mean an order to attend the Court or a direction to attend the Court. It gives certain parties an opportunity of attending the Court in order to put their own case before the Court and make their own claim, if they wish to do so. When the word is employed in the Land Revenue Act it has no such meaning. It undoubtedly means a direction of some kind to appear in Court and this appears to have been overlooked by their Lordships of the Allahabad High Court in the case cited. They have regarded this citation as being an invitation. If so, it is an invitation couched in unusual terms because the person invited was threatened with a prosecution under s. 174 of the Indian Penal Code, if he did not attend. I cannot myself regard this as an invitation. It was a direction to attend the Court. The word "citation" itself means a notice or a summons and it is probable that the draftsman of the Land Revenue Act was using it, not in a technical sense such as that employed in the Succession Act, but merely as a variant for a notice. The intention of the Court which issued this citation was that

the man should appear and the Court was empowered to direct his appearance and, in my opinion, he was legally bound to comply with that direction. This being so I am of opinion that his failure to attend laid him open to punishment under s. 174 of the Indian Penal Code. I agree, therefore, with the view of law taken in the judgment which has just been delivered. As to the sentence I consider that the circumstances of the case do not call for severity and I agree in the proposed reduction of the fine to one rupee.

By the Court.—The order of the Court is that the conviction be maintained but that the fine be reduced to a fine of Re. 1 and that the balance Rs. 49, if already paid, be remitted to Chandrika Singh.

A. N. A.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 577 OF 1927.

November 2, 1927.

Present :—Mr. Justice Dalal.

MANZUR HUSAIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 22—'Delivery', meaning of—Delivery of arm for merely carrying it to licensed-holder, whether offence.

Delivery into possession contemplated by s. 22 of the Arms Act is such a delivery as to give the person into whose possession arm is delivered control over the arm and authority to use it as an arm. [p. 690, col. 2]

The licensed-holder of a gun can permit another person who is not so licensed to carry his gun. [*ibid.*]

A repairer of a gun who, under the directions of its licensed-holder, delivers it after repair to a person who is not licensed, for the purpose of merely carrying it to the licensed-holder is not, therefore, guilty of an offence under s. 22 of the Arms Act. [*ibid.*]

Criminal Reference made by the Sessions Judge, Kamaun.

ORDER OF REFERENCE.

Manzur Husain files an application in revision. The facts as found by the Magistrate are that Manzur Husain is licensed as a gunmaker. No license is required to repair arms, (*vide* r. 35 of the United Provinces Arms Rules and Orders). One Mohan Singh holds a license for a gun. He brought his gun to Manzur Husain for repairs, and he told Manzur Husain that when he had finished the repairs, he could re-

turn the gun either to Jagannath or to Partap Singh. He returned the gun to Partap Singh and the Sub-Inspector found it in the possession of Jagannath. Manzur Husain was accordingly run in under s. 22 of the Arms Act for delivering the gun into the possession of Partap Singh without previously ascertaining that Partap Singh was legally authorised to possess it.

I find myself unable to distinguish this case in principle from *Queen-Empress v. Alexander William* (1). In that case the facts were that Alexander William was carrying a gun for the purpose of having it repaired. The licensee of the gun appears to have been one Herbert Smith, and it was not stated that Alexander William was the servant of Herbert Smith. He had been convicted under s. 19 (c) of going armed. It was held that carrying arms is not an offence under s. 19 (c) unless there is an intention to use the arms.

In *Queen-Empress v. Bhure* (2) it was said, commenting on *Alexander William's case* (1), that he was not carrying a gun but a parcel.

Similarly in *Emperor v. Harpal Rai* (3) the facts were that Harpal Rai was sent with a pistol for repairs. He was convicted of going armed, and he was acquitted.

It is thus settled law that any person duly authorised by the licensee can carry arms to a shop for the purpose of repair. The question is whether this principle ought to be extended so as to lay down that the repairer may hand a gun to any person authorised by licensee to take it, without committing an offence under s. 22 of the Arms Act. A remark in *Harpal Rai's case* (3) suggests that there is a distinction between a gun which requires repair and, therefore, cannot be used, and a gun which has been repaired and is, therefore, an effective weapon. But I do not think that *Alexander William's case* proceeded on any such distinction. It seems reasonable that the owner of a gun, whose time may be valuable, should be able to send his servant to get the gun back after it has been repaired, and it was laid down in *Harpal Rai's case* (3) that no distinction ought to be drawn between a servant and a friend who is willing to perform service for the licensee. As far

as the repairer is concerned, the essential matter seems to be that he should hand over the gun either to the licensee himself or a person authorised by the licensee who will, the repairer believes, immediately take the weapon back and give it to the licensee.

Therefore, from the facts of the present case, it would appear that the conviction is wrong. As the point of law involved is one of some importance, I propose to forward the record to the High Court with a recommendation that the conviction be quashed. But before doing so, the record will be sent, in the usual way, to the Magistrate for any explanation he may have to offer.

Mr. M. A. Aziz, for the Applicant.

The Assistant Government Advocate, for the Crown.

ORDER.—The learned Judge has explained the law on the subject in his Order of Reference and I agree with him. The applicant Manzur Husain is a licensed gunmaker and a certain gun was made over to him by Mohan Singh a licensed-holder to repair. Mohan Singh's direction was that after the gun was repaired, it may be made over either to Jagannath or to Partap Singh to bring over to Mohan Singh. The gun was repaired, and made over to both the persons authorised by the licensed-holder. Jagannath was carrying the gun and Partap Singh following him when a Police Officer arrested Jagannath with the gun and learning that he had obtained it from the applicant Manzur Husain, prosecuted the applicant under s. 22 of the Arms Act. The trial Court of a Magistrate recorded a conviction. The learned Judge has quoted cases in support of his view that delivery into possession contemplated by s. 22 of the Arms Act was such a delivery as to give the person into whose possession arm is delivered control over the arm and authority to use it as an arm. Manzur Husain made over the gun to Jagannath merely to carry it to its owner and not with any authority to use it as an arm. Even if Jagannath had misused his privilege and used the gun instead of carrying it to Mohan Singh, Jagannath would have been liable for unlicensed possession of the gun and not Manzur Husain under s. 22 of the Arms Act. A licensed-holder of a gun can permit another person who is not so licensed to carry his

(1) A. W. N. (1891) 208.

(2) A. W. N. (1892) 221; 7 Ind. Dec. (N. S.) 732.

(3) 24 A. 454; A. W. N. (1902) 123.

gun. The permission of the licensed-holder to Jagannath to carry the gun is proved and Manzur Husain was merely acting under the directions of the licensed-holder.

I set aside the conviction and sentence and direct the fine, if any recovered, to be refunded.

A. N. A.

Conviction set aside.

PATNA HIGH COURT.

GOVERNMENT APPEAL NO. 2 OF 1927.

May 24, 1927.

Present:— Sir B. K. Mullick, Kt.,
Acting Chief Justice, and Mr. Justice Wort.
EMPEROR—PROSECUTOR

versus

BANDHU SINGH AND OTHERS—ACCUSED—
RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 143, 441—Criminal trespass—Unlawful continuance of occupation after unlawful entry, whether punishable—True owner's right to eject trespasser—Resistance to true owner—Offence—Person entering with permission of trespasser, liability of—Assembly to enforce right to possession by criminal force—Unlawful assembly—Liability of members of assembly.

A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself possession, in the legal sense of the term, against the person whom he ejects, and the latter may, if he does not acquiesce, re-enter and restate himself provided he does not use more force than is necessary. Such a re-entry will be viewed only as a resistance to an intrusion upon a possession which had never been lost. [p. 692, col. 2; p. 693, col. 1.]

Browne v. Dawson (1), relied on.

The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the Law of Limitation. [p. 693, col. 1.]

Where an unlawful entry is followed by an unlawful continuance of occupation each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by s. 441 of the Penal Code, a new offence under that section is committed and a new liability arises. [p. 693, col. 2.]

A person who unlawfully enters upon the property of another with the intention specified in s. 441 of the Penal Code can be convicted of the offence of criminal trespass even though he enters with the permission of another trespasser who has already unlawfully entered and occupied the property, where the owner has not acquiesced in the possession of the latter. [*ibid.*]

Even assuming that trespassers have a right to possession after they have once unlawfully entered, they will be guilty under s. 143 of the Penal Code, if they, being more than five in number, enforce that right by means of criminal force. [p. 694, col. 1.]

Government appeal against a decision of the Sessions Judge, Gaya, dated the 5th February, 1927, overruling that of the Sub-Divisional Magistrate, Nawadah, dated the 20th December, 1926.

Mr. Sultan Ahmad, Government Advocate, for the Crown.

Mr. S. M. Gupta (with him Mr. N. K. Sinha), for the Respondents.

JUDGMENT.

Mullick, A. C. J.—This is an appeal by Government against the acquittal of eleven persons who were charged before the Sub-Divisional Magistrate of Nawadah with offences under ss. 143 and 452 of the Indian Penal Code. Sixteen persons were placed on their trial before the Sub-Divisional Magistrate who acquitted five and convicted the remainder sentencing the respondents Jhaman, Kesho, Bhola and Bandhu to six months' rigorous imprisonment and Akhal, Bhattan Kahar, Ganga Ram, Chakauri, Mahadeo, Canu and Hardeyal to three months' rigorous imprisonment each under s. 143 of the Indian Penal Code; no separate sentences were passed under s. 452 of the Indian Penal Code.

The occurrence arose out of a dispute relating to the property of Rai Jai Mangal Prasad Sahi who died in October, 1920, leaving a Will by which he appointed his Dewan Bundi Lal and others as trustees for the administration of his estate. He appears to have had strong religious convictions and to have dedicated all his immoveable property comprising several *mauzas* to certain Hindu deities giving by his Will directions to his trustees for the administration of the trust. The Probate of the Will was resisted by the testator's heirs; but the trustees finally succeeded in July, 1922.

On the 23th February, 1923, the Sub-Divisional Magistrate of Nawadah found that the heirs who in these proceedings have been styled as the Sahis were in possession and he directed the trustees under s. 107 of the Code of Criminal Procedure to give security to keep the peace. The trustees then applied for registration in the Land Registration Court, and after a reference to the District Judge under s. 55 of the Land Registration Act the question of possession was decided in their favour and delivery of possession was made by the bailiff of the Civil Court with the aid of the Military Police on the 8th September, 1923.

It has been found by the learned Sub-Divisional Magistrate that thereafter the trustees remained in undisturbed possession till July, 1926.

But on the 26th June, 1926, the Sahis filed a civil suit for declaration of title and possession. The plaint thereof was returned for want of adequate Court-fee and a review application is now pending against the Civil Court's order. Next, on the 1st July, the trustees, apprehending trouble, applied for Police assistance and two constables were sent to the *zemindari kutcherry* at Singer, commonly called Singer Garh (Singer Fort).

On the 10th July, notwithstanding the presence of the Constables, about 100 men belonging to the Sahis forced their way into the *kutcherry* and took possession with violence and turned out the servants of the trustees who were in possession.

An information was lodged before the Police and some of the trespassers have been convicted.

Next, on the 12th July an attack was made by the Sahis at a place called Chotha.

Next, on the 25th July, Kashi Singh, a peon in the service of the trustees, went to the Singer *kutcherry* to see whether the Sahis were still there. He found a large number of men armed with *lathis* who threatened to beat him. He then retired and in *Mauza Chotha* he met the Superintendent of Police with an Inspector and a Sub-Inspector. He laid an information and returned with the Police to the Garh. The Police found the main door locked from the outside and 4 or 5 men armed with *lathis* on guard. The voices of a large number were heard inside the *kutcherry* and those outside declined to allow Kashi or his fellow servants to enter and the respondent Ganga Ram threatened to murder Kashi's companion Bishun Lal. Thereupon under the orders of the Superintendent of Police Bandhu Nepali, Akal Dusadh, Ganga Ram, Chotu and Bhattan Ram were arrested and taken away. As the Superintendent of Police had only six armed constables with him he did not consider it safe to arrest those inside the *kutcherry*. But he returned on the 27th July with a large force and arrested the other respondents and some others. He found them inside the "garh" where a large number of *lathis* and a large quantity of brickbats were being stored.

The respondents have been charged with having between the 10th and the 27th July been members of an unlawful assembly the common object of which was to commit the offence of house trespass.

They have also been charged with having between the 10th and the 27th July committed house trespass by entering into Singer Garh which was in the possession of the trustees after having made preparations for causing hurt to the employees of the trustees.

On appeal the learned Sessions Judge of Gaya has found that on the Sahis having obtained possession of the *kutcherry* on the 10th July the respondents could not be convicted of committing criminal house trespass between the 10th and the 25th July by being in possession under the orders of or with the leave of those who entered on the 10th July.

He has also held that as the offence of criminal house trespass could not be committed, the common object charged did not exist and, therefore, there could be no conviction under s. 143 of the Indian Penal Code. He has, therefore, acquitted all the respondents.

The learned Sessions Judge finds, and I think there can be no doubt about it, that the trustees were in possession till the 10th July and that on that date their men were forcibly ejected by the employees of the Sahis among whom were the respondents Bhuttan Kahar and Chakauri.

The date when the respondents other than those two men entered the *kutcherry* has not been found by either Court. But they both seem to be of opinion that it was sometime after the 10th and before the 27th and that such entry was made with the leave and license or under the orders of the Sahis. I will accept that position.

Now the first question to be decided is who was in possession on the 25th and 27th July.

In my opinion it is quite clear that the trustees were in possession. "A mere trespasser" said Lord Denman, "cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title if he can, without delay; reinstate himself in his former possession." [*Browne v. Dawson* (1)]. It

(1) (1840) 12 A. & E. 624; 4 P. & D. 355; 10 L. J. Q. B. 7; 113 E. R. 950.

depends on the facts in each case what can be considered to be reasonable delay.

The owner may, if he does not acquiesce, re-enter upon the land and reinstate himself provided he does not use more force than is necessary. He must not commit a breach of the peace so as to render himself liable for an indictment under the Statutes of forcible entry and this entry will be viewed as a resistance to an intrusion upon a possession which he had never lost.

Therefore, possession being with him, he may, in India, prosecute the intruder for committing criminal trespass within the meaning of s. 441 of the Indian Penal Code provided the necessary intention exists and he may also if he secures a conviction apply to the Court for the ejectment of the intruder under s. 522 of the Code of Criminal Procedure.

He may also resort to the preventive sections of the Code of Criminal Procedure, namely, ss. 107 and 145 of that Code.

If he takes the risk of a forcible entry and uses more violence than is necessary he will not be able to plead the right of private defence; but he cannot be sued by the trespasser who has entered by force or fraud either for recovery of possession under s. 9 of the Specific Relief Act or for ejectment upon the strength of his temporary prior possession. Section 9 requires legal possession and the owner who re-enters without delay has in law never lost possession. And when two persons are on a field each claiming it, he who has title is in law deemed to be in possession.

If the true owner acquiesces or acts otherwise, so that legal possession vests in the trespasser, then he must resort to the Civil Court and bring a suit either under s. 9 or in ejectment, or in trespass for damages. The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the Law of Limitation. This, I think, is the law both in India and England.

Now what is the position of a trespasser who has been convicted of an offence under s. 447 of the Indian Penal Code if he continues to remain on the land after a forcible entry against the true owner,

In England the Statutes of Forcible Entry provide punishment for forcible entry "with a strong hand or with multitude of people" even when the intruder has a right. They also make forcible detainer a substantive offence if proceeded by a forcible entry. Thirdly, they make forcible detainer after peaceable entry an offence (5 Richard II, Chap. VII; 15 Richard II, Chap. II; 8 Henry VI, Chap. IX). In my opinion s. 441 of the Indian Penal Code substantially reproduces the English Law. It provides that if the trespasser having entered lawfully remains unlawfully on the property with intent to annoy he will be said to commit criminal trespass. In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation. It may be said that the intruder or trespasser pays the penalty once for all upon conviction for the act of entry and that he cannot be again punished for continuance of occupation. I think the answer to this is that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by s. 441 a new offence under that section is committed and a new liability arises.

In this view of the case the respondents Bhattan Kahar and Chakauri who have already been convicted for trespass upon the *kutcherry* on the 10th July are again liable to conviction for having resisted the owner between that date and the 27th July.

Much more so are the other respondents liable to conviction for an entry subsequent to that date and it makes no difference that they entered with the permission of those who first occupied the *kutcherry* on the 10th.

The discovery of the *lathis* and the brickbats in the *kutcherry* is sufficient proof of the intention to annoy the trustees and there is also clear evidence of their threatening behaviour both on the 25th and the 27th. On both these dates the resistance offered to Kashi Singh was a dispossession in law. I fully believe the evidence of the witnesses for the prosecution as to the behaviour of the respective respondents on the 25th and 27th. There can be no doubt that their conduct even in the presence of the Police indicated an intention to annoy and intimidate.

The conviction under s. 452 of the Indian Penal Code, therefore, must be upheld.

With regard to the convictions under s. 143 of the Indian Penal Code the case is still clearer:

Assuming that the petitioners had a right to possession on the 25th and 27th, which, in my opinion, they had not, they committed an offence under s. 143 of the Indian Penal Code by enforcing that right by means of criminal force. They were members of an unlawful assembly within the meaning of s. 141 of the Indian Penal Code the common object being to enforce that right in a tumultuous and forcible manner.

It is true that this is not the common object charged and if we had taken a different view of the question of possession it might have been necessary to amend the charge.

But as I think that possession was with the trustees and the conviction under s. 452 of the Indian Penal Code was correct, I must also hold that there was no error in stating the common object to be to commit an offence under that section. In my opinion, the learned Sub-Divisional Magistrate was right in convicting the petitioners of an offence under s. 143 of the Indian Penal Code.

The sentences passed by the learned Magistrate were not unduly severe and being satisfied that the learned Sessions Judge has taken an erroneous view of the law I set aside the order of acquittal passed by him and restore the convictions and sentences entered and passed by the Sub-Divisional Magistrate. The District Magistrate will take the necessary steps to secure the arrest of the respondents and their re-commitment to proper custody.

Wort, J.—I agree.

A. N. A.

*Acquittals set aside;
Accused convicted and
sentenced.*

ODDH CHIEF COURT.

COMMERCIAL CASE REGISTER NO. 14 OF 1927.
MISCELLANEOUS APPLICATIONS NOS. 555, 562,
629 AND 639 OF 1927.

November 21, 1927.

Present:—Mr Justice Hasan

S. C. MITTRA, OFFICIAL LIQUIDATOR,
UNITED INDIA INDUSTRIAL
TRUST, LTD., (IN LIQUIDATION)—PETITIONER
versus

Raja KALI CHARAN AND OTHERS

—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423, 439, 561-A—"Quashing of proceedings", meaning of—Power of High Court to quash proceedings in subordinate Court—Abuse of process—Power of Single Judge of Chief Court to quash proceedings—Limits of jurisdiction—Practice.

"Quashing of proceedings" is a term of compendious connotation and the practical result of quashing is the setting aside or reversal of the order initiating the proceedings. This power is vested in the High Court under s. 439 read with cl. (1) of s. 423, Criminal Procedure Code. [p. 695, col. 2.]

The language of s. 561-A, Criminal Procedure Code, is wide and comprehensive and the High Court has jurisdiction to pass an order to set aside proceedings in a subordinate Court if the proceedings constitute an abuse of the process of the Court. [*ibid.*]

Any Single Judge of the Chief Court can exercise the jurisdiction which is conferred on a High Court by s. 561-A of the Criminal Procedure Code. [p. 696, col. 1.]

Though the limits of the jurisdiction under s. 561-A, Criminal Procedure Code, are very wide, yet as a rule of practice it will be exercised in exceptional cases only. [*ibid.*]

Sanction to prosecute certain officers of a Company was granted to the official liquidator on the 18th November, 1924. The official liquidator subsequently applied for public examination and for proceedings against them under s. 235 of the Companies Act. The Court declined to take proceedings until particulars of the charges against the officers were given. The official liquidator did not supply the particulars but filed a complaint against the officers in the Criminal Court on the 8th March, 1927, in pursuance of the sanction of 1924:

Held, that the conduct of the official liquidator in disregarding the order of the Court to specify the particulars of the charges, and making a complaint during the pendency of proceedings under s. 235 of the Companies Act was a clear attempt to divest the Court of its jurisdiction possessed under s. 237 of the Act, and that the High Court had power under s. 561-A of the Criminal Procedure Code to quash the criminal proceedings instituted against the officers. [p. 697, col. 2; p. 698, col. 1.]

Application under ss. 196 and 235 of the Companies Act (Act VII of 1913).

Mr. S. D. Saksena with him Mr. Harish Chandra who appears for Brij Bahadur Srivastava, Mahabir Sharma and Radhe Saran.

Mr. Ghulam Hasan for Balgovind and Jagmohan Lal.

Mr. H. N. Misra, for Jai Lal.

Mr. S. N. Roy, for Mr. S. C. Mittra, Liquidator.

Mr. J. Jackson for Captain Oursetji.

ORDER.—Sajjad Husain, Oursetji, Madho Narain Shukla, Brij Bahadur, Swami Dial Saksena and Mahabir Sharma have made applications in writing to this Court and during the progress of the hearing of those applications the following persons also appeared and made oral applications:—

1. Jai Lal, 2. E. A. Labanti, 3. Brijmohan Lal, 4. Balgobind, 5. Jiwan Nath Hukku, 6. Pura Chaud Kapur, 7. K. O. Bhalla, 8. Chaudhri Ram Narain, 9. Jagmohan Lal, 10. Radhe Saran and 11. Lal Bahadur.

The prayer of these applications both in writing and oral invokes the jurisdiction of the Court with which it is vested under the provisions of ss. 439 and 561-A of the Code of Criminal Procedure, 1898. The basic foundation is proceedings under the Indian Companies Act, 1913, taken by me in the matter of the liquidation of the United India Industrial Trust, Limited. The applications have, therefore, been entrusted to me by the Hon'ble the Chief Judge for disposal.

On the 8th of March, 1927, Mr. S. C. Mittra, who was appointed official liquidator of the Company mentioned above under the order dated the 30th of September, 1924, of the late Court of the Judicial Commissioner of Oudh, presented a complaint to the District Magistrate of Lucknow charging the persons mentioned above and Sri Krishna, P. D. Gaur, Madan Mohan Lal Bhatnagar and Chandra Bhan Shukla with offences punishable under ss. 120 B, 409 and 420 of the Indian Penal Code. The learned District Magistrate thereupon transferred the complaint to the Court of the City Magistrate of Lucknow for trial. The applicants are accordingly being prosecuted in the Court of the City Magistrate for the offences just now mentioned. Except some evidence under s. 202 of the Code of Criminal Procedure no evidence has so far been recorded in the Magistrate's Court mainly for the reason that the proceedings therein were stayed by an *ad interim* order of this Court.

The substance of the prayer of these applicants is that the criminal proceedings pending against them in the Court of the City Magistrate be quashed. I have no doubt that this Court has jurisdiction to

quash the proceedings in the exercise of its powers conferred by s. 439 of the Code of Criminal Procedure. I was entertained at the Bar with the argument that the Code of Criminal Procedure does not provide for any "quashing of proceedings" of a subordinate Court by the High Court. The argument, it seems to me, is a piece of pure pedantry. The word "quash" is not a banned word—see ss. 215 and 232, Criminal Procedure Code. "Quashing of Proceedings" is a term of compendious connotation and the practical result is the setting aside or reversal of the order initiating the proceedings. The power of so doing is clearly vested in the High Court under s. 439 read with cl. (c) of sub-s. (1) of s. 423 of the Code of Criminal Procedure. Section 439 in terms says that the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by s. 423. Clause (c) mentioned above is as follows:—

"In an appeal from any other order, alter or reverse such order."

The power under cl. (c), therefore, is the power of altering or reversing an order. Clause (d) also gives jurisdiction to make any consequential or incidental order that may be just or proper.

The Code of Criminal Procedure, 1898, has recently been amended by s. 156 of the Code of Criminal Procedure (Amendment Act), 1923. This amendment has introduced a new section in the Code. Section 561-A is the new section and is as follows:

"561-A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The language of the new section is wide and comprehensive. According to that section the High Court has inherent jurisdiction to make an order as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. There can be no doubt that criminal proceedings in a subordinate Court constitute process of the Court and if the High Court comes to the conclusion that the process is being abused the new law invests the Court with the jurisdiction of passing an order to set aside those proceedings so as to

prevent the abuse. Reference in this connection may be made to a decision of three Judges in *Nripendra Bhusan Ray v. Gobinda Bandhu Majumdar* (1). This Court has never been driven off that jurisdiction and has frequently exercised it. The case of *Parakh v. Emperor* (2) decided by the Hon'ble Sir Louis Stuart, C.J., is a recent illustration.

Having reached to the conclusion that the High Court has jurisdiction it follows that any Single Judge of this Court can exercise the said jurisdiction. "High Court" according to the definition in cl. (j) of s. 4 of the Code of Criminal Procedure, 1898, means the highest Court of Criminal Appeal or Revision for any local area. According to s. 9 of the Oudh Courts Act, 1925, the Chief Court shall be the highest Court of Criminal Appeal and Revision and according to s. 10 of the same Act the jurisdiction of the Chief Court may be exercised by a Single Judge of the Court. Besides this the Chief Court of Oudh is expressly included in the definition of a 'High Court' in cl. (j) of s. 4 of the Code of Criminal Procedure.

The limits of the jurisdiction are very wide indeed as the language employed by the Legislature in enacting ss. 439 and 561-A of the Code of Criminal Procedure shows; but though the jurisdiction exists and is wide in its scope it is a rule of practice that it will only be exercised in exceptional cases. I have come to the conclusion that the case before me is exceptional in its nature and that I should exercise my jurisdiction in respect thereof.

The circumstances are as follows:—

The United India Industrial Trust Ltd. was put under compulsory liquidation under an order dated the 30th of September, 1924, of the late Court of the Judicial Commissioner of Oudh and as already stated Mr. S. C. Mittra was appointed official liquidator. Among other things the "official liquidator shall have power, with the sanction of the Court to institute any criminal prosecution in the name and on behalf of the Company"—(s. 179 of the Indian Companies Act, 1913). One of the arguments in the case is that the official liquidator not having obtained the

sanction of the Court has acted *ultra vires* of his powers in instituting criminal prosecution mentioned above. In reply to this argument the official liquidator shows an order of the 18th of November, 1924, of the late Court of the Judicial Commissioner of Oudh granting him sanction to institute a criminal prosecution. It is contended on behalf of the applicants that the sanction purporting to have been granted by the order of the 18th of November, 1924, is not enough in law and that it should be specific as to the charge for and as to the person against whom it is granted.

Having regard to the opinion which I have formed as to the merits of the case after protracted hearing and prolonged consideration, I do not think it is necessary to decide this pure question of law and I decline to do so. The fact remains that the sanction which the official liquidator obtained under the order of the 18th of November, 1924, was not availed of until after circumstances grave in their character and which have a serious bearing on the case had come to happen as I shall presently state.

On the 3rd of January, 1925, the official liquidator through his Counsel, Mr. S. N. Roy, made an application under s. 196 of the Indian Companies Act, 1913, for the public examination of 11 persons connected with the Company under liquidation. Their names are as follows:—

1. P. D. Gour, 2. Sri Krishna, 3. E. A. Labanti, 4. Balgobind, 5. J. N. Mukerji, 6. Ram Narain, 7. Jai Lal, 8. K. O. Bhalla, 9. N. K. Shavakshaw, 10. Puran Chand and 11. K. S. Sajjad Hussain.

On the 11th of February, 1925, a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Mr. (Now Mr. Justice) Dalal and myself passed an order that the official liquidator should file a list of questions which he desires to be answered by the persons mentioned in his application. When those questions are placed before the Court then the Court shall decide whether they should be served on those persons or whether they should be summoned to appear in Court for open examination. One month's time was allowed to the liquidator to comply with this order. Afterwards the time was extended on several occasions. Finally on the 16th of September, 1925, I ordered issue of summonses for public examination under

(1) 82 Ind. Cas. 266; 25 Cr. L. J. 1258; 39 C. L. J. 236; A. I. R. 1924 Cal. 1018.

(2) 92 Ind. Cas. 744; 1 Luck. 133; 3 O. W. N. 160; A. I. R. 1926 Oudh. 202; 27 Cr. L. J. 328.

s. 196 of the Indian Companies Act, 1913, to the following persons:—

1. P. D. Gour, 2. Sri Krishna, 3 E. A. Labanti, 4. Balgobind, 5. K. C. Bhalla, and 6. N. K. Shavakshaw.

In pursuance of the above order E. A. Labanti, Balgobind and one other person with whom we are not concerned were examined in open Court on the 25th of January, 1926. On the 16th of September, 1926, the official liquidator made another application. In this application he repeated the prayer for summonses for public examination of certain officers of the Company and also "that the opposite parties or such of them as may be found to be liable for having misappropriated or misapplied the funds of the Company be ordered to make good the sums misappropriated or misapplied by them." This last-mentioned prayer was in accordance with the provisions of s. 235 of the Indian Companies Act. On the 28th of September, 1926, the order made by the Court on the application just now mentioned was as follows: "I order the liquidator to state particulars of charge under s. 235 of the Indian Companies Act as against each of such persons and to support that statement by affidavit. Until this is not done I decline to issue summonses. 15 days' time is allowed for this purpose".

The time granted under this order was subsequently extended on the application of the official liquidator. In spite of this the order was never complied with. Had it been complied with the procedure according to the provisions of the Indian Companies Act would have been the institution of proceedings under s. 235 and on the determination of those proceedings the Court would then have proceeded under s. 237 of the Indian Companies Act to inquire as to whether "any past or present director, manager, officer or member of the Company has been guilty of any offence in relation to the Company for which he is criminally responsible". In the event of the inquiry yielding result in the affirmative the Court would have directed "the official liquidator to prosecute for the offence." Instead of complying with the order of the Court and allowing the law to take its normal course the official liquidator institutes the criminal complaint mentioned above.

The file of the criminal case is before me. It shows no trace of any intimation having been conveyed to the District

Magistrate of the fact that proceedings under s. 235 of the Indian Companies Act which may result in criminal prosecution under s. 237 of the same Act were pending in this Court. The official liquidator and his Counsel both stated before me that no such information was given to the District Magistrate. I am convinced that had this information been given to the District Magistrate he would certainly have awaited the result of the impending inquiry in proceedings before this Court. Be that as it may, the conduct of the official liquidator in disregarding the order of the 28th of September, 1926, and making the criminal complaint during the pendency of the proceedings in this Court is a clear attempt to divest this Court of its jurisdiction possessed under s. 237 of the Indian Companies Act. For reasons of public policy the High Court cannot permit such an attempt to succeed. This, therefore, reveals the exceptional nature of this case.

The principle upon which I propose to act in this case was enunciated by Buckley, J., (afterwards Lord Justice Buckley) in *In re London and Globe Finance Corporation, Limited* (3). That was a converse case where the Crown had refused to institute a criminal prosecution and Buckley, J., proceeded to act under s. 167 of the Companies Act, 1862, (25 & 26 Vict. c. 89). (This section is the same as s. 237 of the Indian Companies Act, 1913); and ordered the Official Receiver to institute a criminal prosecution. He said: "Under these circumstances it seems to me that I ought not to allow my judgment to be influenced even by the fact that the highest authority at the Bar, and the first law officer of the Crown, has thought proper to decline to put the public prosecutor in motion. I must accept the responsibility of determining the question before me for myself".

Therefore I have heard arguments on the merits of the case of these applicants for five days. Documentary evidence in possession of the liquidator and in possession of the several applicants was read to me in the course of the arguments. On behalf of the official liquidator statements of witnesses whom he proposes to produce in support of the criminal prosecution were also read and the conclu-

(3) (1903) 1 Ch. 728; 72 L. J. Ch. 368; 51 W. R. 651; 88 L. T. 194; 19 T. L. R. 314; 10 Manson 198.

sion at which I have arrived will now be stated.

Having regard to the criminal prosecution now pending in the Court of the City Magistrate of Lucknow it will not be in the interest of justice that I should state my reasons for quashing this prosecution in favour of some and allowing it to continue as against others but this is the conclusion at which I have reached. I accordingly quash or set aside the pending prosecution against the following persons:—

1. K. S. Sajjad Husain, 2. Cursetji, 3. Ram Narain, 4. Madho Narain Shukla, 5. Swami Dayal Saksena, 6. Mahabir Sharma, 7. Lal Bahadur Mathur and 8. Jiwan Nath Hukku.

I further direct that the said criminal prosecution shall proceed in accordance with law against the following persons:—

1. Sri Krishna, 2. Balgobind Rastogi, 3. E. A. Labanti, 4. Jagmohan Lal Rastogi, 5. Jai Lal, 6. P. D. Gour, 7. K. O. Bhalla, 8. Brij Bahadur Srivastava, 9. Brij Mohan Lal, 10. Chandra Bhan Shukla, 11. Puran Chand, 12. Madan Mohan Lal Bhatnagar and 13. Radhe Saran Agarwal.

This order should at once be communicated to the City Magistrate, Lucknow, for compliance.

G. H.

A. N. A.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 8 OF 1927

AND

CRIMINAL APPEAL NO. 69 OF 1927.

May 5, 1927.

Present:—Sir B. K. Mullick, Kt., Acting Chief Justice, and Mr. Justice Wort.

LALJI DUSADH—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 8, 27, 32 (1)—Confession leading to discovery of weapon used, extent of admissibility of—Dying declaration, admissibility of, to prove charges other than homicide—Dying declaration made immediately after robbery—Res gestæ.

Although the whole of the confession of a prisoner in Police custody cannot be admitted in evidence under s. 27 of the Evidence Act, yet where a confession includes a statement that a weapon was used for committing the offence charged, that part of the confession can go in if it leads to the discovery of the weapon. [p. 702, col. 1.]

A dying declaration is admissible in evidence under s. 32 (1) of the Evidence Act even where the charge is not one of homicide. [p. 703, col. 1.]

A dying declaration made by a person who has been robbed and killed, immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery, is admissible in evidence in the trial of the assailant for robbery, under s. 8 of the Evidence Act as part of the *res gestæ*. [*ibid.*]

Sections 8 and 32 of the Evidence Act may overlap in some cases but they provide for different and distinct conditions. [p. 703, cols. 1 & 2.]

Appeal from a decision of the Sessions Judge, Muzaffarpur, dated the 2nd April, 1927.

Mr. B. C. De, for the Appellant.

Mr. C. M. Agarwala, Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, A. C. J.—This case comes before us on a reference under s. 374 of the Code of Criminal Procedure by the Sessions Judge of Muzaffarpur and also on appeal by the prisoner Lalji Dusadh alias Lalji Mallah.

The appellant is alleged to have robbed and killed a young man named Abdul about 8 p. m. on the 9th November, 1926. For the robbery he was charged under ss. 392 and 397 of the Indian Penal Code and tried by a Jury of five. For the offence of murder he was charged under s. 302 of the Indian Penal Code and tried by the Sessions Judge with the help of the above Jurors sitting as Assessors.

The unanimous verdict of the Jurors in the trial for the offences under ss. 392 and 397 was that the appellant was guilty. The opinion of the Assessors on the charge of murder was to the same effect.

The learned Sessions Judge, agreeing with the Assessors, has sentenced the appellant to death for the offence of murder. Agreeing with the Jurors he has also found the appellant guilty of the offences under ss. 392 and 397 but he has passed no separate sentence.

The appellant is thirty years of age. His home was in Mauza Mushari in the District of Muzaffarpur and he belonged by birth to the Mallah caste. About two years before the murder he was outcasted in consequence of an intrigue with a Dusadh woman named Kanchania who lived in Mauza Madhopur in the same District and he became a Dusadh. He lived with her for two or three months in Madhopur and then emigrated to the District of Dinajpur taking her with him and one infant child. Later his mother joined him with his other child and thereafter for 5 or 6 months in 1926 he worked as a labourer in

the service of one Anjor Sahai in *Mauza Nashipur* in the District of Dinajpur.

The deceased Abdul was twenty-five at the time of his death. He came to Dinajpur when he was quite a child and worked there for about twenty years. He was a Goala by caste and the name given to him by his parents was Munia, but he became a Mussulman later on and took the name of Abdul. He lived at Nashipur and worked first as a grass-cutter and then as an agricultural labourer.

On the 8th November Lalji with his wife, mother and two children started from Dinajpur for Madhopur. Abdul accompanied them and the evidence is that Lalji told him that he would get him married as he had no wife. At about 11 A. M. on the 9th the party arrived at Shekra Station which is ten miles from Madhopur. There was some trouble about Abdul's ticket. Apparently it could not be found and the result was that he had to leave his bundle behind containing some brass utensils, a *chaddar*, some clothes and some rice.

We have no evidence as to the subsequent movements of Abdul till about 9 P. M. when he arrived bleeding from several wounds on the head and body at the *bathan* (cattle pen) of Hitan Missir of Salaha which is about one mile from Madhopur. Adhin Goala, who has a neighbouring *bathan* and had come out to feed his cattle, saw Abdul go and sit in Hitan Missir's *bathan*. Adhin's cries brought Hitan Missir to the *bathan*. The *chaukidar* Chauhuddi was next fetched and other people came. Whether Abdul was able to make any coherent statement is a matter of controversy in this case and will be discussed later. The President Panch, Ramphal Tiwari, was then fetched and drew up a short report which he handed over to Chauhuddi. Chauhuddi arrived at the Muzaffarpur Police Station at 7 A. M. on the 10th and laid an information before the Writer Head Constable, Sudhist Narayan Singh, who was in charge. The Head Constable arrived at Salaha about 8 A. M. and found that Abdul was dead. He sent the body to Muzaffarpur for *post mortem* examination and was engaged the whole day in making investigations.

On the bank of a circular piece of water called a "*man*" 250 paces from the *bathan* of Hitan Missir, the Head Constable found large patches of blood and a bundle containing two nets, some cotton thread, a pen-knife, a razor, a medicine bottle and a *dhoti*. Near

the bundle was a small stick made of jute wood. It is in evidence that the nets belonged to the appellant Lalji.

On the 11th November, the Sub-Inspector of Muzaffarpur took charge of the case and the appellant was arrested about 1-30 P. M. In consequence of a statement made by him, his wife Kanchania delivered up to the Sub-Inspector Rs. 39 and gold coin of the Muhammadan period in India which she was carrying upon her person. Also in consequence of information given by the appellant the "*man*" was searched, and in water about thigh deep a heavy *hasua* was found.

On the 13th the appellant was produced from Jail before a Deputy Magistrate at Muzaffarpur in order that his confession might be recorded. The appellant, however, did not make a confession but he made an exculpatory statement in which he admitted that he had come with Abdul to Shakra and had then walked with him as far as the village of Titra (four miles from Shakra) where he had parted company with him. According to the appellant Abdul said that he was going to Muzaffarpur but it does not appear that Abdul had any home of his own at Muzaffarpur. The appellant says his mother halted on the 9th November in the house of a Dusadh at Titra. Where he and his wife slept on the night of the 9th there is nothing to show, but on the 10th Abdul says he slept at the house of Sirtaj Singh of Madhopur.

It appears that the Police found Kanchania in the house of her father at Madhopur on the 11th and, on information given by her, Lalji was found in a *kharour* (field of high grass) in Madhopur about half a mile or a mile from that house.

I do not think that there is any reason for doubting that the deceased Abdul came with Lalji from Dinajpur where they had been working together and that he was last seen in his usual health at Shakra Station about 11 A. M. on the 9th November.

The "*man*" on the bank of which the blood was found is on the way from Shakra Station to Madhopur. It is on the boundary between *Mauzas* Baikutpur and Salaha and is about one mile from the house of Kanchania's father. It is 6 or 7 miles from Shakra and 2 or 3 miles from Titra where the appellant says he halted for a little time with Abdul. There are no houses anywhere near. The blood on the ground has by analysis been found to be human.

The witnesses Adhin and Hitan who next saw Abdul live in Salaha. Those who came afterwards live either in Salaha or Baikutpur or Madhopur.

Girdhari and Anjor, the two Dinajpur witnesses, identified as Lalji's the two nets found in the bundle which was discovered near the blood patches on the bank of the 'man'. It may be said that one cannot rely on this identification as there do not appear to be any special marks, but, on the other hand, the accused was originally a fisherman by caste and would be expected to know how to make nets and there is nothing to show that the two Dinajpur witnesses are deposing falsely. Girdhari and Anjor also establish that the gold coin handed over to the Police on the 11th by Kanchania belonged to Abdul. It is an old Badshahi coin and not likely to be easily mistaken. Girdhari deposes that Abdul told him that he had bought it from a man called Kalhu Nonia for Rs. 26 and that he wanted to sell it; also that he had bought it to have it threaded to wear round his neck. Anjor also identifies the coin. The man Kalhu Nonia from whom the coin is alleged to have been bought has not been found. With regard to the *hasua* found in the "man" on the 11th both Girdhari and Anjor identify it as the appellant's. They say that, although it is an ordinary *hasua*, they recognize it by the handle and by the blade and that Lalji used to cut bamboos with it in Dinajpur. It is a heavy weapon and capable of causing the injuries from which Abdul died.

These injuries were five severe wounds on the head and two slight wounds on the right shoulder. The Civil Surgeon deposes that death was due to shock and hæmorrhage caused by the wounds, especially those which caused the fracture of the skull.

Except the statement of the deceased which is alleged to have been recorded by the President Panch, Ramphal Tiwari, there is nothing to show where the deceased lived. In this statement it is recorded that he stated that his home was at Madhbalia, Thana Masrakh, District Chapra. If that is correct, then Shakra was not the station where Abdul would, in the ordinary course, have alighted and there is no reason why he should have gone to Muzaffarpur. It will be remembered that the appellant in his statement before the Magistrate on the 13th November said that he last saw Abdul in Titra when Abdul said that he was

going to Muzaffarpur. I think this statement is only partially correct and that Abdul was with him up to the time of the assault. There is no evidence to show where the appellant spent the night of the 9th and I think the prosecution might with advantage have called Kanchania even though she is the appellant's wife. The appellant stated in his statement before the Committing Magistrate on the 22nd December, 1926, that he went to Sirtaj Singh on the 10th. This man might also with advantage have been called and so also Ramdhani, the father of Kanchania. If the prosecution did not consider that these witnesses could be relied upon to speak the truth, they should have asked the Court to examine them and the witnesses could have been cross-examined by both sides.

The trial was also defective in another respect. I find that the inquest report which the Writer Head Constable drew up immediately on arrival at the *bathan* of Hitan Missir states that the name of the deceased was not known. As the evidence given in Court is that before he died the deceased gave his name, his father's name and his address to the President Panch, the Writer Head Constable should have been asked the reason for the omission in the inquest report. He should also have been asked why, if it was known then that Lalji was the man who had committed the murder, no attempt was made to arrest him on that day. The Writer Head Constable appears to have been very active in examining witnesses in the neighbouring *mauzas*, for he deposes that he did not return to Muzaffarpur till midnight. The prosecution should also have given evidence as to when the Dinajpur witnesses were examined for the first time by the Police so as to show that the dying declaration alleged to have been made by Abdul could not have been fabricated to accord with any information obtained from these witnesses.

The above omissions on the part of the prosecution have thrown considerable doubt upon the genuineness of the dying declaration made by the deceased and the learned Judge has not relied upon any of them; but I think there is internal evidence to show that the witnesses who depose to them are not intentionally giving false evidence. In the first place none of them are men of the appellant's caste. It is contended that the appellant had to leave his village be-

cause he had become a Dusadh and had formed an intrigue with Kanchania; but that did not affect men like Adhin Gope, Hitan Missir, Chauhuddi Gope, Dwarka Gope, Pirthi Kandu, Jag Lal Koeri, Bishundeo Missir, Nabu *chaukidar* (a Mussulman) and the President Panch, Ramphal Tiwari.

Adhin and Hitan who were the first to question the deceased, depose that Lalji's name was mentioned then; but Chauhuddi *chaukidar* does not support this and in his information at the Police Station he does not mention Lalji at all but merely states that the deceased had said that he had been attacked by his companion who had snatched away his necklace. The learned Judge has explained to the Jury and the Assessors that probably Adhin and Hitan were speaking from inferences drawn from facts subsequently ascertained and were actuated by a mistaken zeal in the cause of public justice.

We know that Chauhuddi was at the Thana at 7 o'clock in the morning of the 10th so that he must have left home at the latest about 3 o'clock. He says in his first information that the President gave him the report at 11 P. M.; but he must have got it earlier because the President deposes that the second statement was made about half an hour after the first and in this document the President writes that it was recorded after the *chaukidar* had left. Abdul died after the President came home. There is no evidence as to the hour. Nabu *chaukidar* deposes that he was left in charge and that Abdul died soon after the President left.

The medical evidence shows that it was not impossible that the deceased might have lived for three or four hours; but that no definite opinion can be given.

I think the evidence shows that the first statement was recorded about 10 o'clock and the second about half past ten and that Chauhuddi *chaukidar* had by then already left with the first report. It is clear from the first information that Chauhuddi must have left for the Thana before the man died. The *chaukidar* was not asked when he arrived at the Thana. The first information states that it was recorded as soon as the *chaukidar* arrived, but it appears from the *chaukidar's* evidence that he must have arrived during the night or that he halted somewhere on the road. The *chaukidar* states that he left after the Panch went home; but this is, in my opinion,

a mistake. I have no doubt that all that the deceased did say to those who came before the *chaukidar* left for the Thana was that he had been attacked by his companion and that a gold *haulduli* was snatched from his neck. A "*haulduli*" is a necklace of stones and a gold *haulduli* is obviously a misnomer for a gold coin worn as a locket; but the *chaukidar* had to make the best of what the deceased said and it was either his mistake or the deceased's. The *chaukidar* also states that by his conversation the deceased appeared to be a man from another part; but that he could not state his name and address. I think the *chaukidar* spoke the truth in his information to the Police and that up to that time Lalji's name had not been mentioned. This is further corroborated by the written report sent by the President in which the President says merely that the wounded man could not give any satisfactory reply to his questions.

The second report written by the President has been attacked by the defence as a pure fabrication. This report shows that the deceased gave his name as Abdul and his father's name as Somer Ali, and his home as Mauza Madhbalia, Thana Masrakh, District Chapra, and that the deceased had been possessed of Rs. 62 and one *mohur* worth Rs. 26 and that his assailant was one Lalji whose house was in the District of Muzaffarpur. I cannot believe that a man of the President's standing and so many disinterested witnesses could have deliberately assisted in the fabrication of a piece of false evidence such as this. The President's explanation is that the man was given a drink of water after the *chaukidar* left and then revived sufficiently to give these details. If these details had not been given I do not see why Lalji was arrested at all on the 11th. It certainly seems to be a fact that on the 10th the President told his *chaukidars* to keep Kanchania under observation and if he knew nothing then about Lalji's connection with the deceased his action cannot be explained. Further, the Writer Head Constable himself deposes that he got the second report at 10 o'clock in the morning on arrival at the village. The value of the gold *mohur* is put down as Rs. 26 in the second report and it is extremely unlikely that the President put down this figure out of his own head; the same applies to the figure Rs. 62 which was given as the amount which Abdul brought from Dinajpur. The price of the gold *mohur* was

not known to any one except the two Dinajpur witnesses and they appear to have been examined by the Police long afterwards. It is also difficult to see how the President got the deceased's father's name and address unless it was given by the deceased himself. There is a village called Majhulia but no village called Madh-balia and Majhulia is now no longer in *Thana* Masrakh. If the President had fabricated the document he would not have made a mistake about the name of the village and the *Thana*. The circumstances show that the information given in the second dying declaration was obtained from the deceased.

There is, of course, the fact that the Writer Head Constable did not put down the name of the deceased in this inquest report and also the fact that he did not arrest Lalji on that day. In the absence of any explanation, the only conjecture that I can make is that he did not trust the accuracy of the second report and of the witnesses who supported it.

In my opinion the learned Judge has erred on the side of over-caution and both the reports drawn up by the President are genuine.

But, apart from the statements made by the deceased, the circumstantial evidence is quite sufficient to support the conviction.

The deceased came with the appellant as far as Shakra and started from that station in his company. He is not seen again but his *hasua* is found in the "*man*" one mile from the house of the appellant's father-in-law. The appellant's bundle is found on the bank of the "*man*" and the earth close by is stained with human blood. Immediately upon arrest on the 11th the appellant makes a statement in consequence of which the deceased's gold coin is found in the possession of the appellant's wife and is given up to the Police at his request and the accused's *hasua* is found in the "*man*." Also the appellant gives no account of where he went after he parted company with the deceased and where he slept on the night of the 9th; and his statement that he left the deceased at Titra must be false.

The learned Vakil for the appellant has attacked the evidence regarding the finding of the *hasua*. He says that Hira Dusadh, the man who got into the water and found the weapon, is at enmity with the appellant and put the weapon there. It is suggested

that Hira is the headman of the Dusadhs of Madhopur and bears a grudge against the appellant for having misconducted himself with Kanchania. There is no evidence to support this suggestion. The evidence conclusively shows that when he was asked by the Sub-Inspector where the weapon was, the appellant took the Sub-Inspector to the "*man*" and the weapon was found after some delay. The learned Vakil objects to the admissibility of that part of the statement which refers to the weapon as the one used for attacking the deceased; but, in my opinion, s. 27 of the Indian Evidence Act is quite clear upon this point. It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon; but common sense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provisions of s. 27 of the Indian Evidence Act wholly nugatory. The whole confession of a prisoner in Police custody cannot, of course, go in, but where the confession includes a statement that a weapon was used for committing the offence charged, that part of the confession can certainly go in if it leads to the discovery of the weapon. The most recent case on this point is *In re Sogiamuthu Padayachi* (1).

For the same reason evidence could have been given to show that the appellant stated immediately upon arrest that he had given the deceased's gold *mohur* and money to his wife. But as the record stands at present all we have got is that the appellant made a certain statement and that in consequence of that statement the gold *mohur* and Rs. 39 were given up by Kanchania.

But even on the record as it stands the discovery of the gold coin in Kanchania's possession taken with the other evidence in the case conclusively shows that the appellant was the person who caused the death of the deceased.

The learned Vakil has also taken a point that it was not permissible to the Crown to have the statement of the appellant recorded under s. 164 of the Code of Criminal Procedure on the 13th as the statement

(1) 93 Ind. Cas. 42; 27 Cr. L. J. 304; A. I. R. 1926 Mad. 638.

was not a confession. The answer to this is that the accused was sent up to have his confession recorded and that he gave the Police to understand that he would make a confession. After a night in Jail he changed his mind, and when he appeared before the Magistrate it was open to him to say that he would make no statement; but he did not follow this course; he was warned and notwithstanding that he proceeded to make a statement. This statement is certainly evidence of conduct.

A further legal point is taken with regard to the dying declarations.

It is contended that so far as the charges for the offences under ss. 392 and 397 are concerned the dying declarations are not admissible under s. 32 (1) of the Indian Evidence Act inasmuch as the cause of the deceased's death does not come in question in the trial of those charges. It is contended that on this point the Indian law is the same as the English Law and that a dying declaration as to the cause of the death is only admissible when the causing of the death is the subject of the charge. I cannot agree with this view. The words of s. 32 are very wide and it is not necessary that the charge should be one of homicide. The evidence as to the cause of death was relevant to the charge of robbery and consequently, the cause of death, that is to say, the assault committed by the appellant, came in question in the trial. Before the Indian Evidence Act was enacted it was held in *Queen v. Bissorunjun Mookerjee* (2) that there was no necessity in India for following the very narrow rule of English Law and that a dying declaration could be used as evidence in a charge of rape. One of the illustrations to s. 32 of the present Indian Evidence Act expressly provides for such evidence where the charge is not culpable homicide but rape.

Moreover, in this case the dying declaration was also admissible under s. 8 of the Indian Evidence Act as a part of the *res gestæ*. A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery was admissible though the person who made it cannot be called to depose to it on oath. The truth in ss. 8 and 32 of the Indian Evidence Act may overlap in some cases, but they provide

for different and distinct conditions. A statement, for instance, which would not be admissible under s. 8 may be admissible under s. 32.

The result, therefore, is that, in my opinion the Assessors and the Jury were right in the view which they took of the guilt of the appellant. The appellant is guilty both of robbery and murder. Having regard to the injuries there can be no doubt that it was his intention to cause such injuries as would in the ordinary course cause death. His motive was robbery and he appears to have attacked his victim from behind without giving him a chance of protecting himself. I agree with the learned Sessions Judge that the sentence of death is the only possible sentence and the order of the learned Judge must, therefore, be confirmed.

The conviction for the offences under ss. 392 and 397 are also affirmed but it is unnecessary to pass any separate sentence for these offences.

The appeal is dismissed.

Wort J.—I agree.

A. N. A.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 55 OF 1927.

May 9, 1927.

Present:—Sir B. K. Mullick, Kt., Acting Chief Justice, and Mr. Justice Wort.

KARI GOPE—APPELLANT.

versus

Mahant MANMOHAN DAS—

OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 192, 199—False affidavit by identifier for proving service of process—Offence—S. 19, scope of.

An identifier who knowingly makes a false affidavit of service of process for the purpose of being used in a judicial proceeding commits the offence of fabricating false evidence within the meaning of s. 193 of the Penal Code. He is also guilty of an offence under s. 199 of the Code where the Court is authorised under its circular orders or any other law to receive an affidavit from an identifier as evidence of the fact of service of summons. (S. 704, cols. 1 & 2.

Section 199 of the Penal Code is much wider than s. 192 and applies to every kind of affidavit which the Court is bound or authorised to receive. [p. 704, col. 2.]

Criminal appeal against an order passed by the Sessions Judge, Darbhanga, dated the 6th February, 1927.

Messrs. L. K. Jha and K. N. Jha, for the Appellant.

Mr. C. M. Agarwala, Assistant Government Advocate (with him Mr. R. K. Jha), for the Crown.

JUDGMENT.

Mullick, A. C. J.—This is an appeal under s. 476-B of the Code of Criminal Procedure. The appellant Kari Gope was an applicant in a proceeding under Act XIV of 1920 in which the respondent Mahanth Manmohan Das was summoned to appear before the Court on the 13th November, 1926.

It is alleged by the appellant that on the 11th November, 1926, summons was duly served upon the respondent and was refused by him. The respondent denies service and says that he was not at home and that the affidavit of the peon as well as the affidavit of the identifier were intentionally false.

The learned District Judge has after inquiry found that the appellant who was the identifier intentionally made a false affidavit and he has filed a complaint for his prosecution for an offence under s. 193 of the Indian Penal Code.

There is evidence to show that the affidavit made by the appellant was false. All the witnesses for the prosecution were not examined by the Court and it is not necessary at this stage to say more than this that there is a *prima facie* case which must be investigated.

There is, however, a point of law taken which requires notice. It is urged that the affidavit of the identifier was not required for the purpose of proving service of summons upon the defendant, that it was a voluntary declaration and that no prosecution for giving false evidence can be based upon it. Anything that we may say will not debar the appellant from raising the point at his trial, and, therefore, it will be sufficient here to say that our present view is that the prosecution for offences under ss. 193 and 199 of the Indian Penal Code will lie. The

affidavit was sworn before an officer competent to take affidavits and the appellant was bound to state the truth. It may be that the peon's affidavit was sufficient and that no affidavit was required from an identifier; but if the affidavit was intended to be used in a judicial proceeding, then the offence of fabricating false evidence within the meaning of s. 193 was complete. It makes no difference that the affidavit was voluntary. Voluntary statements made without any intention that the statement may appear in evidence in a judicial proceeding are not offences; so it has been held that a verification in a document not requiring to be verified is no offence; also that false statements made in an application for re-hearing of an *ex parte* decree or for a new trial in a Small Cause Court were not criminally punishable. The statements in themselves were not evidence and acquired no extra weight by being verified.

The affidavit in question is also punishable under s. 199. It is clear that the Court was authorised under the Circular Orders of the High Court and O. XIX of the Civil Procedure Code to receive an affidavit from an identifier as evidence of the fact of service of summons. Section 199 is wider than s. 192 and applies to every kind of affidavit which the Court is bound or authorised to receive. The Civil Procedure Code and the Circular Orders of the High Court authorise the Court in this instance to receive the affidavit in question.

The result, therefore, is that the appeal will be dismissed and the proceedings will be continued from the stage at which they were left.

Wort, J.—I agree and have nothing to add.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 540 OF 1927.

October 19, 1927.

Present:—Mr. Justice Madhavan Nair
and Mr. Justice Reilly.THE PUBLIC PROSECUTOR—APPELLANT
versus

PALANIYANDI NAICKEN—ACCUSED.

Madras Local Boards Act (XIV of 1920), s. 3 (18)
—Public road—Road poramboke lying between
roadway and boundary of adjacent property, whether
public road—Encroachment—Offence.‘Road poramboke’ which lies between the roadway
and the boundary of adjacent property, is included
within the term ‘public road’ as defined in the Madras
Local Boards Act.Criminal appeal under s. 417 of the Code
of Criminal Procedure, 1893, against the
acquittal of the accused by the Joint Magis-
trate, Kumbakonam, in C. A. No. 5 of
1927, on his file.Mr. T. S. Krishnaswami, *Amicus Curie*,
for the Accused.**JUDGMENT.**

Madhavan Nair, J.—The facts are briefly these: the accused encroached on road No. 18 within the limits of Milattoo village which vested in the District Board, Tanjore, and notice was served upon him under s. 159 (1) of the Local Boards Act to vacate the encroachments. This was disobeyed and he was convicted by the Sub-Magistrate, Papanasam, in C. O. No. 240 of 1925. He preferred no appeal against this conviction. He did not, however, remove the encroachment, and, as the offence continued, the present case was brought against him under ss. 159 (1) and 207 (2) of the Madras Local Boards Act. The Stationary Sub-Magistrate of Papanasam found him guilty and fined him Rs. 61. This conviction was set aside on appeal. This present appeal has been preferred by the Public Prosecutor against the acquittal of the accused by the Joint Magistrate of Kumbakonam.

Prosecution Witness No. 2, the Local Fund Road Maistry, deposed that the encroachment in question lies outside the line of avenue trees on the road and on land which was acquired for road conservancy purposes and that there is no obstruction to traffic. The conviction was set aside by the learned Joint Magistrate mainly on the ground that the public road as defined by s. 3 (18) of the Local Boards Act means the actual road over which the public have a right of way and that none of the clauses of s. 3

(18) is wide enough to include a road *poramboke* used for conservancy purposes. I think that the conclusion of the learned Magistrate is based upon a misreading of s. 3 (18). Sub cl. (c) of that section says a public road includes land which lies on either side of the roadway up to the boundaries of the adjacent property. The land which is in question in this case clearly comes within this description. It is registered as “road *poramboke*” and is vested in the District Board. The Public have a right of way over every part of land registered as road *poramboke*. The fact that the encroachment does not cause any obstruction to the public does not in the slightest degree affect the case. The District Board which owns the public roads has every right to ask those who encroach upon them to remove the obstruction.

It was argued on behalf of the accused that he has perfected his title to the land in question by adverse possession for over 30 years. This ground was raised in the grounds of appeal to the lower Appellate Court but in the judgment we find no discussion of the point. The judgment is confined exclusively to a consideration of the question whether the encroachment was on the public road as defined in s. 3 (18). It appears to us that this point has not been pressed before the learned Magistrate; I agree with the Sub-Magistrate that the evidence does not conclusively show that the case of adverse possession has been made out by the accused.

In these circumstances I set aside the acquittal and convict the accused of the offence under ss. 159 (1) and 207 (2) of the Madras Local Boards Act and sentence him to pay a fine of Rs. 61, or in default to suffer simple imprisonment for two months.

Reilly, J.—I agree. In regard to the definition of a “public road” in the Madras Local Boards Act it appears to me that, *prima facie* the public have a right of way over every part of every road *poramboke*. Therefore, if we find a piece of road *poramboke* which lies between the roadway and the boundary of adjacent property, that will be a public road as defined in the Act unless it is shown that in some way the public have lost their right of way over it.

V. N. V.

Acquittal set aside.

MADRAS HIGH COURT.CRIMINAL REVISION CASE No. 371
OF 1927.(CRIMINAL REVISION PETITION No. 327
OF 1927.)

October 7, 1927.

Present:—Mr. Justice Devadoss.

PARTHASARATHI NAICKER—

COMPLAINANT—PETITIONER

versus

T. KRISHNASWAMI IYER—

ACCUSED—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 250—
Complaint, dismissal of, without examining all pro-
secution witnesses—Compensation, whether can be
awarded.*

It is only after the examination of all the evidence a complainant wants to adduce that a Magistrate can come to a conclusion that the case is false and vexatious, and though a Magistrate is entitled to discharge the accused at any stage, he cannot award compensation to the accused without examining all the complainant's witnesses.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Deputy First Class Magistrate, Saidapet, in C. O. No. 56 of 1926.

Mr. V. L. Ethiraj, for the Petitioner.

Mr. P. Viswanatha Aiyar, for the Respondent.

Mr. J. C. Adam, Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the Sub-Divisional Magistrate of Saidapet awarding compensation to the accused in a case brought by the petitioner. The learned Magistrate disposed of the case after hearing only five of the prosecution witnesses and he did not care to examine the rest of the evidence as he thought that the remaining witnesses would not materially help the case. In these circumstances, he was not justified in awarding compensation to the accused. It is only after the examination of all the evidence the complainant wanted to adduce that he could come to the conclusion that the case is false and vexatious. No doubt he was entitled at any stage to discharge the accused, but that would not be a ground for awarding compensation to the accused. I, therefore, set aside the order of compensation and direct the amount if recovered, to be refunded to the petitioner.

V. N. V. S. S.

A. N. A.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 196 OF 1927.

May 13, 1927.

Present:—Sir B. K. Mullick, Kt., Acting
Chief Justice, and Mr. Justice Wort.

Mahanth Baba BADRI DASS

—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Police Act (V of 1861), ss. 30, 30-A, 32—License for
procession on certain conditions—Duty of licensee to
observe conditions throughout the procession—Licensee's
liability for conduct of members subsequently joining,
extent of.*

Where an application for license to take out a procession is granted subject to the condition that no member of the procession carries a *lathi* or sword, it is the duty of the licensee to see not only that no member of the procession carries a *lathi* or sword at the commencement of the procession but also that no one subsequently joins the procession with such weapons. He cannot be heard to say that they joined without his permission and that he was in no way responsible for them. [p. 707, col. 1.]

Per Wort, J.—The fact that there is a provision in s. 30-A of the Police Act giving power to the authorities to stop any procession which violates the conditions of a license does not excuse the licensee from controlling the persons who may join the procession. [*ibid.*]

Criminal revision against an order of the District Magistrate, Patna, dated the 2nd February, 1927, confirming that of the Second Class Magistrate, Patna City, dated the 14th December, 1926.

Mr. S. Sinha (with him Messrs. S. P. Varma and D. P. Varma), for the Petitioner.

Mr. Sultan Ahmed, Government Advocate, for the Crown.

JUDGMENT.

Mullick, Actg. C. J.—The petitioner has been sentenced to a fine of Rs. 100 under s. 32 of the Police Act (V of 1861). It is admitted that the petitioner took out a license for a procession to proceed from Bakarganj to Patna City, one of the conditions of which was that no member of it was to carry a *lathi* or a sword. The Inspector of Police joined the procession at Muradpur which is some distance from the starting point and found that some of its members were carrying swords and doing *lathi* play. He asked the petitioner to stop the *lathi* play but the petitioner made some unsatisfactory reply in the vernacular of which the English translation in the record is "they would play".

It is urged on behalf of the petitioner that he was only responsible for seeing that no member of the procession carried a *lathi* at the time the procession started and that

he was not called upon to control those who joined it on the way.

In my opinion that is not a correct view of the law. The object of a license under the Police Act is to ensure the preservation of public order and clearly the licensee must undertake the duty of maintaining order throughout the course of the procession. He takes the risk, as he must do, of persons joining the procession on the way and of circumstances arising which will require him to compel them to conform to the terms of the license. He cannot be heard to say that they joined without his leave and authority and that he was in no way responsible for them. If they get out of hand he should break up the procession or ask the assistance of the Police.

But here the petitioner declined to assist the Police and merely said that the *lathi* play would go on. In my opinion the inference is irresistible that the *lathi* players were members of the petitioner's assembly and that they were contravening the terms of the license with his permission if not under his direct orders. The conviction and sentence will, therefore, be affirmed and this application dismissed. The Police might, no doubt, have declared the procession to be an unlawful assembly and called upon it to disperse but because they did not exercise that power the petitioner is not relieved from his duty.

Wort, J.—I agree. It has been argued that by reason of the provisions of s. 30-A of the Police Act, which gives Magistrates, District Superintendents and Inspectors of Police power to stop any procession which violates the conditions of a license, the licensee is thereby excused from controlling the persons who may have joined the procession and over whom the licensee states he has no control. This, however, is clearly fallacious. The section referred to gives the power to the officers mentioned to stop a procession in spite of the procession having been licensed, and thus gives them a power which they otherwise would not have in law as already indicated. This does not excuse a licensee from strictly complying with the conditions of his license, and, in the view which I take of the facts of this case and of the law, the conditions of the license were broken and the licensee was, therefore, properly convicted.

A. N. A.

Application dismissed.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 1465 OF 1926.

September 9, 1927.

Present:—Mr. Justice Mya Bu.

EMPEROR—PROSECUTOR

versus

NGA LU GALE—RESPONDENT.

Arms Act (XI of 1878), ss. 4, 19 (e)—Clasp knife whether 'arms'—Tests—Definition of arms, whether exhaustive.

The definition of 'arms' in s. 4 of the Arms Act is not exhaustive and there could be arms beyond the list of weapons mentioned in the said definition. [p. 708, col. 1.]

It cannot be laid down as a hard and fast rule that a clasp knife does not fall within the definition of 'arms'. [p. 708, cols. 1 & 2.]

The purpose for which an implement is primarily intended regulates whether it should be deemed to be 'arms'. [p. 708, col. 2.]

Where a knife had a blade $5\frac{1}{2}$ inches long with a pointed end, was fitted to a long handle and turned over into the handle:

Held, that the knife fell within the definition of arms inasmuch as the primary purpose of such an instrument can only be for stabbing. [*ibid.*]

Ebrahim Dawoodji Babi Bawa v. King-Emperor (2) and *Bishan Singh v. Emperor* (3), relied on.

Mr. Tun Byu, Assistant Government Advocate, for the Crown.

Mr. E. Maung, for the Respondent.

JUDGMENT.—In Criminal Regular Trial No. 51 of 1926 of the Court of the Township Magistrate of Kayan, the respondent was tried for an offence punishable under s. 19 (e) of the Arms Act for going armed with a clasp knife (Ex. 1), on the 2nd of April, 1926.

The case for the prosecution was that on that day the respondent went to a monkey show near the bazar at Kayan carrying the knife opened in his hand and interfered with the show. When examined by the Magistrate he admitted that he had the knife with him, but stated that it was in his pocket and was not held open in his hand. On the charge under s. 19 (e) of the Arms Act being framed against him, he pleaded guilty and stated nothing in his defence. Consequently, the learned Magistrate convicted him of the charge and sentenced him to suffer three months' rigorous imprisonment. From this conviction the respondent appealed to the Court of Session, Hanthawaddy, in Criminal Appeal No. 123 of 1926, on the ground that he was too drunk to know anything on the occasion which gave rise to charge, and that the witnesses for the prosecution did not state that he had the knife in his hand.

According to s. 412 of the Criminal Procedure Code, it was obviously not open to the respondent to appeal against the conviction. The Sessions Court, however, remarked that the respondent had been convicted of carrying a dagger, and that, as the weapon was merely a large sailor's claspknife, it set aside the conviction and sentence and acquitted the respondent.

As, under s. 412 of the Code of Criminal Procedure, no appeal lay from the conviction, the order of acquittal made by the Court of Session was made without jurisdiction. Even if the proceeding was regarded as a revision, the Court of Session would still have no jurisdiction to set aside the conviction. It is this order of the Appellate Court which is now appealed against by the Local Government.

It is clear that the order of acquittal under appeal must be set aside as being made without jurisdiction. The question now remains whether, by going armed with the knife in exhibit, the respondent committed an offence punishable under s. 19 (e) of the Arms Act. It resolves itself into a question whether this knife is "arms" within the meaning of s. 4 of the Act.

The definition of "arms" in the Act runs thus:—

"arms" includes firearms, bayonets, swords, daggers, spears, spear-heads and bows and arrows, also cannon and part of arms, and machinery for manufacturing arms."

It is not contended in this case that the knife in exhibit can be described as a dagger; but the above definition does not purport to enumerate exhaustively all kinds of weapons which are arms, so that it is clear that, beyond the list of weapons mentioned in this definition, there could be arms.

In the case of *Crown v. Ngà Hmat Kyan* (1), Mr. Justice Thirkell White, Chief Judge, and Mr. Justice Fox, held that a claspknife does not fall within the ordinary natural meaning of the word "arms", but it was pointed out that the purpose for which an implement is primarily intended regulates whether it would in ordinary parlance be spoken of as an arm, and if it is not designed for use as a weapon of offence and defence, although it may be used as such, then it is not an arm.

(1) 1 L. B. R. 271.

In the report of the case, the size of the claspknife is not mentioned, but it is apparent that the ruling does not purport to lay down as a hard and fast rule that no claspknife would fall within the meaning of the word "arms."

The same learned Judges dealt with the same question in regard to a claspknife in the case of *Ebrahim Dawoodji Babi Bawa v. King-Emperor* (2), wherein they re-affirmed the criterion laid down in the case of *Crown v. Ngà Hmat Kyan* (2), but held that dagger-shaped knives of the kind produced in the case fell within the definition of "arms," although they might be called claspknives. Those knives were of the following description:—The steel blade was five and one-fifth of inches long, six-elevenths of an inch broad, was shaped and pointed as a dagger is shaped and pointed and was fitted to a long handle in the way in which the ordinary pen and pocketknife is fitted, that is to say, it turned over into the handle and when open and shut it was held by a spring.

As regards the criterion, it is clear that the purpose for which an implement is primarily intended regulates whether it should be deemed to be arms. In the present case, the knife has a blade $5\frac{1}{2}$ inches long with a pointed end, and it is fitted to a long handle and turns over into the handle, and there cannot be any room for doubt that the primary purpose for which such an implement is manufactured is to supply weapons to persons who want efficient stabbing instruments. It is extremely difficult to conceive of any domestic purpose for which such an instrument would be necessary or useful. It is a sort of weapon which, though not called a dagger, would be as effective as a dagger in its use.

In the case of *Bishan Singh v. Emperor* (3), a knife with a tapering blade, sharp throughout one edge and only towards the point of the other, which is attached to a cross-guard and handle, and which can be used for stabbing and cutting, was held to be "arms" within the meaning of the section.

The fact that the blade of the knife in the present case appears to be less tapering, and that there is no cross-guard to it, does not appear to me to make any real differ-

(2) 3 L. B. R. 1; 2 Cr. L. J. 372; 11 Bur. L. R. 183.

(3) 81 Ind. Cas. 943; 51 O. 573; A. I. R. 1924 Cal. 714; 25 Cr. L. J. 1119.

ence to the solution of the question. In my opinion, the knife under consideration is an instrument which does fall within the meaning of the term "arms" in s. 13 of the Act. That being so, the respondent's conviction by the learned Magistrate was correct, and I restore the same.

As regards the sentence I take into consideration the fact that it is not uncommon to come across claspknives of the kind for sale in the bazaars which might most probably have led the respondent to think that there was no prohibition against the arming of himself with such a knife and also the fact that he was in custody during the trial in the Magistrate's Court and has been in custody in connection with this appeal. I would, therefore, restore only half of the term of rigorous imprisonment passed by the Magistrate. In the result this appeal is allowed and the respondent is convicted and sentenced under s. 19 (e) of the Arms Act to suffer one and a half months' rigorous imprisonment, the period to be computed from the date of the Magistrate's sentence and the period of imprisonment undergone after the Magistrate's sentence should be counted towards the imprisonment now passed.

A. N. A.

Appeal allowed.

LAHORE HIGH COURT.CRIMINAL REVISION PETITION No. 1101
OF 1927.

August 12, 1927.

Present:—Mr. Justice Tek Chand and
Mr. Justice Coldstream.SANTA SINGH—ACCUSED—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Indian States (Protection against Disaffection) Act, 1923, s. 3—Offence under s. 3—Accused's right to prove truth of his allegations—Criminal trials—Inconsistent defences, legality of.

A person who is accused of an offence under s. 3 of the Indian States (Protection against Disaffection) Act, 1923, is entitled to adduce evidence to prove that the allegations made by him are true inasmuch as he has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty which may be imposed on him in the event of his conviction and for making good such a plea it may be necessary for him to show that the allegations are true. [p. 710, col. 2.]

An accused person is entitled to set up inconsistent defences. [p. 711, col. 1.]

Criminal revision petition from an order of the District Magistrate, Amritsar, dated the 20th June, 1927.

Mr. Muhammad Alam, for the Petitioner.
Mr. Abdul Rashid, for the Crown.

JUDGMENT.

Coldstream, J.—Santa Singh, petitioner, is being prosecuted in the Court of the District Magistrate, Amritsar, under s. 3, of the Indian States (Protection against Disaffection) Act, 1923, to be referred to hereinafter as the Act of 1923, in respect of a writing under the title, "Patiala's Zulum No. 1" published on 26th January, 1927, in the newspaper called the *Sacha Dhandora*, Amritsar, of which the petitioner is alleged to have been at the time the editor, printer and publisher.

A charge was framed against Santa Singh on the 16th of June. Santa Singh put in a written statement denying that he was the editor, printer and publisher of the *Sacha Dhandora* and that he was in any way responsible for the publication of the offensive article. He also denied that the article had brought the Maharaja of Patiala into hatred and asserted that the object of the writer of the article was simply to draw the attention of Government to the existing state of affairs and to provoke Government to an enquiry. The allegations were true and would be proved to be true, and their publication was in the public interest.

Santa Singh put in a list of 45 witnesses whom he wished to be summoned in his defence. On the 20th June the District Magistrate recorded an order under s. 257, Criminal Procedure Code, refusing to summon any of these witnesses on the ground that the only purpose for which they were summoned was vexatious. Against this order Santa Singh had petitioned under the provisions of s. 439 of the Code.

The petition came before Broadway, J. For the petitioner Counsel relied upon *Emperor v. Raj Pal* (1), arguing that evidence proving the truth of the allegations would be relevant as showing the intention of the writer as well as relevant on the question of sentence to be passed in the event of conviction. On behalf of the Crown the petition was opposed by the learned Government Advocate who contended that the judgment cited was not a correct exposition of the law. In view of this con-

(1) 33 Ind. Cas. 1052; 7 Lah. 15; A. I. R. 1926 Lah. 195; 27 Cr. L. J. 556; 27 P. L. R. 207.

tention Broadway, J., referred the matter to a Division Bench and the petition is accordingly before us. We have heard Mr. Muhammad Alam for the petitioner and the Government Advocate for the Crown.

The learned District Magistrate has held that the petitioner's application for the summoning of his witnesses could only be for the purpose of vexation, because, as the District Magistrate puts it, it was obviously no answer to the charge of an offence defined as this offence is defined, to plead that the allegations made were true and he saw no reason to call witnesses whose evidence could not affect the point to be decided. He remarked that in this case he would not accept the position that truth could be considered in mitigation of the offence since the accused out of his own mouth and by the cross-examination of his Counsel stood before him as an illiterate yokel who, whether he was or was not the publisher of the *Sacha Dhandora*, was in any case in no position to examine with due care and caution the evidence in support of what he was alleged to have published, and to say, that having examined it, he believed himself to be publishing what was true.

To establish the charge as framed by the District Magistrate against the petitioner in this case it has to be proved that by publishing the article the petitioner: (a) did bring into hatred or contempt the Maharaja of Patiala; or (b) did excite disaffection towards him, or that by publishing the article he (c) intended to bring the Maharaja into hatred or contempt; or (d) intended to excite disaffection towards him. The prosecution, who have closed their evidence, have not attempted to prove (a) or (b) and it will be for the Magistrate to decide whether the petitioner intended to bring the Maharaja into hatred or contempt or excite disaffection towards him. There can be no doubt that intention is an essential ingredient of the offence described in the Magistrate's charge and Mr. Muhammad Alam, who has referred to a number of rulings under ss. 124-A and 153-A, Indian Penal Code, has argued that the question of the truth of the allegations made in the article must be regarded as a relevant matter not only on the question of punishment but as relevant to show the intention of the publication and, therefore, relevant on the question of whether any offence was committed. I do not think it proper at the present stage of this prosecution, necessary

in view of the order I propose to pass, to express any opinion either as to the correctness of the learned Magistrate's view that a plea of truthfulness cannot be an answer to a charge under s. 3 of the Act of 1922 or to discuss the soundness of the principles enunciated by Martineau, J., in *Emperor v. Raj Pal* (1). That judgment was in a case under s. 153-A, Indian Penal Code, which is a different offence from the one made punishable under s. 3 of the Act of 1923.

I do not think that the District Magistrate acted rightly in refusing to allow the petitioner an opportunity of proving the truth of the allegations in the article, for the publication of which he is being prosecuted. There can be no doubt that the offence with which he is charged may be visited with penalties of varying severity, imprisonment which may be simple or rigorous, for one day or for five years, with or without fine or with fine alone, and it cannot be disputed that the petitioner has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty to be imposed in the event of conviction and that for the purpose of making good that plea it may be necessary for him to show that the offensive allegations were true. The learned Government Advocate is unable to cite any authority in support of his contention that in a case of this kind such a plea in mitigation of his offence is not open to the accused.

Before Broadway, J. Dr. Muhammad Alam stated that the alternative defence set up by his client (namely the denial that accused was in any way responsible for the publication of the offensive article) was a foolish one. Dr. Muhammad Alam has during the present proceedings before us filed a written statement (which has been placed on the record) explaining that what he said before Broadway, J., was said on the understanding that the accused had really signed a declaration under the Press and Registration Act; his present instructions are that the accused still denies that he signed any such declaration and Dr. Muhammad Alam desires us to record his statement that in case it is not proved against him (that he signed a declaration) the petitioner considers his defence to be a valid one.

The effect of this action by Dr. Muhammad Alam is to revive both defences and the learned Government Advocate pro-

tests against the proposal that the petitioner should be allowed to put forward two pleas apparently hopelessly inconsistent, namely (a) that the petitioner did not publish the offending article and (b) that the circumstances in which it was published mitigate the offence, and he urges that the District Magistrate's order should be upheld in view of this inconsistency. There is, however, good authority for the view that an accused person cannot be barred from setting up inconsistent pleas. I need refer here only to two rulings of Division Benches of the Calcutta High Court; *Kali Prosad Banerjee v. Emperor* (2) and *Nagendra Chandra Dhar v. Emperor* (3), in the latter of which it was remarked that, while there can be no doubt that by setting up an inconsistent defence the case for the accused becomes considerably weaker, there is nothing illegal in setting up an alternative and inconsistent defence. For these reasons I would set aside the order of the District Magistrate.

It is possible that the District Magistrate, after reviewing the matter with reference to each witness cited, may still find that some of the witnesses named have been cited for the purpose of vexation or delay or for defeating the ends of justice. If so he may, of course refuse, to issue process against those witnesses after recording the grounds for his refusal; or it may happen that after calling and hearing some of the witnesses the District Magistrate may find himself convinced that the remainder have been cited merely for the purpose of vexation etc. In this case it would be open to the District Magistrate to refuse to summon them after recording his reasons. Dr. Muhammad Alam states that he withdraws the application for summoning His Highness the Maharaja of Patiala. As regards witnesses outside the jurisdiction of the Court (for instance, prisoners in the Patiala Jail) he proposes to ask for proceedings under s. 503, Criminal Procedure Code.

Tek Chand, J.—I agree in the order proposed.

A. N. A.

Order set aside.

(2) 26 Ind. Cas. 668; 16 Cr. L. J. 76.

(3) 76 Ind. Cas. 430; A. I. R. 1923 Cal. 717; 38 C. L. J. 203; 27 C. W. N. 820; 25 Cr. L. J. 190.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 333 OF 1927

AND

CRIMINAL REVISION No. 7 OF 1927.

November 9, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Chotzner.
AHAMADAR RAHMAN—APPELLANT

versus

DWIP CHAND CHOWDHURY—

RESPONDENT.

Criminal Procedure Code (Act V. of 1898), s. 476-B—Appellate order directing complaint to be made, whether appealable to High Court—Complaint, what amounts to.

No appeal lies from an order passed by an Appellate Court under s. 476-B of the Criminal Procedure Code, directing a complaint to be made. [p. 713, col. 1.]

Per Rankin, C. J.—The policy of the law as laid down in s. 476-B, Criminal Procedure Code, is this that whenever there is a decision by a Court upon an application that a complaint shall be made—whether that decision be one way or another—there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court his remedy after that is to take his defence before a Jury or a Magistrate according to the nature of the case. Two Courts and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not. [p. 715, col. 1.]

Somabhai Vallabhaji v. Adit Parshotam (1) and *Mahomed Idris v. Emperor* (2), followed.
• *Ranjit Narayan Singh v. Ram Bahadur Singh* (3) and *Fauzdar Rai v. Emperor* (4), not followed.

A District Judge, in making a complaint, after giving his reasons for holding that there was a good *prima facie* case ordered as follows:—"I, therefore, direct the prosecution of A. Let a copy of this order be sent along with the records to the proper Magistrate as a complaint".

Held, that although in some cases a more formal and fuller document may be required, there was a proper complaint in the circumstances of the case. [p. 715, cols. 1 & 2.]

Criminal appeal against an order of the District Judge, Chittagong, dated the 5th March, 1927, directing the prosecution of the appellant under ss. 476-476-B, Criminal Procedure Code.

Mr A. K. Fazlul Huq, Babus Debendra Narain Bhattacharji and Tarapada Banerji, for the Appellant.

Mr. Khundkar and Babu Narendra Kumar Das, for the Respondent.

JUDGMENT.

Rankin, C. J.—This is an appeal from an order, dated the 5th of March, 1927, and made by the District Judge, Chittagong, under s. 476-B Criminal Procedure Code. It appears that the appellant was a tenant to and *tehsildar* of a certain party.

He, in the course of his duty, appears to have collected rents due to his masters and there was certain litigation between the parties. In 1924 the masters brought certain rent suits for arrears in respect of the years 1920 to 1923 against the present appellant and his co-sharers. He pleaded full payment as regards the rent of 1920 and part-payment as regards the later years and on this latter point he supported his case by producing two *dakhilas*, Ex. A and Ex. A-I. It is said that Ex. A is a *dakhila* emanating from the *Sudder Cutchery* and Ex. A-I was given by one Mahendra under orders of the *Sudder Cutchery*. Be that as it may, the Munsif in whose Court the suit was brought decreed the rent suit in full and appears to have made an observation that the *dakhilas* were suspicious. Thereupon the plaintiffs in the case made an application to the Munsif under s. 476, Criminal Procedure Code, asking him to take steps by making a complaint to institute prosecution of the present appellant for producing in evidence these documents known by him to be false, in other words, for perjury and forgery. The case itself—the rent suit—went on appeal to the District Judge, but the Munsif's finding was affirmed on the 10th of July, 1926. Thereupon the petition asking the Munsif to make a complaint to the Magistrate was revived and a miscellaneous case was started and the parties commenced to contest the question whether the Munsif's Court ought not to make a complaint against the present appellant. How far they contested it on the merits is doubtful, because it would appear that in the end, on the 7th of December, 1926, the application of the plaintiffs-landlords was dismissed for default. Taking that order of dismissal for default as being in the words of s. 476-B a refusal to make a complaint, the plaintiff's-landlords appealed against it to the District Judge who on the 5th of March, 1927, made the order against which the present appeal is brought. By his order the learned District Judge gives certain reasons which appear to him to amount to good *prima facie* proof that the *dakhilas* were forgeries. He goes into the questions of the counterfoils, the numbers of the counterfoils and so on. He comes to the conclusion that there is a good *prima facie* case not only that they were forgeries but that the present appellant used them knowing them to be forgeries.

In the present appeal the first question that arises is whether in a case like this an appeal lies to the High Court or not. That question depends upon the words of s. 476-B, Criminal Procedure Code. What is said is that in a case where the first Court in dealing with an application to lodge a complaint refuses to lodge a complaint and an appeal is taken to a superior Court which decides to make a complaint there is a further right of appeal from that; because s. 476-B having operated to give an appeal from the order of the first Court dealing with the matter operates all over again when the second Court decides that a complaint should be made. Mr. Fazlul Huq, the learned Advocate who appears for the appellant, does not contend that, if in such a case as this the superior Court had dismissed the appeal thereby refusing to make a complaint and agreeing with the Court below, from such an order a right of appeal to the High Court would lie. He contends that it makes all the difference that the order of the superior Court was an order which for the first time amounted to the making of a complaint. He agrees, too, that if in the first Court a complaint had been made and on appeal the appeal had been dismissed, no further appeal would lie to this Court. He contends that in the particular case where the first Court having refused to make a complaint a superior Court differs and does for the first time make a complaint then s. 476 B operates to give what is in effect a second appeal. There is some authority upon this question and it is very important that the matter should be rightly decided. The question is whether the intention of the Legislature was to give one appeal from every decision upon an application for an order that a complaint shall be made, or whether the intention of the Code is not merely to give that right but in addition to give a right to one appeal from every order directing a complaint.

In my judgment it is desirable to refer to the three cases in which this matter has been dealt with. The first case to which I would refer is the case of *Somabhai Vallabhbhai v. Adit Parshottam* (1). That case was one in which a Subordinate Judge decided to make a complaint. The language used by the Subordinate Court was

(1) 81 Ind. Cas. 947; 26 Bom. L. R. 289; 11 B. 401; A. I. R. 1924 Bom. 347; 25 Cr. L. J. 1123.

language applicable to the old Code, but in fact the first Court decided to make a complaint. On appeal the superior Court, namely, the Sessions Judge reversed that order and re-called the complaint. Thereupon an appeal was brought to the High Court and the decision of Macleod, C. J., and Shah, J., was to the following effect:—"From that order in effect directing withdrawal of the complaint the petitioner has filed an appeal. The first question is whether the appeal lies. We are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate."

It is quite true that in that particular case the superior Court had refused to make a complaint and had set aside the order directing a complaint to be made. The learned Judges do not seem to me to proceed upon that at all. They proceed, I think, upon the principle that on the true construction of s. 476-B there is no provision for an appeal to be taken from the order made by the superior Court.

The next case to which I would refer is the case of *Mahomed Idris v. Emperor* (2). In that case there had been a Subordinate Judge's order refusing to make a complaint and there had been an appellate order under s. 476 B directing a complaint to be made; so that it was a case exactly on all fours with the present case; and when an appeal was taken to the High Court of Lahore the matter was referred to a Bench for decision. The Appellate Bench decided in this way:—"The question referred to us in this appeal and in Appeals Nos. 233 and 286 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under s. 476 of the Criminal Procedure Code. Section 476-B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under s. 476 or s. 476-A, and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint."

It appears to me, therefore, that the High Court of Lahore has proceeded upon the

same principle as the High Court of Bombay, namely, that under s. 476-B there is evidently an intention to give one appeal from the decision of the first Court which deals with an application that a complaint should be made. Whether the appeal results in granting the application or refusing the application, there is one appeal and only one appeal provided for by s. 476-B.

The case, however, in which the matter has been most fully discussed is a case which is in favour of the present appellant. That is the case of *Ranjit Narayan Singh v. Ram Bahadur Singh* (3). The learned Judges there take the view that if the superior Court acting under s. 476-B decides in a particular way or for the first time decides to make a complaint which the lower Court has refused to make, then the section having once operated proceeds to operate all over again because the order made by the superior Court in such a case is itself in order making a complaint; and, therefore, an order making a complaint having been made and made for the first time s. 476-B has a second lease of life and operates upon that to give in effect a second appeal. In so deciding the learned Judges appear to have been in agreement with a previous case *Faujdar Rai v. Emperor* decided by Mr. Justice Mullick in the same High Court but which is not, so far as I know, reported*. They do, however, cite in full for the present purpose the dicta of Mr. Justice Mullick and it appears that an application was made to a Sub-Deputy Collector to make a complaint against one Faujdar Rai directing his prosecution for the offenses of using a forged document and giving false evidence. The Sub-Deputy Collector refused to take any action. The complainant appealed to the Collector under s. 476-B. The Collector disagreed with the Sub-Deputy Collector's view and himself made a complaint. Thereupon Faujdar Rai appealed to the Divisional Commissioner by way of second appeal and the Divisional Commissioner held that no such appeal was competent. The matter came to the High Court before Mr. Justice Mullick and he took the view that the second appeal to the Commissioner was competent. The reasons which he gives

(2) 88 Ind. Cas. 528; 6 Lah. 56; A. I. R. 1925 Lah. 322; 1 Lah. Cas. 480; 26 Cr. L. J. 1168; 7 Lah. L. J. 584.

(3) 94 Ind. Cas. 593; 5 Pat. 262; 7 P. L. T. 114; A. I. R. 1926 P. 81; (1926) Pat. 89; 37 Cr. L. J. 641.

*Since reported as 90 Ind. Cas. 445 [Ed.]

are as follows:—"Section 476-B of the Code of Criminal Procedure appears to contemplate that if an Appellate Court sets aside the order of the original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that Appellate Court ordinarily lie."

The view taken by Mr. Justice Mullick was, so far as I can see, not that it depended upon whether the superior Court decided to make a complaint or decided for the first time to make a complaint, but merely upon whether the Appellate Court set aside the order of the original Court. In *Ranjit Narayan Singh v. Ram Bahadur Singh* (3), that was not the view which the Appellate Bench appears to have adopted. The view that it adopted is this that if an order for a complaint to be made is made by the first Court and upheld by the second Court no further appeal lies, but if such an order is refused by the first Court and a complaint is made by the second Court, then an appeal lies: not by reason of any express provision to that effect at the end of s. 476-B but by reason that the section operates upon the same subject-matter over again, this being a complaint within the meaning of the opening words of the section.

In my judgment it is unsound to hold on the language of s. 476-B that any such distinction was intended. Section 476 B gives a right of appeal first to a person aggrieved because any Civil, Revenue or Criminal Court has refused to make a complaint. It also gives it to any person against whom such a complaint has been made; and if this section is to operate upon the same subject-matter twice so as in effect to produce more than one appeal from the first decision upon an application to direct a prosecution, I think it applies indifferently whether the effect of the second Court's order is to make a complaint or to refuse to make a complaint. In the present case now before us the Munsif refused to make a complaint. The only meaning of the appeal to the District Judge was to ask him to make a complaint. It was in his decision to make a complaint or not to make a complaint. If he had refused to make a complaint and upheld the order of the Munsif I fail to see why he would not have been as much within the opening words of the section as he was when he decided to differ from the Munsif, and to make a complaint. It seems to me to be erroneous to say that if he makes a

complaint he does so not under s. 476-B but under s. 476 while if he refuses to make a complaint under s. 476 he does so under s. 476-B. Section 476 applies, in the case of a "superior Court," i. e., a Court superior to the Court in which the offence took place only after a complaint is made under an authority not given by that section. Section 476-B applies to a complaint made or refused by a Court acting under the authority conferred upon it by s. 476 or s. 476-A. Hence the words used are "has refused to make a complaint under s. 476 or s. 476-A, etc." The reference to s. 476 is in almost identical terms at the conclusion of s. 476-A and 476-B and had the Legislature intended to produce the result now contended for on behalf of the appellant it would have provided specifically for an appeal when a complaint is made by a Court acting under the powers conferred by s. 476-B.

Prima facie s. 476 B deals first of all with a Court and then with the Court to which the former Court is subordinate which is called the superior Court. In my judgment it is misconstruction of the section to suppose that when the superior Court has acted under the section and the section has taken its effect the same matter is to be subjected for the second time to a process exactly of the same character with the result that one provision in general terms for an appeal operates twice.

It has been pointed out to us that under s. 476-A, if this matter had not been canvassed in the Munsif's Court at all, the District Judge might have made an order that a complaint should issue. In that case he would have been dealing with the matter for the first time and it is clear on the terms of s. 476 B that an appeal would have lain from his decision. It is important to point out that an appeal would lie from his decision equally whether he refused to make a complaint under s. 476-A or whether he made a complaint under s. 476. There would be no difference at all according to the result or nature of his order. There would be one appeal from the Court which is dealt with the matter for the first time. I fail altogether to see how this shows it to be correct to construe s. 476-B as though it were intended to take operation upon the same case twice over.

It has been suggested that the language at the end of the section assists the appellant's case, namely, the wording where it is

said that if the superior Court makes such complaint the provisions of s. 476 shall apply to the complaint. That is quite clear and necessary. The accused can be sent in custody to a Magistrate. The superior Court in such a case can bind over any person to give evidence before a Magistrate. The Magistrate must proceed according to law and so forth. There can be no doubt that s. 476 must apply. But, as I ventured to point out in the course of the argument, that is a very different thing from saying that s. 476-B must apply all over again.

I am of opinion, therefore, that the policy of the law as laid down in s. 476-B is this that whenever there is a decision by a Court upon an application that a complaint shall be made—whether that decision be one way or another—there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court his remedy after that is to take his defence before a Jury or a Magistrate according to the nature of the case. Two Courts and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not. If the second Court is against the present accused he must look to the Jury for his safety.

This being a proceeding in a civil case, a Rule has been obtained under s. 115 of the Civil Procedure Code asking us to interfere with the order made and the learned Advocate for the appellant asks us upon this Rule to take action because he says that the learned Judge's order is not a proper complaint and that he has not recorded a finding that it is expedient in the interest of justice that the appellant should be prosecuted. When we come to look at what is absolutely required by the Criminal Procedure Code, it does not seem to be illegal to deal with the matter as the learned District Judge has done. Having given his reasons holding that there is a good *prima facie* case he says: "I, therefore, direct the prosecution of Ahamadar Rahman. Let a copy of this order be sent along with the records to the proper Magistrate as a complaint." That seems to me to be sufficient under the Criminal Procedure Code. In some cases a more formal and fuller document may be required, but in this case I am not prepared to hold that it

is not a good complaint. The learned Judge says: "I direct the prosecution of Ahamadar Rahman." It is true that he has not used the exact words of s. 476 as indeed he should have done; but, in my judgment, there can be no doubt that he has come to the conclusion that it is expedient in the interests of justice. After all the question is whether or not this man used forged documents knowing them to be forged documents and gave evidence which was perjured evidence before a Court of Law. If it appeared to the learned Judge that there was a *prima facie* case against him of that character, then in the absence of very special circumstances it would be in the public interests that that matter should be investigated before a competent Magistrate.

In my judgment, therefore, the appeal fails and must be dismissed and the Rule must be discharged.

Chotzner, J.—I agree.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITIONS NOS. 223
AND 224 OF 1927.

April 29, 1927.

Present:—Mr. Justice Wallace.

In re V. A. GOPAL NAIR—ACCUSED—
PETITIONER.

*Criminal trial—Proceedings before Bench Court—
Application for transfer on ground of difficult question
arising—Procedure.*

If a Bench Court thinks that a case pending before it should be transferred to the file of some other Court, on the ground that the case involves difficult questions which cannot be properly tried by a Bench it should move the matter officially and not leave it to the party to move.

Petitions for transfer of B. C. No. 2456 and 2454 of 1926 from the file of the Court of the First Class Bench Magistrate, Calicut, to that of any other Court in the District.

FACTS.—Out of a dispute concerning possession and ownership of a *paramba*, two criminal cases, a case and a counter case, arose for trial before the First Class Bench Magistrate, Calicut, the complainant in B. C. No. 2454 of 1926 being the accused in B. C. No. 2456 of 1926 and *vice versa*.

The complainant in B. C. No. 2454 of 1926 contended that the facts disclosed

an offence under s. 392 triable by a First Class Magistrate, that the case involved difficult questions of law which could not be conveniently tried summarily by a Bench Court and applied to the Bench Court for initiating proceedings for transfer. The President of the Bench Court recommended transfer of the proceedings to the Sub-Divisional Magistrate. But the latter without notice to the complainant refused to transfer and dismissed the petition.

The petitioner then moved the District Magistrate who transferred the petition to the Additional District Magistrate for disposal but the latter likewise rejected the petition without notice to the petitioner and without hearing him.

The petitioner thereupon applied to the High Court for transfer of the proceedings to the file of some Sub-Divisional Magistrate.

Mr. K. P. Ramakrishna Iyer, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—I am not prepared to transfer the cases on the grounds shown. If the Bench itself thinks that the cases should be transferred, it should move the matter officially and not leave it to the party to move.

The petitions are dismissed.

V. N. V.

Petitions dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 407 OF 1927.

July 26, 1927.

Present:—Mr. Justice Dalal.

KHUB CHAND—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act 7 of 1898), ss. 12, 529 (e)—Trial by Magistrate of offence not committed within his circle of jurisdiction, validity of.

The trial of an offence by a Magistrate who is otherwise competent to try the same is not invalid merely because the offence was not committed within the circle of the jurisdiction of the Magistrate. Such an irregularity is excused by the provisions of s. 529 (e) of the Code of Criminal Procedure.

Kunj Behari Lal v. Lauva (1), distinguished.

Criminal appeal from an order of the Sessions Judge, Etah.

Mr. Panna Lal, for the Applicant.

Mr. M. Waliullah, Assistant Government Advocate, for the Crown.

JUDGMENT.—The point of law urged in this application for revision is that the Magistrate who tried the case had not jurisdiction to do so. The offence was not committed, within the circle of the jurisdiction of the Magistrate. He was, however, competent, according to his powers, to try a charge under s. 182 of the Indian Penal Code. The learned Sessions Judge has pointed out that this irregularity is excused by the provisions of s. 529 (e) of the Code of Criminal Procedure. On behalf of the applicant my attention was drawn to a judgment of this Court in the case of *Kunj Behari Lal v. Lauva (1)*, in which it was held that under s. 12 of the Code of Criminal Procedure only the Magistrate to whom the District Magistrate has allotted a particular area could take cognizance of offences committed in that area. There, however, the question did not arise as to what was to happen when a Magistrate, not having jurisdiction, tried a charge. In my opinion the section quoted by the learned Sessions Judge applies. I do not think that the sentence is severe, and dismiss this application.

A. N. A.

Application dismissed.

(1) 59 Ind. Cas. 554; 19 A. L. J. 77; 22 Cr. L. J. 122.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 475 OF 1927.

October 13, 1927.

Present:—Mr. Justice Devadoss.

THE PUBLIC PROSECUTOR—

COMPLAINANT—APPELLANT

versus

BYSANI RAMASUBBAYYA CHETTY—

ACCUSED—RESPONDENT

Madras Abkari Act (I of 1886), s. 55 (1)—'Sell', meaning of—Actual delivery to buyer, whether necessary.

It is not necessary to constitute a 'sale' within the meaning of s. 55 (1) of the Madras Abkari Act that there should be an actual delivery of the thing sold to the buyer.

A person accepted the price of a bottle of brandy and brought the bottle to be handed over to the buyer but was arrested before he had actually handed it over to the buyer:

Held, that there was a sale within the meaning of s. 55 (1) of the Madras Abkari Act.

Appeal under s. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Sub-Divisional First Class Magistrate, Chittoor, in C. A. No. 14 of 1927.

Mr. E. Krishnamurthi, for the Accused.

JUDGMENT.—This is an appeal by the Government against the order of the Sub-Divisional First Class Magistrate of Chittoor acquitting the counter-petitioner who was convicted by the Second Class Magistrate of Madanapalle under s. 55 (1) of the Abkari Act. The learned Sub-Divisional Magistrate found the facts as alleged by the prosecution but acquitted the counter-petitioner solely on the ground that there was no delivery of the brandy bottle to the buyer. Under s. 55 (1) of the Abkari Act of 1886 it is an offence for any one to sell any liquor or any intoxicating drug in contravention of the provisions of the Act. The word "sell" is not defined; but "sale" or "selling" is defined as including any transfer otherwise than by way of gift. The contention of the Public Prosecutor is that for the purpose of a sale it is unnecessary that there should be actual handing over of the property sold. Under the Contract Act there can be a sale without actual delivery of the goods sold. I do not think that the word "sell" in s. 55 of the Abkari Act is used in any sense different from that used in the Contract Act. A sale is complete as soon as the price is paid or agreed to be paid for the goods. It is not necessary for a completed sale that there should be an actual delivery of the thing sold. In this case there is satisfactory evidence which is accepted by both the lower Courts that the counter-petitioner took some money through his son from P. W. No. 3 and brought out a half brandy bottle, and when he was actually handing over to P. W. No. 3 he was arrested by P. W. No. 1. Taking the money and bringing the bottle out for the purpose of handing it over to P. W. No. 3 constitute an offence under s. 55 (1) of the Abkari Act. I, therefore, set aside the order of acquittal passed by the Sub-Divisional Magistrate and impose a fine of Rs. 50 on the counter-petitioner and in default of the payment of fine two weeks' simple imprisonment.

A. N. A.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1252
OF 1927.

September 27, 1927.

Present:—Mr. Justice Harrison.

AKHTAR MOHAMMAD—ACCUSED—
PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 342—
Transfer of Magistrate—De novo trial—Succeeding
Magistrate's duty to examine accused again—Omission
to examine—Illegality.*

Where the Magistrate trying a case is transferred and the accused demands a *de novo* trial, the succeeding Magistrate is bound to examine the accused again under s. 342 of the Criminal Procedure Code, and failure on the part of the Magistrate to do so will vitiate the trial.

"It is not only a rule but a principle of law that the Magistrate who tries a case in the sense of 'decides' it, must give the accused an opportunity of explaining any points which may have been made against him and must hear what he has to say."

Criminal revision from an order of the Sub-Judge, Lahore, dated the 13th June, 1927.

Mr. Barkat Ali, for the Petitioner.

JUDGMENT.—Akhtar Mohammad had been convicted of being in illegal possession of *charas* and sentenced to two years' rigorous imprisonment and a fine of Rs. 200. On appeal the sentence of imprisonment was reduced to one year.

The facts as found are that this man had been selling *charas* to the labourers on Ganda Singh Wala Canal. An application for revision has been admitted, and the first point urged by Mr. Barkat Ali is that there is an incurable irregularity in the proceedings in that after all the evidence had been recorded and the charge framed, the accused having previously been examined, the Magistrate was transferred and his successor took over the case. The accused applied for a *de novo* trial and after the witnesses had all been summoned he changed his mind to this extent that he asked to have certain witnesses only examined, and this was done. The second Magistrate relied partly on the evidence recorded by himself and partly on that recorded by his predecessor.

In my opinion there has been no irregularity on this point but my view is of no consequence for there is a much more serious defect, which, I think, vitiates the whole proceedings. In spite of the fact that the accused asked for *de novo* proceedings and did actually re-call the more important wit-

nesses the Second Magistrate never examined him under s. 342. It does appear to me to be not only a rule but a principle that the Magistrate who tries a case in the sense of "decides" it, must give the accused an opportunity of explaining any points which may have been made against him and must hear what he has to say, and it is not sufficient for the predecessor-in-office to have done so.

The application for revision is accepted and as the accused has undergone more than four months' imprisonment, I do not think it necessary to order a re-trial.

A. N. A.

Revision allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 557 of 1927.
July 6, 1927.

Present :—Justice Sir Charu Chunder Ghose, Kt., and Mr. Justice Gregory.
GANGADHAR BHATTACHARYA
AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), ss. 30, 32—Notification under s. 30—Occasion for notice passing away—Notice, whether continues to operate—Contravention of notification—Conviction.

A notification under s. 30 of the Police Act prohibiting processions without a license cannot be held to be operative after the occasion which called for the notification has passed away.

The accused were convicted under s. 32 of the Police Act for having promoted and directed a procession without a license on the 19th March, 1927, in contravention of an order promulgated by the Superintendent of Police under s. 30 of the Act on the 18th July, 1926, preceding the *Mohurram* festival of 1926 :

Held, that the order of the Superintendent of Police had ceased to be operative in March, 1927, and the conviction of the accused was illegal.

Rule against the judgment and order of the Sessions Judge, Jessore, dated the 23rd April, 1927, refusing to take action under s. 438, Criminal Procedure Code, against the order of the Sadar Sub-Divisional Officer, Jessore, dated the 30th March, 1927.

FACTS.—The petitioners were fined Rs. 50 each under s. 32 of Act V of 1861 for being promoters and directors of a *sankirtan* party which passed through the roads of the Town of Jessore on 19th March, 1927, without taking out a license from the Jessore Superintendent of Police though the Superintendent of Police on 18th July, 1926,

preceding a *Mohurram* festival, had passed the following order under s. 30 (2) of Act V of 1861 :—"Whereas I am informed that in the judgment of the District Magistrate all processions, religious or otherwise within the Municipal area of Jessore Town, are likely to cause breach of peace, it is notified for the information of the public that I do hereby require under s. 30 (2) of the Police Act V of 1861 that all persons directing or promoting such processions shall apply to the Superintendent of Police, Jessore, for a license for the said processions within the said area and that on failure to comply with this requirement, the defaulters will be dealt with in accordance with law."

The case of the accused was that they were not aware of the notification issued by the Superintendent of Police.

Mr. S. K. Sen (with him Babus Bhudhar Haldar and Nagendra Kumar Dutt), for the Petitioners.

JUDGMENT.—No cause is shown. We have examined the record for ourselves and we are satisfied that the conviction of the petitioners is illegal in the circumstances stated. There was undoubtedly a notification under s. 30 of the Police Act in 1926, but that could not be held to be operative after the occasion which called for the notification had passed away. In this view of the matter the Rule is made absolute, the conviction and sentence of the petitioners are set aside and the fine, if paid, be refunded.

*Rule made absolute ;
Conviction set aside.*

A. N. A.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 30 of 1927.
(CRIMINAL REVISION PETITION No. 22 of 1927.)
August 9, 1927.

Present :—Mr. Justice Jackson and Mr. Justice Thiruvengkatachiar.

ELLAMAL AND OTHERS—ACCUSED—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 171, 173, 176, 177, 188, 212—Private market before commencement of Act—Refusal of license by Local Board, legality of—Disobedience of order—Offence.

A person who owned a private market before the commencement of the Madras Local Boards Act of 1920, is entitled to the grant of a license under s. 171 of the Act, subject only to such conditions as are prescribed by s. 173. [p. 719, col. 1.]

An order of the Local Board merely refusing license to such a person does not come under s. 212 (11) of the Madras Local Boards Act and is illegal and *ultra vires*, and unless and until a legal order is passed, his application for license cannot be considered to have been properly disposed of and the owner cannot be convicted under s. 175 of the Act. [p. 720, col. 1.]

Per Jackson, J.—A private market is a private property and an Act to consolidate the law relating to Local Boards can hardly be an Act of confiscation. [p. 719, col. 1.]

Refusal to function under an Act is not passing an order under the Act. An order must be *intra vires* and an order *ultra vires* is no order at all. [p. 719, col. 2.]

Per Thiruvengkatachiar, J.—Where no action is taken under s. 176 of the Madras Local Boards Act, a refusal to grant a license to the owner of a private market cannot be justified under s. 177 of the Act. [p. 720, col. 2.]

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, to revise the judgment of the Court of the Stationary Sub-Magistrate of Poonamallee, in Calendar Case No. 450 of 1926.

Mr. M. S. Venkatarama Aiyar, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.

Jackson, J.—The three petitioners have each been fined Rs. 5 by the Sub-Divisional Magistrate, Saidapet, (confirming on appeal the judgment of the Sub-Magistrate Poonamallee) under ss. 175 and 207 of the Madras Local Boards Act XIV of 1920, for selling fish in an unlicensed private market.

Admittedly the petitioners were owners of a private market before the commencement of the Act. That being so, they were entitled to the grant of a license subject only to such conditions as regards sanitation etc., as the Union (s. 188) might impose. That is the clear meaning of ss. 171-173.

"The Board shall grant the license applied for subject only to such regulations" etc., and it is difficult to see how anything else could have been enacted. A private market is a private property and an Act to consolidate the law relating to Local Boards could hardly be an Act of confiscation. At the same time it is clearly within the Board's competence to see that such property is enjoyed without detriment to public health.

Under s. 212(11) it is provided that if orders on an application for license are not communicated to the applicant within

30 days after the receipt of the application by the President, the application shall be deemed to have been allowed for the year. The petitioners seem to have applied for the year 1926-1927, and on the 8th May, 1926, the Board passed the resolution that a license cannot be granted and communicated this information to the petitioners.

It is contended by the learned Public Prosecutor that this is an order on the application such as is contemplated by s. 212 (11). The petitioners argue, on the contrary that an order on an application must be a legal order within the terms of the Act and an announcement that the Board declines to perform its statutory duty is no such order. This seems to be a valid plea. The Board is bound to grant a license and if, when it receives the application in due course, it confines itself to saying that it will not grant the license it is tantamount to passing no order on the application. Refusal to function under the Act is not passing an order under the Act. The order must be *intra vires* and an order *ultra vires* is no order at all.

In these circumstances the conviction cannot be upheld. It is set aside and the fines are ordered to be refunded.

Thiruvengkatachiar, J.—I agree with my learned brother that the conviction in this case should be set aside; and as the question is one of some importance I shall add a few words. The Madras Local Boards Act of 1920, permits only the keeping open of a private market which was in existence before the commencement of that Act, and no new private market can be opened after the commencement of that Act. The owner, occupier or farmer of any private market has to take out annual license without which he cannot keep open the market. The license has to be applied for not less than six weeks before the commencement of the year for which it is required. If no order on the application for license is communicated to the applicant within 30 days after the receipt of the application by the President of the Board concerned, the application shall be deemed to have been allowed for the year or for such less period as is mentioned in the application and subject to the rules, bye-laws, regulations and conditions ordinarily imposed. (See ss. 171, 173 and 212, sub-s. 11). In the case before us, the applicants have been

convicted for selling fish in a private market which was unlicensed on the date of the sale, viz., May 15th, 1926. It is not clear upon the evidence when the application for license for the private market for the official year 1926 1927, was put in. So far as I can see, it was put in on the 23rd April, 1926, which would be after the commencement of the official year. Upon that petition, the Union Board passed the proceedings of the 8th May, 1926, refusing the license applied for and a copy of the resolution was communicated to the petitioners and the same presumably reached them within 30 days from the date of the application. The learned Vakil for the applicants, therefore, has raised no ground that the appellants are entitled to the benefit of the last part of s. 212 (sub-s. 11). His contention on behalf of the appellants is that the order refusing the license is illegal and *ultra vires*, and that unless and until a legal order is passed, the application for license cannot be considered to have been properly disposed of and hence the appellants cannot be convicted under s. 175.

Section 171 (3) which is relied on says:

"The Taluk Board shall grant the license applied for subject only to such regulations as to supervision and inspection and to such conditions, as to sanitation, and drainage, etc. as the Taluk Board may think proper."

It is argued that under this provision the Taluk Board, though it may impose conditions in the interests of public health, has no power to refuse the license and that, therefore, the refusal of the license cannot be held to be a valid exercise of the powers conferred on the Union Board. The learned Public Prosecutor, on the other hand, contends that under sub-s. 3 of s. 171 it is open to the Union Board to refuse a license when in its opinion, the conditions of the market are such that the license should not be granted. The language of s. 171 (3) is by no means happy, but on the whole I think that the contention of the appellants is the correct one. The conclusion is supported by the provisions of ss. 176 and 177 of the Act. Under s. 177, the Board may refuse to grant to the applicant the license applied for, only when it has served a notice on the owner, occupier or farmer of the private market to do any of the things mentioned in the cls. (a) to (f) of s. 176 and he fails within the period

and in the manner laid down in the said notice to carry out any of the works mentioned in s. 176. In the present case no such action was taken by the Board under s. 176, and the refusal to grant a license cannot, therefore, be justified under s. 177. The reason given in the resolution of the 8th May, 1926, is that the license cannot be issued because in the opinion of the District Board the location of the private market at that place is detrimental to the health of the city itself. It is, no doubt, within the province of the Board to close any private market if in their opinion it ought not to be continued in the interests of public health; but in such cases they have to do one of two things. They may give a notice to the owner under s. 176 to carry out such works as may be considered necessary for rendering a private market a suitable one or they should acquire the owner's rights in the private market under the Land Acquisition Act as provided in s. 180. Otherwise, it would be, as observed by my learned brother, confiscating private rights without compensation, which intention cannot be imputed to the Legislature. The Board's resolution of the 8th May, 1926, has ignored all these provisions and the Board has refused the license alleging merely that they consider it undesirable that the market should be kept open there. I agree, therefore, that the order of the Board cannot be supported as legal one passed in the exercise of their powers and that the conviction should be set aside.

V. N. V.

A. N. A.

Conviction set aside.

OUDE CHIEF COURT.

(REVOLUTIONARY CONSPIRACY CASE).

CRIMINAL APPEALS NOS. 189, 186, 187, 231, 261,
272, 273, 288, 289, 290, 291, 292, 315, 316
AND 317 OF 1927.

August 22, 1927.

Present:—Sir Louis Stuart, Kt., Chief
Judge, and Mr. Justice Raza.

RAM PRASAD, Bismil AND OTHERS—

ACCUSED—APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 235, 537, 556—Penal Code (Act XLV of 1860), ss. 120-B, 121-A—Conspiracy to overawe Government—Some members guilty of offence under s. 120-B—Joint trial of charges, legality of—Committing Magistrate conducting Jail identification—Magistrate giving evidence before himself—Commitment, whether vitiated—Criminal trials—Identification proceedings—Witness identifying in Jail unable to identify in Court—Evidence of identification, admissibility of—Evidence Act (I of 1872), ss. 10, 30—Conspiracy—Evidence—Confession of co-accused—Evidentiary value—Corroboration, nature of—Criminal trial—Robbery for political purposes—Sentence.

Several accused persons were all charged under s. 121-A of the Penal Code with conspiring to deprive His Majesty the King of the Sovereignty of British India, of conspiring to wage war against the Government and of conspiring to overawe the Government by means of criminal force. Apart from the conspiracy to effect these objects there was disclosed on the evidence a conspiracy to commit dacoities either accompanied by murder or not accompanied by murder and consequently certain of the conspirators were liable to punishment under s. 120-B of the Penal Code for being party to a criminal conspiracy to commit offences punishable with death or transportation for life. The actual participants in these offences were separately charged and the accused were all jointly tried on these charges:

Held, that the joinder of the charges was regular and legal as all the offences formed part of the same transaction. [p. 728, col. 1.]

Where a Magistrate who has conducted the Jail identifications happens to be the Committing Magistrate, ordinarily his evidence should be taken for the first time in the Court of Session by calling him as a Court witness. But the fact that a Magistrate took the unusual course of going into the witness-box during the committal proceedings will not vitiate the committal or the subsequent trial. [p. 729, cols. 1 & 2.]

Section 10 of the Evidence Act renders admissible in cases of conspiracy much evidence which is not ordinarily admissible. The provisions of the said section are much wider than those of the English Law and under the section anything said or written by any conspirator in reference to the common intention of the conspiracy after the time when such intention was first entertained by any conspirator is a relevant fact as against each of the persons believed to be so conspiring as well for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. [p. 729, col. 2.]

The evidence of accomplices is always admissible and is always relevant but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. [p. 730, col. 1.]

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it, although it is not necessary that there should be confirmation of all the circumstances of the crime. [p. 731, col. 1.]

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. [*ibid.*]

R. v. Baskerville (2), *R. v. Atwood* (3), *R. v. Stubbs* (4), *In re Meunier* (5), *R. v. Mullins* (6), *R. v. Noakes* (7) and *R. v. Wilkes* (8), considered.

When a witness who has made an identification in Jail is unable to identify in the Court of the Committing Magistrate or of the Sessions Judge or in both, his evidence of identification, though weak, is not inadmissible in evidence. In such cases outside evidence is admissible to prove that the witness did make such identification and the circumstances in which he made it, though the question as to what weight may be given to it will depend on the facts of each case. [p. 732, col. 1.]

Abdul Wahab v. Emperor (10), relied on.

Nagina v. Emperor (9), dissented from.

A confession of a co-accused in a case of conspiracy is admissible in evidence against all the accused under the provisions of s. 10 of the Evidence Act. It can also be taken into consideration against his co-accused under s. 30 of the Act. [p. 734, col. 2.]

The gravity of a robbery is not extenuated by the fact that it was committed not for the personal gain of the robbers but solely in order to obtain funds for the furtherance of a political cause which the robbers had at heart. [p. 787, col. 1.]

Appeals against an order of the Special Sessions Judge, Lucknow, dated the 6th April, 1927.

Mr. L. S. Misra, for the Appellant, in Appeal No. 189.

Dr. J. N. Misra and Mr. Mohan Lal, for the Appellant, in Appeal No. 186.

Messrs. H. C. Dutt and C. B. Gupta, for the Appellant, in Appeal No. 187.

Mr. John Jackson, for the Appellant, in Appeal No. 231.

Mr. H. N. Misra, for the Appellant, in Appeal No. 261.

Mr. N. C. Dutt, for the Appellant, in Appeal No. 272.

Mr. C. B. Gupta, for the Appellant, in Appeal No. 273.

Mr. N. C. Dutt, for the Appellant, in Appeal No. 288.

Mr. H. N. Misra, for the Appellant, in Appeal No. 289.

Mr. N. C. Dutt, for the Appellant in Appeal No. 290.

Mr. N. C. Dutt, for the Appellant, in Appeal No. 291.

Mr. H. N. Misra, for the Appellant, in Appeal No. 292.

Mr. H. N. Misra, for the Appellant in Appeal No. 315.

Mr. H. N. Misra, for the Appellant, in Appeal No. 316.

Mr. H. N. Misra, for the Appellant, in Appeal No. 317.

Pandit Jagat Narain and Mr. G. H. Thomas, Government Advocate, for the Crown.

JUDGMENT.—Between the 28th and the 31st of January, 1925, a four-page printed pamphlet was circulated secretly by post and by hand in the United Provinces and other parts of India. This pamphlet bore the name of no printing press. The heading was "The Revolutionary—An Organ of the Revolutionary Party of India". It was called the first number of the first volume, and bore the date of the 1st January, 1925.

This was the first paragraph :

" 'Chaos is necessary to the birth of a new star' and the birth of life is accompanied by agony and pain. India is also taking a new birth, and is passing through that inevitable phase, when chaos and agony shall play their destined role, when all calculations shall prove futile, when the wise and the mighty shall be bewildered by the simple and the weak, when great empires shall crumble down and new nations shall arise and surprise humanity with the splendour and glory which shall be all its own."

In continuation it was stated that a new power had come into existence in India, that power being the revolutionary movement amongst young men, which in spite of all opposition would eventually triumph. This movement had withstood repression for twenty years. It was now stronger than ever before, and its prospects were brighter. The writer then proceeded to justify the movement on the ground that India was ruled without justification by

foreigners whose authority rested on domination by the sword. The sword of these foreigners was to be met by the sword of the Indians.

The writer then proceeded to declare the "immediate" object of the revolutionary party which was "to establish a Federal Republic of the United States of India by an organised and armed revolution." Under this Republic there would be universal suffrage, nationalisation of railways, mines, leading manufactures and the shipping industry. The Legislature would control the executive. The aims of the revolutionary party were stated to be international rather than national "and in this respect it follows the footsteps of the great Indian Rishis of the glorious past and of Bolshevik Russia in the modern age." There would be equal rights for all communities, general co-operation and a spiritual recognition of the realities of life.

The writer continued that the time was not ripe for the disclosure of the policy and the programme of the party. The party reserved to itself freedom to associate or not to associate with the Indian Congress. Then follow the words : "But this party views all constitutional agitations in the country with contempt and ridicule." After some amplification of this idea came the following passage—

"Young Indians ! Shake off your illusions, face realities with a stout heart, and do not avoid struggles, difficulties and sacrifices. The inevitable is to come. Do not be misguided any more. Peace and tranquillity you cannot have and India's liberty can never be achieved through peaceful and legal means. The following memorable words of a great English author Mr. Robertson may serve to make the wise men of India wiser still.

"The movement and programme of reform was mainly the achievement of Irish and Protestant leaders to whom British statesmen had revealed the fatal secret that England could be bullied but not argued into justice and generosity'. (England under the Hanoverians, page 197). 'Indian public leaders are still ignorant of this 'fatal secret' or else they are foolishly wise to ignore it."

The writer then proceeded to dispute the accuracy of the view that Indians were unable to drive the British out of India by force of arms. The pamphlet concluded as follows :—

"A few words more about terrorism and anarchism. These two words are playing the most mischievous part in India to-day. They are being invariably misapplied whenever any reference to the revolutionaries is to be made because it is so very convenient to denounce the revolutionaries under that name. The Indian revolutionaries are neither terrorists nor anarchists. They never aim at spreading anarchy in the land, and, therefore, they can never properly be called anarchists. Terrorism is never their object and they cannot be called terrorists. They do not believe that terrorism alone can bring independence and they do not want terrorism for terrorism's sake, although they may at times resort to this method as a very effective means of retaliation. The present Government exists solely because the foreigners have successfully been able to terrorise the Indian people. The Indian people do not love their English masters, they do not want them to be here; but they do help the Britishers simply because they are terribly afraid of them; and this very fear resists the Indians from extending their helping hands to the revolutionaries, not that they do not love them.

"This official terrorism is surely to be met by counter-terrorism. A spirit of utter helplessness pervades every strata of our society and terrorism is an effective means of restoring the proper spirits in the society without which progress will be difficult. Moreover the English masters and their hired lackeys can never be allowed to do whatever they like, unhampered, unmolested. Every possible difficulty and resistance must be thrown in their way. Terrorism has an international bearing also because the attentions of the enemies of England are at once drawn towards India through the acts of terrorism and revolutionary demonstrations and the revolutionaries are thereby able to form an alliance with them, and thus expedite the speedy attainment of India's deliverance. But this revolutionary party has deliberately abstained itself from entering into this terrorist campaign at the present moment even at the greatest provocation in the form of outrages committed on their sisters and mothers by the agents of a foreign Government, simply because the party is waiting to deliver the final blow. But when expediency will demand it the party will unhesitatingly enter into a desperate cam-

paign of terrorism, when the life of every officer and the individual who will be helping the foreign rulers in any way will be made intolerable, be he Indian or European, high or low. But even then the party will never forget that terrorism is not their object, and they will try incessantly to organise a band of selfless and devoted workers who will devote their best energies towards the political and social emancipation of their country. They will always remember that 'the making of nations requires the self-sacrifice of thousands of obscure men and women who care more for the idea of their country than for their own comfort or interest, their own lives and the lives of those whom they love.'

(Sd.) VIJAY KUMAR,
President, Central Council,
The R. P. of India."

Vijay Kumar was a fictitious name.

Many copies of this pamphlet are proved to have been distributed over districts in the United Provinces between the 28th and the 31st January, 1925. Other copies are proved to have been distributed in other Provinces. Inspector Nestor has proved that three hundred and six copies were received in eighteen districts in this Province and handed over to or recovered by the Government Authorities. The recipients were for the most part school masters and school boys. In all cases the source from which these pamphlets had come was not revealed.

About a month previous to the distribution of these pamphlets (that is to say on Christmas Day of 1924), an armed gang robbery (or dacoity) was committed in Bamrauli, a large village in the Pilibhit District, adjoining the border of the Shah-jahanpur District. The house of Baldeo Prasad, a money-lender and sugar factory owner, was attacked by a gang of twenty or twenty-five men about an hour after sunset. Fire-arms were in possession of certain members of the gang and operations commenced with gun fire. Baldeo Prasad climbed up to the roof of the house, and, finding that certain dacoits were ascending the ladder from the courtyard to the roof, endeavoured to resist them. A shot was fired at him which hit him in the neck. He then rushed from his roof to the roof of the house of a neighbour, and while running was shot again. Neither wound was fatal, and he survived. Villagers assembled

and made an attempt to disperse the dacoits by throwing bricks at them. The dacoits fired many shots at them. Mohan, a Bamrauli resident, who was a village wrestler, challenged the dacoits to come down and fight the matter out as between man and man. A dacoit fired at him at close quarters, shot him through the abdomen, and killed him instantaneously. Six other men in addition to Baldeo Prasad received wounds from fire-arms, none of which were fatal. The dacoits pillaged the house and eventually made good their escape with Rs. 1,600 in cash and some three thousand to four thousand worth of ornaments, leaving behind them one man shot dead and seven men wounded.

On the 9th March, 1925, a similar armed dacoity was committed in Bichpuri, another village in the Pilibhit District. The victims on this occasion were Toti, a well-to-do Kurmi cultivator with a holding of some thirty-six acres; his brother Behari and their wives and children. A gang of over fifteen men raided their house between 9 P. M. and 10 P. M. Some of the members of the gang were in possession of fire-arms. The dacoits used considerable violence on the inmates and employed torture. One of them seized Toti's young son, placed the edge of a knife at his throat and threatened to cut his throat, if Toti did not disclose where his money and valuables were concealed. The boy was not, however, seriously injured. Toti was nearly throttled. The point of a knife was placed against each of his eyes and he was threatened with blindness if he did not give up his property. He was not blinded but he received a cut under one eye. Finally a cloth soaked in oil was inserted between his legs. The cloth was then set alight. In spite of this maltreatment he disclosed very little. The dacoits managed to secure Rs. 800 or Rs. 900 worth of property. Only a few shots were fired on this occasion. Two men received injuries from fire-arms, one of whom Sham Lal subsequently died. The other Dulli recovered. The dacoits made good their escape with the stolen property.

On the 24th May, 1925, a third armed dacoity was committed at Dwarkapur in the Partabgarh District on the house of a certain Sheoratan Vaish. His house was attacked between 8 P. M. and 9 P. M. by eight or nine men who had fire-arms and other weapons. Sheoratan was bitten in

the arm, struck three times over the head with a hatchet, and robbed of property worth about Rs. 2,000. The dacoits used fire-arms freely. A villager called Ram Saran was shot dead and four other villagers received wounds from fire-arms. The dacoits made good their escape with the stolen property.

On the 9th August, 1925, a fourth armed dacoity was committed. This dacoity was of a character unusual in India. A Railway train known as the 8 Down was proceeding on the broad gauge line of the East Indian Railway on its way towards Lucknow. It left Kakori Railway Station which is eight miles from Lucknow shortly after 7 P. M. When it had reached a place a mile the other side of the distant signal a man pulled the communication cord of the alarm signal in a second class compartment and the train was brought to a stand-still. Certain persons, some of whom were armed with fire-arms, got out of the train. When the guard descended to inquire the cause of the stoppage certain men got into the brake-van. The guard was thrown down, overpowered and threatened with death. A heavy safe containing Railway takings was heaved by some of these men out of the brake-van on to the permanent way. The safe was broken open with tools which had clearly been brought for the purpose. While some of the men were breaking open the safe, others posted themselves on each side of the train. Cries were raised by the dacoits that their object was not to injure private persons but to take "Sarkari property." This would mean either the property of Government or the property of the Railway Company. They also informed the passengers that any passenger who left the train would do so at the risk of his life. A fusillade of shots was maintained on each side of the train. Most of the passengers accepted the warning and remained inside. A Muhammadan legal practitioner Ahmad Ali left his carriage in spite of the warning. He got on the permanent way and was shot dead. In about half an hour the safe was opened and its contents consisting of Rs. 4,553-3-6 were abstracted. The dacoits then decamped with the plunder having escaped interference. The train then proceeded on its way to Lucknow.

It was not until after the commission of the train robbery that the existence of

a conspiracy, the organ of which was "The Revolutionary" and the fruits of which were these four dacoities, was suspected by the Police authorities. No theory was evolved until the deputation of Mr. R. A. Horton, a Superintendent of Police of the Criminal Investigation Department, to investigate occurrence of the 9th August, 1925. He took charge of this investigation on the 14th August, 1925. For reasons (which, as will be seen later, were justified) he turned his attention to the actions of certain suspects, and after interception of correspondence, communication with his own department and Criminal Investigation Departments in other Provinces, receipt of secret information and inquiries based on information received, he issued warrants of arrest on the 28th September, 1925. Certain arrests took place under these warrants. Amongst the persons arrested were two men called Banarsi Lal and Banwari Lal and a boy called Indu Bhushan Mittra. As a result of the statements made by Banarsi Lal, Mr. Horton formed the opinion that the dacoities in Bamrauli and Bichpuri and the train dacoity were the work of persons engaged

in a conspiracy against British Rule. He subsequently on internal evidence formed the opinion that the Dwarikapur dacoity was also the work of the same gang. Statements made by Banwari Lal and Indu Bhushan Mittra confirmed his opinion in respect of the train dacoity.

As a result, the Local Government, U P., issued sanction (Ex. P-2) on the 2nd December, 1925, for the prosecution of twenty-four persons and sanction (Ex. P-7) on the 23rd December, 1925, for the prosecution of three other persons, and sanction (Ex. P-341) for the prosecution of one more person. Saiyid Ainuddin, a First Class Magistrate, was appointed Special Magistrate in respect of the committal proceedings. He framed charges against twenty-one of these persons on the 16th April, 1926. These twenty-one persons were tried by Mr. Hamilton, Sessions Judge, appointed specially for the purpose. He decided the case by a judgment dated 6th April, 1927. The recording of the evidence in that case took about eight months. In that case Mr. Hamilton convicted the following persons on charges under the following sections—

Name.	Charge under section 121-A	Charge under section 120-B	Bamrauli dacoity section 396	Bichpuri dacoity section 396	Train dacoity section 396
Ram Prasad Bismil	Convicted.	Convicted.	...	Convicted.	Convicted.
Rajendra Nath Lahiri	Do	Do	...	..	Convicted.
Raushan Singh	Do	Do	Convicted.	..	...
Jogesh Chandra Chatterji	Do	Do	...	...	...
Suresh Chandra Bhattacharji	Do	Do	...	...	...
Vishnu Saran Dublis	Do	Do	...	...	...
Manmatha Nath Gupta	Do	Do	...	Convicted.	Convicted.
Govind Charan Kar	Do	Do	...	...	Convicted.
Makundi Lal	Do	Do	...	...	Convicted.
Ram Kishan Khattri	Do	Do	...	Convicted.	...
Prem Kishan Khanna	Do	Do	...	...	...
Raj Kumar Sinha	Do	Do	...	...	Convicted.
Ram Dulare Trivedi	Do	Do	...	...	...
Ram Nath Pande	Do	Do	...	...	...
Parnawesh Kumar Chatterji	Do	Do	...	...	...
Sachindra Nath Sanyal	Do	Do	...	...	...
Bhupendra Nath Sanyal	Do	Do	...	...	...
Banwari Lal	Do	Do	...	...	Convicted.

He acquitted Hargovind and Sachindra Nath Biewas. The trial of a man called Damodar Sarup was postponed owing to his illness. Mr. Hamilton sentenced Ram Prasad *Bismil*, Rajendra Nath Lahiri and Raushan Singh to death subject to confirmation by this Court and also to other sentences. He sentenced Sachindra Nath Sanyal to transportation for life. He sentenced the remainder to various terms of imprisonment.

Ram Prasad, Rajendra Nath Lahiri and Raushan Singh appeal against their convictions and sentences. The references in confirmation are also before us. Jogesh Chandra Chatterji, Suresh Chandra Bhattacharji, Vishnu Saran Dublis, Manmatha Nath Gupta, Govind Charan Kar, Makundi Lal, Ram Kishan Khattri, Prem Kishan Khanna, Raj Kumar Sinha, Ram Dulare Trivedi, Ram Nath Pande and Parnawesh Kumar Chatterji also appeal.

The Local Government has applied for enhancement of sentences on Jogesh Chandra Chatterji, Suresh Chandra Bhattacharji, Vishnu Saran Dublis, Manmatha Nath Gupta, Govind Charan Kar and Makundi Lal. Parnawesh Kumar Chatterji has since withdrawn his allegations of innocence, admitted the justice of his conviction and thrown himself on the mercy of the Court, Sachindra Nath Sanyal, Bhupendra Nath Sanyal and Banwari Lal have not appealed. The period in which they could have filed an appeal has now expired. Ashfaqullah Khan and Sachindra Nath Bakhshi are persons whose prosecution has been sanctioned by the Local Government. They were not apprehended in time to take their trial with the persons already mentioned.

Ashfaqullah Khan was committed by Saiyid Ainuddin, Special Magistrate, on the 14th December, 1926. Sachindra Nath Bakhshi was committed by the same Magistrate on the 9th March, 1927. They were tried together by Mr. J. R. W. Bennett, Special Sessions Judge, and convicted by him in a judgment dated 13th July, 1927. Ashfaqullah Khan has been convicted on charges under ss. 121-A, 120-B and s. 396 of the Indian Penal Code, and sentenced to death subject to confirmation by this Court and to other sentences. Sachindra Nath Bakhshi has been convicted on the same charges and sentenced to transportation for life. Ashfaqullah Khan has appealed. The arguments in his Appeal No. 380 of

1927 were heard by this Bench on the 3rd and 4th August, 1927, before the consideration of this judgment. Sachindra Nath Bakhshi has not yet appealed but there is still time within which he can appeal.

The conduct of the cases in Mr. Hamilton's Court and the conduct of the appeals in this Court have been distinguished by incidents which are exceptional in the hearing of criminal cases in Oudh. As all the persons tried by Mr. Hamilton were charged with offences punishable with death, the Local Government, in compliance with a practice that was introduced a few years ago, offered every one of the accused persons legal assistance. Some of the accused persons took advantage of this offer, others provided themselves with Counsel who were remunerated privately. The accused persons took in some instances the peculiar position of retaining a Counsel for a short period, then discarding him and replacing him by another Counsel or defending the case in person. After discarding the Counsel he was frequently employed again. The procedure was a procedure not to be commended. It placed the Court in a position of very great difficulty and no advantage was gained by its adoption. The result was an unavoidable friction and protraction of the proceedings. Further the hearing of the case in Mr. Hamilton's Court was considerably delayed by resorts to hunger striking. Objections which were frequently of a most frivolous character were lodged in very great numbers. The most pertinacious of the accused persons was Ram Prasad. When the appeals were filed the three appellants Ram Prasad, Rajendra Nath Lahiri and Raushan Singh, who were sentenced to death subject to confirmation by this Court, became entitled, under a practice of the Local Government which has been in force for some years, to legal assistance at the expense of the Crown. The appellants, who had not been sentenced to death, were not under this practice entitled to legal assistance at the expense of the Crown. But as a special case the Crown has allowed those, who did not appoint private Counsel, legal assistance and paid for it. Ram Prasad in his petition of appeal demanded as of right to select his own Counsel. He stated that he would only be satisfied if he was represented by a gentleman called Mr. Gobind Ballabh Panth; and, if he were not represented by Mr.

Gobind Ballabh Panth, he demanded that he should be allowed to argue his appeal in person. The Crown approached Mr. Gobind Ballabh Panth and offered him the brief. He refused to accept it on the fee that the Crown was ready to pay. The Crown then approached Mr. L. S. Misra, a Barrister at-Law of seven years standing, offering him the same fee which had been offered to Mr. Gobind Ballabh Panth. Mr. Misra accepted the brief. Ram Prasad submitted a petition from the Jail stating that he refused to accept Mr. L. S. Misra as his Counsel and refused to instruct him. He demanded that he should be allowed to argue his appeal in person. Under the practice which has been prevalent in the late Court of the Judicial Commissioner and of this Court without interruption, convicts appealing from Jail in the manner that Ram Prasad appealed, are not permitted to argue their appeals in person. It is clear that a rule of practice has to be laid down to cover all cases. If one convict is permitted to argue in person, all convict appellants should be permitted to do so. The practical difficulties against permitting them to do so would be very great. There are some five hundred convict appellants who appeal to this Court in the course of a year, and the difficulties of arranging for their escorts from Jail to the Court and for their return would be formidable. But the objection to permission to convict appellants arguing in person is founded in the main not on convenience but on their own interests. It is our opinion that practically no Indian convict will gain anything by arguing his appeal in person. All such persons have had full opportunity of stating their cases in the lower Court. If they were permitted to argue their appeals they would usually do themselves more harm than good. In the particular case of Ram Prasad, if he had argued his appeal in person, he would have exposed himself to having to answer objections which his lawyer could answer without implicating his client. Ram Prasad, however, withdrew in the end his objections to Mr. L. S. Misra, subsequently instructed him, and finally expressed his confidence in Mr. Misra's advocacy. In addition he has written himself, and supplied written arguments which we have had printed and which cover seventy-six printed pages. These arguments have been considered by us. Rajendra Nath Lahiri at first applied to be represented by Mr. R. F. Bahadurji,

Barrister-at-Law. Mr. Bahadurji had left India before these appeals came on for hearing. He subsequently asked that he should be represented by Mr. H. C. Dutt, Barrister-at-Law. Mr. H. C. Dutt was appointed to represent him. Raushan Singh in his petition of appeal demanded that he should be represented by Dr. J. N. Misra. Dr. J. N. Misra was appointed to represent him. Both Mr. H. C. Dutt and Dr. Misra argued on behalf of Rajendra Nath Lahiri and Raushan Singh, their fees being paid by the Local Government. But in addition to these gentlemen, Mr. Chatterji, a leading Counsel of the Calcutta Bar, assisted by Mr. Chaudhri who is also a Counsel from Calcutta, argued the appeals on behalf of these two persons. Of the remaining appellants Prem Kishan Khanna was represented by Mr. John Jackson, a leading Counsel of Lucknow. Vishnu Saran Dublis was represented by Mr. Kapil Dev Malaviya from Allahabad. The above gentlemen were private Counsel. Mr. H. N. Misra appointed by the Crown appeared for Ram Nath Pande, Surash Chandra Bhattacharji, Ram Dulare, Raj Kumar, Makundi Lal and Parnawesh Kumar Chatterji. Mr. N. C. Dutt appointed by the Crown appeared for Manmatha Nath Gupta, Ram Kishan, Jogesh Chandra and Govind Charan Kar. There was a suggestion made by Ram Prasad *Bismil* that the Counsel appointed by the Crown had not been given a sufficient opportunity of studying their briefs. There is no foundation whatever for this suggestion. The Counsel in question were given a sufficient time for the study of their briefs. It is quite clear that the time allowed was sufficient, as we were pleased to note that in every instance the cases had been prepared with the greatest care, and the learned Counsel engaged had mastered the facts and the law in a manner which did them considerable credit.

There are certain preliminary points of law of which we can dispose at the beginning. These points were raised by the learned Counsel. Mr. Chatterji took objection to the joinder of charges under ss. 121-A and 120-B and maintained that this joinder vitiated the trial. We are not of opinion that there was any irregularity in the joinder of these charges, and we consider that on the facts it was not necessary to frame separate charges. The accused persons were all charged with conspiring

to deprive His Majesty the King of the Sovereignty of British India, of conspiracy to wage war against the Government, and of conspiring to overawe the Government by means of criminal force. They were, therefore, rightly charged under s. 121-A. Apart from the conspiracy to effect these objects, there was, however, disclosed on the evidence a conspiracy to commit dacoities either accompanied by murder or not accompanied by murder, and thus certain of the conspirators were liable to punishment under s. 120-B for being party to a criminal conspiracy to commit offences punishable with death or transportation for life. The actual participation in dacoities with murder formed ground for separate charges and the joinder of all these charges was regular and legal, as all these offences formed part of the same transaction.

Some objections were taken as to the non-calling of witnesses. These objections will be dealt with when we come to the appeals of individual accused. It is sufficient to state here that in no case have these objections been substantiated. These are all the legal objections that were argued by the learned Counsel at the Bar. All other objections were withdrawn.

We have, however, to consider certain legal objections which were taken by Ram Prasad Bismil in his written arguments to this Court or taken in the Court below and not pressed here. It is unnecessary to take Ram Prasad's objections as disclosed in his written arguments in great detail as his learned Counsel Mr. L. S. Misra has dealt sufficiently with them. Ram Prasad's objections are mainly contained in a comprehensive attack upon Mr. Hamilton, upon Pandit Jagat Narain the learned Counsel who has appeared for the Crown both in Mr. Hamilton's Court and in appeal, upon Mr. Horton, upon the Police and practically upon everybody who has had any connection with the case. He has not only suggested that Mr. Hamilton was not impartial but he has suggested that he was deliberately dishonest. He has made similar attacks upon every one else. We have been through the very lengthy record, the mass of applications and the whole of the protracted proceedings and after examination of everything we are convinced of the following facts. The preparation of the case in so far as it was made by the Police Authorities was throughout in the

hands of Mr. Horton who made himself personally responsible for the production of every piece of evidence. We here state our appreciation of the industry and capacity shown by Mr. Horton in the collection of the evidence. The skill displayed in its presentation deserves the highest appreciation. The conduct of the case was in the hands of Pandit Jagat Narain, a very senior and very competent Counsel. We appreciate highly the manner in which Pandit Jagat Narain conducted the case. But our appreciation is not only of the ability with which the case was put up. Our highest appreciation is reserved for the scrupulous fairness with which it was presented against the individual accused persons. The prosecution, if we may say so, was, almost ultra-scrupulous. It refused to press a single point unless it felt itself on the surest ground. Mr. Hamilton showed exemplary patience and an absolute impartiality in his handling of the case. He showed very high gifts in his appreciation of the evidence which he weighed with care. The learned Judge and the Crown Counsel were exposed to a series of studied impertinences from certain of the accused persons, and we are constrained to express our disapproval of the conduct of certain of the Counsel for the defence. We have in our mind a particular passage in a written objection filed by a member of the Lucknow Bar in which he transgressed the rules of conduct that should distinguish a Counsel in addressing a Judge. The allegations and aspersions made by Ram Prasad have been considered carefully by us and we find them to be absolutely baseless. The extraordinary impertinence displayed by this accused is apparent from an application which he filed on the 26th January, 1927, in which he withdrew his defence witnesses. This application is as follows:—

"Sir,

I have been watching the case from day to day and every new day brought home to me new instances of gross partiality on your Honour's part. I was not astonished; because the attitude of the Government was apparent to all concerned when it appointed you as the trial Judge in this case (The Kakori Conspiracy Case). But still I thought each day that perhaps I may be biased, that perhaps I was judging too hastily, that possibly this day will be the last bitter day. But my hopes

always proved to be illusive. I found you showing more interest in establishing the prosecution case than the prosecution Counsel himself. In fact in good many instances you had put questions in such a suggestive form that the prosecution Counsel himself felt ashamed to put those questions. You almost always interrupted the defence cross-examination so obstinately that there remained no other alternative, except either to come to blows with you or to submit to your high-handedness with flushed faces and blood curdling in one's veins."

There is much more in the same strain. The only point of law raised by Ram Prasad in his written arguments which is worth considering in detail is an objection to the committal. His objection is based on the following fact. Saiyid Ainuddin, as has already been stated, was appointed as Special Magistrate. One of his duties in connection with the proceedings was supervision of Jail identifications. He conducted all the Jail identifications in person. As it was known that the appellants would criticise the conduct of the Jail identifications it was clear that Saiyid Ainuddin would be required to give evidence on oath as to the manner in which they were conducted. Ordinarily his evidence would have been taken for the first time in the Court of Session. The method adopted would be to call him as a Court witness. But Saiyid Ainuddin, in order to give the defence a better opportunity of preparing their criticisms on the conduct of the investigation, took the unusual course of going into the witness-box during the committal proceedings. This course was unusual. There is a precedent for a similar procedure in *Emperor v. Nanhe* (1). A learned Judge of the Allahabad High Court refused to set aside a conviction in a case in which a Magistrate had actually given evidence before himself in a case which he subsequently convicted himself. It certainly would appear to be open to objection for a Magistrate to decide on the value of his own evidence but where the Magistrate, as here, had not to decide but solely to commit, there is nothing objectionable to the course adopted by Saiyid Ainuddin and it is clear that the result so far from prejudicing the accused

persons assisted them in their defence. We do not find that this action taken by Saiyid Ainuddin has either vitiated the committal or the trial. We here leave the general objections on points of law. It is to be noted that the only objections pressed by Counsel in this appeal were the objections as to the joinder of the charges and as to the non-calling of the witnesses in certain instances. As we have said we shall deal with the latter point later.

Before we proceed with the remainder of the judgment we think it desirable to express our appreciation of the admirable manner in which the appeals have been argued before us. The learned Counsel for the appellants have argued fairly and have argued capably. The reply on behalf of the Crown could not have been better. We wish to say a special word as to the assistance that the Court has received in comprehending the record and examining the documents from Mr. Khairat Nabi, Rai Saheb Durga Prasad and Khan Saheb Saiyid Hasan specially deputed officers of the Criminal Investigation Department who have worked in open Court assisting us in dealing with the documentary evidence.

We have first to make some general observations as to the method which we have adopted in approaching certain portions of the case. We are not dealing here with controversial points, as there has been no controversy on these questions. The first point that we have to note is the construction to be placed upon the provisions of s. 10 of the Indian Evidence Act. This section renders admissible in cases of conspiracy much evidence which is not ordinarily admissible under the Indian Law. The provisions of the section are wider than those of the English Law. Under it anything said, done or written by any conspirator in reference to the common intention of the conspiracy after the time when such intention was first entertained by any conspirator is a relevant fact as against each of the persons believed to be so conspiring as well for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. The illustration shows the width of the provisions of the section. It is laid down that where a person is shown *prima facie* to be a conspirator, evidence that a second conspirator procured arms, a third collected

(1) 27 A. 33; A. W. N. (1904) 157; 1 Cr. L. J. 613.

money, a fourth persuaded persons to join the conspiracy, a fifth published writings advocating the object, a sixth sent money to a seventh, and an eighth wrote a letter giving an account of the conspiracy is relevant as evidence and admissible against him to prove his complicity though he was ignorant of all these events and although the persons in question were strangers to him.

We have next to state the manner in which we have approached the evidence of accomplices. The evidence of accomplices is always admissible and is always relevant but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. We have followed that practice in this case, but while following the practice we have considered very carefully a comparatively recent pronouncement of the Court of Criminal Appeal in England consisting of the Chief Justice and four other learned Judges which is reported in *R. v. Baskerville* (2). The facts in appeal were these. A male person was convicted of an offence punishable under s. 11 of the Criminal Law Amendment Act, 1885, with two boys. The only direct evidence of the commission of the acts charged was that of the boys themselves who on their own statement were accomplices. The only corroboration of the boys' statements was contained in the contents of a letter sent by the prisoner to one of the boys enclosing a Treasury note for ten shillings. The words of the letter were capable of an innocent construction. This letter was, however, considered sufficient corroboration and the conviction was upheld. In the judgment in this appeal their Lordships have stated the law in the following words:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *R. v. Atwood* (3).

(2) (1916) 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 696.

(3) (1788) 1 Leach 464; 168 E. R. 534.

But it has long been a rule of practice at Common Law for the Judge to warn the Jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the Jury that it is within their legal province to convict upon such unconfirmed evidence: *R. v. Stubbs* (4), *In re Meunier* (5).....

"As the rule of practice at Common Law was founded originally upon the exercise of the discretion of the Judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, 'confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary': *R. v. Mullins* (6), per Maule, J. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice: *R. v. Noakes* (7).....

...After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *R. v. Stubbs* (4) by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of

(4) (1855) Dears. 555; 25 L. J. M. C. 16; 26 L. T. (o. s.) 109; 19 J. P. 760; 1 Jur. (n. s.) 1115; 4 W. R. 85; 7 Cox C. C. 48; 169 E. R. 843.

(5) (1894) 2 Q. B. 415; 63 L. J. M. C. 198; 10 R. 400 71 L. T. 403; 42 W. R. 637; 18 Cox C. C. 15.

(6) (1850) 3 Cox C. C. 526.

(7) (1832) 5 C. & P. 326.

the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke, B., gave this opinion as a result of twenty-five years' practice; it was accepted by the other Judges, and has been much relied upon in later cases. In *R. v. Wilkes* (8) Alderson, B., said: 'The confirmation which I always advise Juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise Juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence'.....

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.....

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

We have next to make some general observations on the manner in which the Jail identifications were conducted. The practice adopted in this case was that when a person had been arrested charged with complicity in the conspiracy he was removed from the place of his arrest to a Jail where he was in the custody of Jail officials and not of Police officials. After a certain period he was placed in a line which consisted partly of suspects but mainly of persons who were not suspected of complicity in a crime. All these persons were dressed in a manner which would prevent witnesses from recognizing a suspect by peculiarities of costume. Witnesses to the offences were then called in one by one. Saiyid. Ainuddin was present at all identification proceedings. No two witnesses

were allowed to communicate with one another. As each man completed his observation of the persons in the line he was put in a place where he could not communicate with any one else. As far as possible persons were selected of the same class and position in life as the suspects. The suspects were permitted to change their places in the line from time to time. They were permitted to alter their personal appearance by changing their clothes or by shaving, or having their hair cut or in other manners. After the identification proceedings were over Saiyid Ainuddin prepared a note embodying the results. These notes have been proved in the case. Saiyid Ainuddin has been examined as a witness and cross-examined at great length. In this Court no suggestion has been made by any learned Counsel that these identification proceedings were unfair in any respect, but before the learned Sessions Judge sweeping allegations were made against the honesty of the identification proceedings. Our conclusion as to the manner in which the identification proceedings were conducted is that they were conducted most carefully and absolutely honestly and that every precaution was taken to prevent dishonest or careless identification. In fact our criticism is that in a desire to protect the interests of the suspects the learned Magistrate was possibly inclined to place difficulties in the path of honest identifying witnesses.

We have here to touch upon a point which arises out of the identifications. There have been occasions in this case in which witnesses who identified in Jail a suspect in connection with a particular offence were unable subsequently to identify that suspect either in the Court of the Committing Magistrate or in the Court of the Sessions Judge or in both. It was argued in the Court below (although it was not argued here) that evidence of identification in the Jail could not be treated as subsequent independent evidence in the trial as such identification amounts to statements either expressed or implied made by certain persons that the individuals whom they pointed out were persons whom they recognized as having been concerned in a particular crime. Such statements not having been made on oath and having been made in the course of extra judicial proceedings they were admissible not as substantive evidence in the

case, but merely as evidence to corroborate or contradict their statements in Court and as such were not admissible in evidence. The authority for this proposition is a decision of a Bench of two learned Judges of the Allahabad High Court which is reported as *Nagina v. Emperor* (9). With great respect to the learned Judges who decided that appeal we are of opinion that although there is much that is correct in their observations the decision has omitted certain necessary qualifications. Reading the decision as it stands, it would almost appear that the learned Judges laid down that in no circumstances was the evidence of such identification admissible. We cannot accept that conclusion. In our opinion if it is proved that the victim of a certain dacoity was present at Jail identification proceedings, and there stated in the presence of a third party that he identified a certain person as having taken part in the dacoity, it is permissible to produce evidence in a subsequent case that he made such an identification even if he has failed to identify that person in Court. In certain cases it might be impossible for a witness to identify again in Court. After having made the Jail identification the witness might lose his eye-sight and in such a case it would not be physically possible for him to repeat his identification. In a subsequent case in *Abdul Wahab v. Emperor* (10) another Bench of the Allahabad High Court supplemented the decision in *Nagina v. Emperor* (9) by pointing out how such an identification could be proved in evidence. We agree with the conclusion of the learned Judges in the latter case. It is noted in the present case that when a witness who made an identification in Jail was unable to repeat it in Court, outside evidence has been called to prove that the witness did make such identification and the circumstances in which he made it, and we find that evidence of this nature is admissible. The question as to what weight is to be given to this evidence will be decided in the individual cases of each particular appellant. Obviously, when a man has made an identification in Jail proceedings and

has been unable to repeat that identification in Court, his evidence of identification will be weakened but in the circumstances which we have detailed the evidence is admissible. Its value will be considered separately.

Finally, we have to state the method in which we have approached the evidence as to the handwriting of particular appellants. The method adopted of proving the handwriting in this case has been by the production in some instances of witnesses who have proved that they were acquainted with the handwriting of the appellants. The main evidence, however, has been the evidence of a certain Mr. Stott, a gentleman who is employed by the Government of India to report upon questions of handwriting. The course adopted has been to prove by outside evidence that a certain document is in the handwriting of a particular appellant.

The handwriting of the documents which the prosecution has endeavoured to prove against him has been compared by Mr. Stott with proved or admitted handwriting. We may call the latter handwriting the standard handwriting. Mr. Stott made his comparisons privately but repeated and explained them in open Court. We have examined Mr. Stott's evidence carefully and are satisfied that Mr. Stott is competent to express an opinion upon the points to which he has deposed. We have been particularly struck by the fact that he does not rely upon fanciful theories, and that his comparison is the comparison of a practical intelligent man with a wide experience of the subject based upon conclusions which appeal to practical men. We have not, however, accepted Mr. Stott's opinion as final. In every instance we have ourselves compared the handwriting of the documents proposed to be proved with the standard handwriting of the particular appellant. We have used Mr. Stott's evidence to assist and supplement our own observations. We have derived much benefit from his observations but our findings are based upon what we have observed for ourselves. In every instance we find ourselves in agreement with Mr. Stott.

The evidence in this case is voluminous, and the points are not always easy to grasp. Very many questions of fact and law have been discussed. Every important point which was raised before the

(9) 95 Ind. Cas. 477; 19 A. L. J. 947; 27 Cr. L. J. 813.
 (10) 95 Ind. Cas. 756; 47 A. 39; A. I. R. 1925 All. 223; 27 Cr. L. J. 836.

trial Court has been argued at length by the learned Counsel for the appellants and the learned Counsel for the Crown. We have already touched on some of these questions and reference will be made in detail later to many more, but we are not attempting to make a reference to all the arguments. It would be impossible to discuss every question raised, unless the judgment were permitted to extend to an undesirable size. Arguments of a transient character will not receive special comment in this judgment. No advantage will be gained by discussing them. It is to be remembered that the arguments in these appeals have lasted for sixteen working days. The arguments have been concentrated arguments. There has been little reiteration or repetition. Although we shall not discuss every individual argument, there is not a single argument advanced before us which has not been considered.

We shall first state the evidence as to the existence of the general conspiracy. Where that evidence is the evidence of accomplices, we shall note the corroboration mainly as to the existence of the conspiracy, but we shall forestall some of the conclusions at which we have arrived in respect of corroboration as to the individual conspirator. Wherever in this portion of the judgment we state the conclusion that the evidence of an accomplice is corroborated as against an individual conspirator our reasons for the conclusion will be found in detail in that portion of the judgment which deals with his individual case.

The first witness is the accomplice Banarsi Lal who was arrested in this case and subsequently given pardon. Banarsi Lal is a Hindu of Shahjahanpur, a carpenter by caste. He was not a working carpenter, his father having amassed a competence as a contractor. He is now a man of about thirty years of age. His father died when he was seventeen leaving him over Rs. 50,000 in cash and immovable property. He was a spendthrift and dissolute on his own admission and in four years he had wasted practically all his means. In 1921, after he had lost the greater part of his money he engaged in politics and became Secretary to the Local Congress Committee in Shahjahanpur. In connection with his political activities he became acquainted with Ashfaqullah and Ram Prasad. We note here that in this

appeal we shall refer to the evidence on the record against Ashfaqullah. By the adoption of this course we are not prejudicing Ashfaqullah in any way. We have already heard his appeal and the conclusions at which we arrive against him in this appeal are the conclusions at which we have arrived against him in his own appeal which will be decided with this appeal. As, however, Sachindra Nath Bakhshi has not yet appealed and there is still time for him to do so, we have refrained from considering the evidence against him in this case, and we have not allowed any discussion upon it. As far as Sachindra Nath Bakhshi is concerned we know nothing as to what he is alleged to have done and have naturally formed no conclusions one way or another in respect of him. Ram Prasad is a man who is now about twenty-eight years of age. His home is in the Gwalior State but for many years he has been residing in Shahjahanpur. We are not prejudicing him by stating that he has been largely engaged in political activities. He has himself pressed on the notice of the Court that he has been largely engaged in political activities, and attributes his prosecution to the fact that these political activities have rendered him an object of undeserved suspicion. Ram Prasad has been for some time carrying on business as the manager of a firm in Shahjahanpur which deals in silk. He had also other business interests. Ashfaqullah is a Pathan of good family and some social position. He is about the same age as Ram Prasad. He resided in Shahjahanpur living on his own means and not engaged in any employment. Ram Prasad and Ashfaqullah and Banarsi Lal were according to Banarsi Lal's evidence great friends. They went together to the meeting of the Congress at Ahmadabad in 1921. Ram Prasad used to lend books to the other two. These books were books extolling revolution as the solution of life. In 1922 the three friends went to the meeting of the Congress in Gaya. Another person present at the Congress was Prem Kishan Khanna, appellant. Prem Kishan is now about twenty-six years of age. He is the son of an Indian Engineer who is on the Staff of the East Indian Railway. He has been working for some years as a contractor in Shahjahanpur.

In 1924, according to Banarsi Lal at the end of the hot weather or at the beginning

of the rains, (that is to say about July) a man who has been identified as the appellant Jogesh Chandra Chatterji, came to Shahjahanpur. He passed himself off under names which were clearly fictitious, "Roy Mahasha" or "Roy Dada". This man is a resident of a village in the Dacca District of Bengal. A meeting was held in the house of Ram Prasad at which there were present Jogesh Chandra Chatterji, Ram Prasad, Ram Dulare appellant, Ashfaqullah, Banarsi Lal and a tall man about whom nothing is known. Ram Dulare is a youth who lives in Cawnpore. He apparently does not earn his own living. According to Banarsi Lal this meeting was to discuss the formation of a branch of a revolutionary society in Shahjahanpur. The organisers of this society were Jogesh Chandra Chatterji, Ram Dulare and the tall man. It was decided to form this society. Ram Prasad was appointed provincial organiser. Ashfaqullah was appointed his assistant. Banarsi Lal was enrolled as a sympathiser. According to Banarsi Lal Roy Mahasha had said that the English were to be slain and turned out of India by force and an Independent Indian Republic was to be established. He said that all the public of India was to be armed and to be made acquainted with the aims and objects of this Revolutionary Society. He also said that the money required was to be obtained by dacoities. It was to be collected for getting arms and for propaganda. The propaganda was to be by pamphlets, books, leaflets and other printed matter. Ram Prasad and Ram Dulare were present and supported Roy Mahasha with their remarks. Roy Mahasha said names should not be given or asked and any harm caused by a member to the Society would be punished by death."

A few days afterwards Raushan Singh appellant appeared on the scene. Raushan Singh is a Thakur who has some interest in landed property in a village in the Shahjahanpur District. He is now a man of about thirty-six years of age. Raushan Singh had previously known Ram Dulare. He was an old friend of Banarsi Lal.

We now leave for the present the evidence of Banarsi Lal and come to a statement made by Banwari Lal. Banwari Lal, as has already been said, was one of the accused in this case. He made a

full confession on the 3rd January, 1926, before the Special Magistrate. He retracted this confession before the Special Magistrate on the 20th March, 1926. He stated before the Committing Magistrate on that date that he had made this confession under the promise of a pardon, but that, as he was not satisfied with the terms offered him he refused to repeat it. He stated that the confession was absolutely untrue, and had been made by him solely in order to get easily out of the case. On the 18th December, 1926, he resiled from that position before the Sessions Judge. He there stated that his original confession was absolutely true, as far as it went, but that in it he had omitted to mention the name of one accused person as a member of the conspiracy because he wished to shield that person. He said that he had retracted his confession before the Magistrate at the request of Ram Prasad who said it would be to the profit of the remaining accused if he did so. He continued:—

"At first I was unwilling but when Ram Prasad said that it was the opinion of the Counsel that it should be retracted then I agreed. He also said that he had no hope that Banarsi would retract but he had hopes about me and so I agreed. He also said that Mr. Chaudhri will be Counsel for me so I retracted."

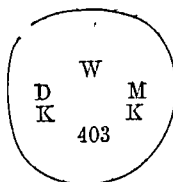
He admitted that all the allegations made by him against Mr. Horton were untrue. He was subsequently convicted and sentenced to five years' rigorous imprisonment. He had not appealed and the period in which he could appeal has now expired.

This confession is admissible in evidence against all the appellants under the provisions of s. 10 of the Indian Evidence Act. It can also be taken into consideration against them under the provisions of s. 30 of the same Act. According to this confession he is a Kayasth, aged now about twenty-four, a resident of Osah in the Rae Bareilly District. His father is an estate manager. When he was about sixteen he left the Government High School at which he was a pupil, to show his sympathy with the non-co-operation movement and joined various Nationalist institutions. He worked for the Partabgarh Congress Committee and went to Jail for six months as a result of his activities. Afterwards he lived for some time on

and off in Allahabad. According to this confession he met Jogesh Chandra Chatterji in 1923. In Allahabad Jogesh Chandra Chatterji informed him that there were revolutionary societies in the making. Banwari Lal wished to go to Lahore to join the Tilak School of Politics but on Jogesh Chandra's advice he went to Partabgarh to see if he could establish a branch of the Revolutionary Society there.

We now return to Prem Kishan Khanna. On the 31st March, 1924, Prem Kishan Khanna obtained an arms license for possession of a Mauser automatic pistol of German manufacture. This pistol was a .300 loading a magazine containing ten cartridges. He was in a good position to obtain the license, owing to the position held by his father as an Engineer in the superior service of the East Indian Railway Company.

It is proved and admitted that on the 7th August, 1924, Ram Prasad purchased fifty cartridges from the firm of P. N. Biswas and Co., Licensed Dealers in arms and ammunition at Cawnpore. He purchased these cartridges on the authority of Prem Kishan's license. The purchase was made by Ram Prasad in person. The fifty cartridges in question were made up in clips containing ten cartridges each. The cartridges were of German manufacture "Deutsche Waffen Fabrik Mauser." The cartridges were of metal. On the base of each cartridge are the following letters and figures:



Ram Prasad had under the rules to sign in a register as purchaser. He signed the register. He did not sign his own name. He signed the name of "Prem Kishan." This is admitted.

The significance of this incident will be seen when the evidence as to the commission of the dacoities is considered.

On the 18th October, 1924, Jogesh Chandra Chatterji was arrested in Calcutta as a suspicious character. He was arrested by members of the Calcutta Police force. We shall consider the circumstances of his arrest when we consider his individual case. We

note here that we are satisfied that on his arrest a paper (Ex. P-198) was found on him. The following was written on this paper in a handwriting unknown—

"A meeting of the P. C. was held on the 3rd October, 1924, in which five among six attended and the following resolutions were passed:—

"1. Keeping in view the fact that more or less efficient representatives acting as or in capacity of district organizers are already posted in the following districts:

"Benares, Allahabad, Partabgarh, Cawnpore, Lucknow, Fatehpur, Jaunpur, Jhansi, Hamirpur, Farukhabad, Mainpuri, Etawah, Agra, Aligarh, Muttra, Bulandshahar, Meerut, Delhi, Etah, Bareilly, Pilibhit, Shahjahanpur, Muzaffargarh.

"The remaining districts of these Provinces be thus divided among the said organizers so long as sufficient number of efficient men are not available to act as district organizer in each district.

"I. Benares, Mirzapur, Ghazipur, Balia, Jaunpur, Azamgarh, Basti, Gorakhpur, Rai Bareilly.

(Sic) "III. Jhansi, Banda.

"II. Cawnpore, Rai Bareilly, Gorakhpur, Unao.

"IV. Aligarh, Anupur.

"V. Meerut, Saharanpur, Dehra Dun, Almora, Bijnour, Badaun, Moradabad.

"VI. Shahjahanpur, Nainital, Gahrwal, Lakhimpur, Sitapur, Hardoi.

"VII. As at present there is no member to represent the Fyzabad division consisting of Fyzabad, Bahraich, Gonda, Bara Banki and Sultanpur it is resolved that a suitable member be sent there to take charge of the centre at the earliest opportunity.

"2. That at least rupees one hundred (considered to be the least expenditure in case of dire necessity at present) be raised by subscription from members and sympathisers of the following centres:—

"Benares, Cawnpore, Jhansi, Aligarh, Meerut, and Shahjahanpur, the sum being contributed equally by each centre.

"(a) That at least a subscription of annas four be realised every month from each member of the Association.

"(b) That the above resolution is to be given effect to within the next two months.

"3. That the meeting recognises that the total number of its members up to the present time is about one hundred, the following being the total strength in each centre: Benares 19+Cawnpore 22+Jhansi 15+Aligarh 12, Meerut (not yet received), Shahjahanpur 8.

"4. That the meeting is of the opinion that the following immediate steps be taken as regards its propaganda through newspapers and magazines which can be utilised by the members of different centres:—

- "(a) To set up a campaign against the C. I. D. activities.
- "(b) To set up a campaign against the repressive laws and measures.
- "(c) To criticise the Congress activities that hinder the work of the Association.
- "(d) To preach social revolutionary ideas and communistic principles.
- "(e) To collect stories, episodes and other materials for publication.

"5 That the department of F money collection be at present placed under the sole charge of Nos. 2, 4 and 6 subject to occasional supervision by the P. C. All informations regarding this department from different centres be submitted to the said Nos. 2, 4 and 6.

"That instead of 5 departments as mentioned in the General Constitutional Rules and Regulations, only 2 departments be set up at present:—

- "(a) Propaganda to be guided by Nos. 1, 3 and 5.
- "(b) Collection of funds and arms by Nos. 2, 4 and 6.

"7. That all the General Constitutional Rules and Regulations be enforced to their entirety except the 6th resolution which was accepted after amendment for the present.

"8. That every possible care be taken as regards the secrecy of the activities of the Association.

"9. That every district organizer should try his best to help the local clubs and associations started with principles which may directly or indirectly promote the cause of revolution and to try to become members of the Congress and take part in its activities whenever advisable putting in view the rules of the Association.

"10. That every district organiser should make arrangements to visit neighbouring

villages and labour centres with the object of gaining their sympathy.

"11 That to provide workers with work it is necessary to divide the district activities into three channels—

- "(a) Village works.
- "(b) Secret works.
- "(c) Local social functions and activities connected with clubs and associations."

The Bengal Police did not follow up the clues contained in this document. It is unfortunate that they did not do so. This much, however, should be said to explain their inaction. There was nothing upon this paper to show where the meeting of "P. C." (Provincial Committee) was held and there was nothing to show who were the members. About that period the Criminal Investigation Department in Calcutta and in fact the whole of the Police force of Calcutta were very actively occupied in the suppression of movements connected directly with their own Province. This afforded considerable excuse for delay in communicating the arrest to the Police of this Province.

The next witness whose evidence we shall consider is also an accomplice who was arrested in this case. A pardon was subsequently tendered to him. He is a Bengali youth called Indu Bhushan Mitra. In 1924 he was fourteen years old. He was then residing with his father Dr. H. D. Mitra, Health Officer of Shahjahanpur and was studying in the High School at Shahjahanpur. Ram Prasad made his acquaintance and lent him books. He says:—"The effect caused by my reading those books was that the English were ruling India by force and by a revolt they should be driven out of India by force". Ram Prasad showed him the rules of the Revolutionary Society. These are the rules which Mr. Hamilton calls the "Yellow Leaflet". We shall state what they were at a later place. He also gave him a copy of the "Revolutionary" to read. As a result of Ram Prasad's conversation, the perusal of these books and "The Revolutionary" he wished to join the Society. Owing to his youth he was not accepted as a working member but he was employed by Ram Prasad as a person to whom letters of a compromising nature were to be sent. On receipt of these letters he handed them over to Ram Prasad. He knew

that the letters were intended for Ram Prasad by the fact that there was a special mark under the name of the post town "Shahjahanpur." The letters were addressed to Indu Bhushan Mittra. He received a large number of letters.

According to Banarsi Lal the members of the Shahjahanpur Branch of the Revolutionary Society were only Ram Prasad, Ashfaqullah and himself. Banarsi Lal stated that Prem Kishan, Raushan Singh, Indu Bhushan and a man who has since been acquitted and to whom reference need not be made, were friends and associates of Ram Prasad, but that as far as he knew none of them were members of the Society. Indu Bhushan Mittra has, however, stated that he considered himself a member of the Society and that he understood that, in addition to Ram Prasad and Ashfaqullah, Prem Kishan and Raushan Singh were also members of the Society. He added that he did not know that Banarsi Lal was a member. Banarsi Lal has deposed that the members used assumed names amongst themselves. He was called "Babua", Ram Prasad was called "Anant Parkash" and other names. Ashfaqullah was called "Kunwarji" or "Warsi". He introduced the names of two other appellants who, he said, were members of the party but who did not belong to Shahjahanpur. One of these was Manmatha Nath Gupta, and the other was Ram Kishan Khattri. He said that these men used to visit Shahjahanpur. Manmatha Nath Gupta is a youth who resides in Benares and was studying there in a privately managed school in which Damodar Sarup was a master. Manmatha Nath Gupta was known under the name of "Nawab." Ram Kishan Khattri is a young man from the Central Provinces. He is a resident of Chanda. He has stated that he has now become a religious ascetic. He was known under the name of "Garga Ram." According to Ex. P-193 the Province was to be divided into revolutionary centres each with head-quarters. According to the prosecution there was a centre in Benares to which belonged Rajendra Nath Lahiri appellant, Manmatha Nath Gupta, Ram Nath Pande appellant, Raj Kumar Sinha appellant and Damodar Sarup. Rajendra Nath Lahiri is a man who is now about twenty-four or twenty-five years old. He occupied himself in Benares partly as a student at the Hindu University

and partly assisting in a shop belonging to his brother. The shop is a medical dispensary known as "Star & Co." Manmatha Nath Gupta has already been described. Ram Nath Pande is a schoolboy at Benares. Raj Kumar Sinha is a resident of Cawnpore but at that time he was reading as a student in the Central Hindu College. He is now a man of about twenty-one years of age. Damodar Sarup was a master at the Kashi Vidya Pith, a privately conducted school in Benares. Manmatha Nath, as has already been stated, was studying at this school. We have had to consider certain facts about Damodar Sarup, although he has not been convicted in this case. He has neither been convicted nor acquitted. From the commencement of proceedings he starved himself with the result that his health became so seriously affected that it was not considered desirable to proceed with the case against him. We do not consider that the fact that he has deliberately prevented a decision by his own act, is a sufficient reason for ignoring his connection with the case. But we shall, as far as possible, avoid an expression of opinion as to his guilt or innocence. We have here to add the names of two other persons. Parnawesh Kumar Chatterji is one. He is a youth residing in Jubbulpur who has been convicted and has appealed but who has subsequently withdrawn his defence. The other is Kunwar Bahadur who is one of the witnesses. He is a young man who has not been prosecuted, a great friend of Banwari Lal. He has given evidence against Banwari Lal. Although he has not been prosecuted, he is on his own showing an accomplice. He sympathised with the movement and used to receive letters and money-orders on behalf of Banwari Lal.

When Parnawesh Kumar Chatterji was arrested a post card (Ex. P-171) was found in his possession. It is dated the 11th November and was received in November 1924. The following is a translation of its contents:—

"Dear Parnawesh,

"Just received your letter. From reading your last letter it seems that your mind is still full of remorse. Dear Parnawesh, this is not right. My condition has become similar on looking at the circumstances. But a faint light of hope has appeared amidst hopelessness.

"I have secured one carpenter who will prepare the thing. But I have not yet told it to Kashida. Remember that he is to be paid his labour and expenses. One will be prepared within nine or ten days. But I have nothing with me. However, I shall manage anyhow to purchase the first one. I am thinking what will happen next. I want to have your advice in the matter. You are a business man. So I write to you about this petty matter. Hope you will not mind it. It is useless to speak to Kashida—because he too is penniless. Do not forget to write how your work is going now. If no work has been accomplished, write to me anything. I take delight in reading your hand writing. My love to you.

Yours,
Anil."

We find this post card to have been in the handwriting of Manmatha Nath Gupta.

Kunwar Bahadur has deposed that it was a practice among the conspirators to veil their meaning by the use of expressions which meant something definite to the recipient that was not borne out by the words. He says:—

"Banwari Lal read out some of the letters. I remember the expressions. How is mother? Father is passing through station, meet him there. Banwari Lal explained that 'How is mother' meant how is the work of the society going on and 'father' was the Central Organiser. He was the Central Organiser of the Revolutionary Society."

It is a fair inference apart from Kunwar Bahadur's evidence that these documents have an inner meaning. It is not clear what the reference is to the "carpenter" who is to "prepare the thing." It is, however, noticeable that some six weeks after this post card was received the "Revolutionary" was circulated, and it is in evidence as will be seen later that funds were required for the printing. The reference to the "carpenter" may be a reference to the printing of the "Revolutionary." Subsequent evidence will show that both Manmatha Nath Gupta and Parnawesh Kumar Chatterji were on what may be called the secretarial staff of the revolutionary organisation.

On the 28th November, 1924, Rs. 10 were sent by money order (Ex. P-96) to Banwari Lal in the name of Kunwar Bahadur from Cawnpore. The name of the remitter is

signed N. Prasad. We find it proved that the handwriting of the money-order is that of the appellant Suresh Chandra Bhattacharji who signed the money-order as N. Prasad. Suresh Chandra Bhattacharji is a man who is now about twenty-eight years of age. He resides in Cawnpore where he works as Assistant Editor of a newspaper.

On the 25th December, 1924, to Bamrauli dacoity took place. We shall refer to this dacoity later grouping it with the other dacoities. On the 2nd January, 1925, a money order for Rs. 15 was sent to Kunwar Bahadur on behalf of Banwari Lal from Dasasumadh, a quarter of the Benares City. It purported to be sent by Kashi Nath Bajpeyi of Benares. We find it proved that the handwriting on this money-order was that of Rajendra Nath Lahiri. Banarsi Lal has deposed that at the end of 1924 or the beginning of 1925, that is to say, directly after the commission of the Bamrauli dacoity, the following incident occurred. We give it in his own words:—

"When I again met Ram Prasad it was that he came to my house. He gave me some ornaments mainly silver and gold. He told me to melt them, sell the metal and give him the proceeds. He gave them to me as I had a *sarrafi* shop. I did so and sold the metal for some Rs. 500. It was the end of 1924 or the beginning of 1925. He did not tell me where he had got the ornaments nor did I ask.

"When I next saw Ashfaqullah I told him about this and he said the ornaments came from a dacoity and Rs. 500 cash had also been got. I did not ask for particulars nor did he give any. He did not name any of the perpetrators save Ram Prasad and himself."

As has already been stated the "Revolutionary" was circulated between the 28th and the 31st January, 1925. Kalka Prasad, Sub-Postmaster of the Kamacha Sub-Post Office, Benares City, has proved that on the 21st January, 1925, five registered packages were posted from Kamacha: one was addressed to Gopi Nath Shukla, Cawnpore, the second was addressed to Banarsi Lal Kokash, Shahjahanpur, the third was addressed to Parnawesh Chatterji, Jubbulpur, the fourth was addressed to Kunwar Bahadur Srivastava, Rae Bareilly, and the fifth was addressed to Kundan Lal, Sitlaganj, Partabgarh District. He has proved the despatch from his registers. It is in evidence that the receipt

for the first package was given by a man called Suraj Bali on behalf of Gopi Nath on the 24th January, 1925. That receipt is Ex. P-53. The receipt for the second package was given by Banarsi Lal, the accomplice, on the 23rd January, 1925. That receipt is Ex. P-17. The receipt for the third package was given by Parnawesh Chatterji, the appellant, on the 23rd January, 1925. That receipt is Ex. P-134. The receipt for the fourth package was given by Kunwar Bahadur, the witness, on the 24th January, 1925. That receipt is Ex. P-61. There is no evidence to connect the fifth package with the conspiracy. To understand the reference to Gopi Nath and Suraj Bali it is necessary to examine the evidence of Gopi Nath. He is also an accomplice. Gopi Nath, who is otherwise known as Gopi Mohan, is a young man residing in Cawnpore who makes his living as a private tutor. He has deposed that he was an intimate friend of Ram Dulare, appellant, and of Suresh Chandra Bhattacharji, appellant, and he worked for Ram Dulare, who to his knowledge was a member of the revolutionary party as a recipient of letters in the same manner that Indu Bhushan worked for Ram Prasad. These recipients of letters are known amongst the revolutionaries as "post offices" or "post boxes." Now we have it from an independent witness Suraj Bali that he received this package which was addressed to Gopi Mohan, and Gopi Mohan's evidence indicates very clearly that this package contained copies of "The Revolutionary". Banarsi Lal definitely states that his package contained copies of "The Revolutionary." In respect of Parnawesh Chatterji there is no evidence that his package contained copies of "The Revolutionary." Kunwar Bahadur, however, has deposed that his package contained copies of "The Revolutionary." Banarsi Lal has deposed that he assisted in distributing the copies of "The Revolutionary." There are a very large number of witnesses who proved the distribution of "The Revolutionary" in these Provinces.

We have here to consider the authorship of "The Revolutionary." The learned Judge Mr. Hamilton has at his original page 100 of his judgment discussed this question and has arrived at the conclusion that Sachindra Nath Sanyal, who has not appealed, was the author of "The Revolutionary." Pandit Jagat Narain has argued before this Court in favour of the conclusion

that Sachindra Nath Sanyal was the author of "The Revolutionary." We consider that it is established on the evidence that Sachindra Nath Sanyal was the author of "The Revolutionary." The point is of no importance as against him as he has not appealed, and the point is of practically no importance as against the appellants. On our findings it is established beyond reasonable doubt that "The Revolutionary" was issued by some of the conspirators in furtherance of the purposes of the conspiracy, and as far as the appellants are concerned it is of no importance who was the author. On the 6th February, 1925, Rs. 10 were sent by money order to Kunwar Bahadur on behalf of Banwari Lal from Dasasumadh by a person who called himself, K. P. Srivastava (Ex. P-95). We find that the handwriting on the money order is that of Rajendra Nath Lahiri. On the 19th February, 1925, Rs 15 were sent by money order to Kunwar Bahadur on behalf of Banwari Lal. The money order Ex. P-94 was sent again from Dasasumadh by a person who called himself K. P. Srivastava. We again find that the handwriting was the handwriting of Rajendra Nath Lahiri.

On the 25th February Sachindra Nath Sanyal was arrested in Calcutta. He was subsequently convicted by Courts in Bengal. As we have stated already he has not appealed in this case. On the 9th March, 1925, the Bichpuri dacoity was committed and on the 24th March, 1925, the Dwarkapur dacoity was committed. We shall refer to these dacoities in their places. At the end of June or the beginning of July, 1925, Banarsi Lal deposed that he saw Rajendra Nath Lahiri in Ram Prasad's house in Shahjahanpur. At the end of July or the beginning of August 1925 Manmatha Nath Gupta and six or seven other men arrived according to Banarsi at Shahjahanpur. Ram Prasad told Banarsi to provide them with accommodation. He had not room in his own house but took a house from a certain Kishan Lal. Kishan Lal corroborates this fact. These men are stated by Banarsi Lal to have been Manmatha Nath Gupta, Rajendra Nath Lahiri, Banwari Lal, Makundi Lal and others. This is the first occasion on which reference has been made to Makundi Lal appellant. Makundi Lal is a man who is now over thirty years of age. He apparently does no work. He resides in Aurayya in the Etawah District. On the 3rd August, 1925, Makundi Lal sent from

Shahjahanpur a [money order Ex. P-378 to his wife Lachmi Bai who was then living in Benares. Upon the coupon which was to be kept by the addressee he wrote "I am well. It will take one week more. Your well-wisher Makundi Lal. Do not be anxious at all." Shortly before the 9th of August, 1925, these men left Shahjahanpur with Ram Prasad and Ashfaqullah. On the 9th August, 1925, the train dacoity was committed. This will be referred to in another place.

After Mr. Horton was put in charge of the investigation his attention was attracted to Shahjahanpur as he had heard that some of the notes stolen in the train dacoity had been traced there. Suspicion fell on Ram Prasad and it was subsequently stated that Indu Bhushan was suspected of being his "Post Office." In consequence Mr. Horton got into communication with Khan Sahib Idris Ahmad, Head Master of the Shahjahanpur High School, in which Indu Bhushan was studying, and arranged with Khan Sahib Idris Ahmad that he should open letters addressed to Indu Bhushan, take copies of the contents, reclose the letters, deliver them to Indu Bhushan and inform the Police of what the letters contained. Khan Sahib Idris Ahmad complied with these instructions. Letters were intercepted. The contents of the following have been placed upon the record. Exhibit P-138-A.

This is dated the 4th September, 1925. It bore the post mark of Dasasmedh. It is as follows:—

"My dear friend,

"Yours of the 1st instant. I sent the introduction letter already. I think by this time you have received them. I have written to Kali Babu to come at the time. He will come no doubt.

"You have not written anything about Lalaji. I am really surprised. There is no able man to represent No. 7 and he thinks he is the fittest man and he has got resources in that side too. He will be able to have his assistants in a short time in that side. I proposed to him and he is ready. Now he is anxious to go to the assembly. If I do not take him with me he will be wounded, and he has been already wounded by some persons. I am now in a false position. If you do not object I shall take him too with me.

"Please reply sharp, I am really anxious. Badri has not yet left—he hopes to in a short time. Bidyarthi (Bidyarthi) (name

not intelligible) has come back from his place with an excuse. When I meet you I shall tell you everything. Do not use the name in which you generally write to me and others. It has come into the notice of interested persons: change it and use some other name.

Yours,
Jawahir Lal."

Exhibit P-140 is as follows:—

"My dear brother, Hardwar.

"Arrived here safely. I am enjoying sound health. If you want to see me, come as sharp as you can, for perhaps I will have to go to take my landed property within a week.

"Enquire me freely at Pt. Atmaswarup Ji's Guru Mandal. My B. C. to you and all my friends. The atmosphere of this place is also all right.

"Please come very soon.

Yours,
(Sd.) Narendra."

Exhibit P-141:

"Vaishya Orphanage, Meerut."

Dated 9th September, 1925.

"My dear brother,

"Everything is all right. All arrangements about the Executive Committee of the Orphanage are complete. The Updeshak at Lahore has promised to attend the function. You are requested to intimate to your friends to put up in various Dharamshalas. Jain Dharamshala is in the way to the Railway Station. Dharam Das Dharamshala is just near the clock tower and Ganga Rai's Dharamshala is near Queja Ganj.

"The place of the function has been after due deliberation fixed at my own place.

Yours,
Supdt. V. O."

Here the heading "Vaishya Orphanage, Meerut" was apparently a printed heading. The word "Updeshak" means lecturer. "Queja Ganj" probably means Qaisarganj, a well known quarter of Meerut.

Exhibit P-142 undated received on the 12th September is as follows:—

"My dear brother,

"Received your kind favour. I am enjoying sound health. Do not be anxious for me so much, kindly mind well I will not go without taking your permission. But come as soon as possible. Up to this time I have not taken visit of him (My Guru) he will come to-day or to-morrow morning.

"After meeting him I will settle whether I will have to go to take my property or not. If he will order me to go with him to take my property, my position will be very awkward. Still anyhow I will detain. But you must come on 16th morning here.

"(You must start by Dehra Dun Mail on 15th night) I will be on station platform on that morning.

Tell my B. C. to my friends.

Yours,
Narandra."

It will be remembered that all these letters were letters intended for Ram Prasad. Mr. Horton further received from a Police informer whose name he preferred not to disclose Ex. P-482. This is as follows :—

Shahjahanpur,
8th September, 1925.

"My dear Undel,

"We are all right. Perhaps you are aware of the fact that the *shradha* ceremony of our grandfather will be celebrated on the 13th instant (Sunday) and your presence is quite necessary, consequently I request you to reach No. 1 on the fixed time and oblige.

Yours as ever,
Rudra.

"P. S.—Kindly start on the 12th instant direct for Delhi and from there you can get the train very easily. You will find me in the Orphanage."

This letter is proved to be in the handwriting of Ram Prasad. At the same time the Calcutta Criminal Investigation Department were intercepting letters. They were intercepting letters that were being despatched to K. C. Guha, Engineer and Contractor, 48 Sankaripara Road, Bhawanipur, Calcutta. They took copies of the contents of these letters and photographed them. Three important letters of this class were Exs. P-210, P-211 and P-212 which are translations of Exs. P-200, P-202 and P-204. K. C. Guha gave evidence. He denied all knowledge of any of these letters and said that he had never received them. A relation of his called P. C. Guha, a student in Calcutta, has stated that he used to take these letters which were addressed to K. C. Guha and deliver them to persons whom he could not identify. He said that these two persons had met him on the road and that he agreed to hand them letters addressed to Mr. K. C. Guha for payment. He received twenty to twenty-five rupees, and handed over the

letters accordingly. Exhibits P-210, P-211 and P-212 are clearly three of these letters. The letters were in Bengali. It is proved from the photographs of the letters and the envelopes that they are in the handwriting of Rajendra Nath Lahiri. The following are the letters :—

Exhibit P-210.

"To my dear,

"It is very wrong of you, brother, that you did not write any letter since you left long time ago. I am very angry with you. However, if you reply to this letter soon, the degree of my anger will lessen a bit.

"You did not write anything whether the 'sarees' had been purchased and if you had received the 'sample' phials of the medicine. I cannot express how much anxious the mistress of the house has been for the sarees." Perhaps you and Kamini Kaka will both be sorry to learn another news. Aunt's sickness has increased much. She may be somewhat relieved if you can send Kamini "Kaka" immediately on receipt of this letter with leave for two weeks. In case Kamini Kaka cannot, come then you yourself come very soon with all the news of your house. If you have already got the 'sarees' then don't forget to bring them, and if not, come without them. Please see, brother, that you don't forget to bring the text books of my son for which money was already given by me. The progress of the boy's school has been daily on the increase yet the boy is going without books. I am all right, how are you all? My hearty love to you. Immediately on receipt of this letter, you come yourself or send Kamini Kaka, you should bring with you the travelling expenses both for coming and going back, the condition of the aunt is not good, don't make much delay in coming. The end.

Your Nitai Mama (Your
maternal uncle Nitai).
Bhawanipur,
3rd September, 1925.

"Post mark: 10 A. M.
Dasasumedh, Calcutta."
"2nd September,
12-30 P. M.,
Bena."

Exhibit P-211.

"To my dear,

4th September, 1925.

"I informed you about aunt's illness about

a day or two back. I wrote you to come immediately on receipt of that letter but now I find that it will do if you come after a few days more. Therefore 'Kamini' Kaka or you must reach here by the 10th of this month. Mind that there be heavy loss in case you don't come. See, brother, that you do not forget to bring with you the articles, as asked for in the previous letter, viz., the *text books of my son*, the 'sarees' of my wife, and the 'sample phials' of medicine. If you cannot bring the sarees and sample of medicine then you must reach here by that date with all news of the house. The pecuniary condition of your brother (the writer) is known to you hence don't forget to bring with you the travelling expenses for coming and going back as also something extra for pocket expenses. The condition of my daughter is not good. My wife is doing well. Shall be glad to learn your welfare. My *namaskar* to you. The end.

Yours most obediently,
(Sd.) Nital.

Bhawanipur,
5th September, 1925,
10 A.M.,
Calcutta."

"Post mark:"
Dasasumeth,
4th September, 1925,
12-30 P. M.,
Benares.

Exhibit P-212,
7th September, 1925.

"Brother,

"I am in receipt of your reply to my first letter. It is a matter of regret that you have not been able to understand the purport of my letter. I have written you another letter if even in that my idea has not been clear it is for this reason that I sit to write again.

"At present it may be managed without the 'sarees'. You or 'Kaka' should reach here by the 10th instant. There is a meeting. In that the presence of either you or 'Kaka' is desirable. In that meeting there will be discussions on many important matters. One of you must come.

"To day is 7th, you will probably get the letter on the 9th, if you start that day you will be able to reach on the 10th: It will do if you reach by the express which arrives at Moghulserai in the night of the

10th. I am well, and shall be glad to learn your welfare. My love to you. The end.

Yours,
(Sd.) Nitaichand."

Post Mark:
Dasasumeth,
8th September, 1925,
12-30 P.M.,
Benares.

As a result of observations made on these letters Mr. Horton surmised that a meeting of the Provincial Central Committee of the society would take place on the premises of the Vaishya Orphanage, Meerut on the 13th September, 1925. He accordingly despatched Sub-Inspector Brahma Singh, an officer attached to the Criminal Investigation Department, to Meerut requesting the Superintendent of Police of Meerut to depute some one (not a Police Officer) to accompany Sub-Inspector Brahma Singh on his duties in Meerut to show him his way and to be in a position to corroborate his statements. The Superintendent of Police at Meerut deputed a *Jat* called Pheru Singh to accompany Sub-Inspector Brahma Singh. The main duties of Sub-Inspector Brahma Singh were to watch the Vaishya Orphanage and observe whether there was anything in the nature of a clandestine meeting there, and if so, who were taking part in it. Sub-Inspector Brahma Singh reached Meerut on the 13th September, 1925, at 8 A.M. He went to the Assistant Superintendent of Police at Meerut and was given Pheru Singh to accompany him. Pheru Singh took him to the Vaishya Orphanage. The two men remained outside the main gate of the Orphanage and maintained a strict observation on the premises taking care to keep themselves unobserved. They did not always remain together. One or the other occasionally left to get food or for other purposes. Nothing was observed during the day of the 13th September, until shortly before sunset when eight men came out of the residential quarters of Vishnu Saran Dublis appellant who is the Superintendent of the Orphanage and took the main road to the north. They returned in about an hour and a half. At that time both Sub-Inspector Brahma Singh and Pheru Singh were present. Among these eight men were Ram Prasad, Rajendra Nath Lahiri, Damodar Sarup and Vishnu Saran Dublis.

After these eight men had re-entered the residential quarters of Vishnu Saran Dublis, Sub-Inspector Brahma Singh and Pheru Singh went away. Next morning Sub-Inspector Brahma Singh arrived first and remained watching outside the gate. About 6 A. M. before Pheru Singh arrived Sub-Inspector Brahma Singh saw Ram Prasad and Rajendra Nath Lahiri come out of the Superintendent's residential quarters, stop outside a few moments and re enter the quarters. Pheru Singh was not present at the time. When Pheru Singh came Sub-Inspector Brahma Singh went away for a short time. While he was away Ram Prasad was seen by Pheru Singh to leave the Superintendent's quarters and go towards the city. He did not return. After Sub-Inspector Brahma Singh had returned Sub-Inspector Brahma Singh and Pheru Singh saw at about 10 A. M., two other men coming from the direction of the city and going into the Superintendent's quarters. One of these men was the appellant Suresh Chandra Bhattacharji. Sub-Inspector Brahma Singh went away again to get some food. While he was away Pheru Singh saw Suresh Chandra Bhattacharji leaving the quarters with the same man. They did not return. Sub-Inspector Brahma Singh left at 4-30 P. M., to go to the Railway Station. Pheru Singh remained. After Sub-Inspector Brahma Singh had gone at about 5 P. M., five men came out of the house one of whom was Rajendra Nath Lahiri. They did not return. In addition to the evidence of Sub-Inspector Brahma Singh and Pheru Singh there is the evidence of Sheo Charan Singh, a joint Secretary of the Vaishya Orphanage, which proves that there was no meeting of any committee connected with the Orphanage on the 13th or 14th September, 1925. Balapat Rai, a Travelling Ticket Inspector, proves that a man returning from Meerut required an extension ticket and that that man gave his name as Damodar Sarup. Head Constable Iftikhar Uddin, Police Constable Sarju Dayal, and Sub-Inspector Hari Kisban have given evidence which shows that Suresh Chandra Bhattacharji who was at that time under Police surveillance went to Meerut on 13th September, 1925, arriving there at 7-30 A. M. on the 14th September. Suresh Chandra Bhattacharji admits that he was in Meerut that day.

Mr. Horton considering that the evidence

justified the issue of warrants issued warrants for the arrest of certain persons on the 24th September, 1925. As a result arrests were made on the 26th September, 1925, of the following appellants—Govind Charan Kar, Ram Prasad, Manmatha Nath Gupta, Suresh Chandra Bhattacharji, Ram Dulare Trivedi, Raushan Singh and Vishnu Saran Dublis. Other warrants were not executed as the persons named were not found. No warrants were issued for the arrest of Prem Kishan Khanna but the Shahjahanpur Police arrested him as a result of what transpired during the search of the house of Ram Prasad.

No previous reference has been made to Govind Charan Kar. It is not proved that he visited either Shahjahanpur, Benares or Cawnpore. He is a Bengali from the Dacca District in Lower Bengal and is a man now of about thirty years of age. For some weeks prior to the date of the train dacoity he had been residing in the Rameshwar Hindu Hotel in the Aminabad Quarter of Lucknow under the false name of D. N. Chaudhuri. He professed to be a commission agent for the sale of German razors and other goods. Jadu Nath Singh, a student in the Church Mission School, Lucknow, was living in the same hotel. Govind Charan Kar approached this boy, and lent him books containing revolutionary ideas. Jadu Nath Sen became a "Post Office" for Govind Charan Kar. After the commission of the train dacoity Jadu Nath Sen became frightened. He told his school master Jagannath Prasad certain facts as to what had happened and as a result there was communication with the authorities and a warrant was issued for the arrest of Govind Charan Kar. He was arrested by Sub-Inspector Ashfaq Hussain at 8 A. M., on the 26th September, at the dispensary of a certain Dr. Lahiri close to the Aminudaula Park. Certain articles were found upon him. One was a fountain pen of a make known as the "Apollo" fountain pen. This pen as will be seen later is proved to be the property of Rajendra Nath Lahiri and its possession connects Govind Charan Kar with Rajendra Nath Lahiri. After the arrest of Govind Charan Kar he was taken to his room in the Rameshwar Hindu Hotel. Many articles were found in the room the most important of which was a printed pamphlet Ex. P-280 which was found in a cupboard in the room. This is the pamphlet which Mr. Hamilton calls the

Yellow Leaflet. It is printed on six pages of yellow paper. It bears no mark of any printing press.

The contents are as follows:—

"The Hindustan Republican Association.

"NAME:—

"The name of the association shall be the Hindustan Republican Association.

"OBJECT.

"The object of the association shall be to establish a Federated Republic of the United States of India by an organised and armed revolution.

"The final form of the constitution of the Republic shall be framed and declared by the representatives of the people at the time when they will be in a position to enforce their decisions.

"The basic principle of the republic shall be universal suffrage and the abolition of all systems which make any kind of exploitation of man by man possible.

"Constitution: Governing Body:—

"The governing body of the association shall be the Central Council composed of the representatives of every Province of India. All decisions of the Central Council shall be arrived at by unanimous consent. The Central Council shall be vested with absolute powers.

"The principal function of the Central Council shall be to supervise, adjust and co-ordinate the activities in the different Provinces of which it shall have full knowledge.

"The Central Council shall be in direct charge of the work to be carried on in countries outside India.

Provincial Organisation:—

"There shall be a committee ordinarily of five men representing the five different departments of the association in every Province which shall regulate all the activities of the association in the Province.

"All decisions of the committee shall be arrived at by unanimous consent.

"Departments.

"Every provincial organisation shall have the following departments:—

"1. Propaganda.

"2. Collection of men.

"3. Collection of funds and terrorism.

"4. Collection and storage of arms and amunitions.

"5. Foreign connection.

"1. Propaganda shall be carried on.

"(a) by an open and a secret press,

"(b) through private conversations,

"(c) through public platforms,

"(d) through a system of organised Kathas, and,

"(e) through magic lantern slides.

"2. Collection of men shall be done by organisers in charge of different districts.

"3. Funds shall be collected generally by means of voluntary subscriptions and occasionally by contributions exacted by force. In extreme cases of repressions by agent or agents of a foreign Government it shall be the duty of the association to retaliate in whatever form it shall consider suitable.

"4. Every effort shall be made to arm every member of the association; but all such arms shall be stored at different centres and be used according to the directions of the Provincial Committee only.

"No arms shall be removed from any place in the district or used without the knowledge and the permission of the district organiser or the officer in charge of this department.

"5. Foreign connection:—This department shall carry on its work under the direct orders from the C. C.

District organiser:—His duties:—

"The District organiser shall be in sole charge of the members of his district.

"He shall try to start branches of this association in every part of his district. In order to have efficient recruitment he should keep himself in touch with the different public bodies and institutions in his district.

"The district organisers shall be subordinate in every way to the Provincial Committee who shall supervise and direct all their activities.

"The district organisers must see that the members are divided into separate groups and the different groups do not know each other.

"So far as possible the district organiser of any Province must not know the activities of each other and if possible they must also not know each other by person or by name.

"No district organiser shall leave his station without previously informing his superior.

"Qualifications of a district organiser.

"1. He must have the tact and the ability to guide and handle men of different temperaments.

"2. He must have the capacity to grasp political, social and economical problems of the present day with special reference to his motherland.

"3. He must be able to grasp the spirit of the history of India, with special reference to the particular civilization which India has evolved.

"4. He must have faith in the mission and the destiny of a free India, which is to bring harmony in the different spheres of human activities both spiritual and material.

"5. He must be courageous and self-sacrificing without which all his brilliant qualities will have no real value.

Provincial Council and Central Council:—

"P. C. and C. C. members must see that every member of this association gets full scope and ample opportunity to develop and use his individual abilities, without which the association will tend to disintegrate.

"PROGRAMME.

"All the activities of the association shall be divided into two parts:—public and private.

"PUBLIC:—

"1. To start associations in the forms of clubs, libraries, *seva sammitis* and the like.

"2. To start labour and peasant organisations. Suitable men must be engaged on behalf of the association to organise and control the labourers in the different factories, the Railways and in the coalfields, and instil into their minds that they are not for the revolution but that the revolution is for them.

"Similarly the *Kisans* must also be organised.

"3. To start weekly paper in every Province to propagate the idea of an independent Indian Republic.

"4. To publish booklets and pamphlets with a view to enlighten the public as to the course of events and the current of thoughts as prevalent in the countries outside India.

"5. To utilise and influence the Congress and other public activities as far as possible.

"PRIVATE.

"(a) To establish a secret press and through it to publish such literature which cannot easily be published openly.

"(b) To circulate such literature.

"(c) To establish branches of this association in every part of the country, district by district.

"(d) To collect funds in as many ways as possible.

"(e) To send suitable men to foreign countries where they may get military or scientific training so that they may become military or scientific experts to take charge of armies and ammunition factories at the time of open rebellion.

"(f) To import arms and ammunitions and also to manufacture them, as far as possible, in the country.

"(g) To remain in close touch and to co-operate with the Indian revolutionaries outside India.

"(h) To get the members of this association enlisted into the present army.

"(i) To enlist the sympathy of the public to our cause by occasional retaliatory measures and propaganda and thus create a band of sympathisers.

"MEMBERSHIP.

"All members shall be recruited by organisers in charge of different districts in every Province. Every member must be ready to devote his whole time for the association and to risk his life if necessary.

"He must obey the commands of the district organiser implicitly.

"He should develop his own initiative and remember that the success of the association depends much on the resourcefulness, the initiative and the sense of duty of its individual members.

"He must behave in a manner that may not prejudice the cause for which this association stands or may not do any harm directly or indirectly to this organisation.

"No member of this association shall belong to any other organisation without the consent of the district organiser.

"No member shall leave his station without informing the district organiser about it.

"Every member must try to avoid being suspected of revolutionary connections by the Police or public.

"Every member must remember that his

individual behaviour and mistakes might lead to the ruin of the whole organisation.

"No member shall conceal anything from the district organiser as far as his public life is concerned.

"Members who will betray shall be punished either with expulsion or death.

"The authority of punishment shall rest entirely with the P. O."

When Ram Prasad was arrested in Shah-jahanpur there was found in addition to other property a letter in his handwriting Ex. P-41. This letter was under a pillow in his room and was clearly intended to be despatched to a person who was apparently Rajendra Nath Lahiri. These are the contents of the letter—

25th September 1925.

"My dear brother,

"You know that I am enjoying the *pooja* vacation, as my school has been closed. If you receive any news from Kali Babu, please inform direct to my office only call me to your place from there I shall start you need not go into detail, but to call me giving date.

"Please send the following books at the following address per registered parcel and under strong and well protected cover.

"1. India in Transition. 2. Mukti kon pathe. 3. Biplaber Bali. 4. Biplabe Chatar Samaj. 5. Bandi Jiwan Part I Hindi. 6. Hindustan Ghulam Kaise Bana and other books in English which you think proper, mostly of communistic ideas. These books will be returned after a month. We require them very urgently. Please send them by return. My school will open on the 29th instant. The address—Jagdish Chandra Johiri, Class X, Government School.

"If you intend to write me before 29 please inform directly. How Nawab Sahib is going on, please reply my previous letter in detail.

Yours,
(Sd.) Rudra."

When Manmatha Nath's house was searched in Benares there were found in a trunk in his room Exs. P-153 and P-154. Exhibit P-153 is a typewritten extract from The Revolutionary Rules. It does not contain the whole of the rules as in Ex. P-280 but contains that portion of the rules which govern the behaviour of the members. Exhibit P-154 is a translation in Hindi of Ex. 153 which runs as follows :—

Exhibit P-153.

"Rules and Regulations of the Hindustan Republican Association with necessary commentaries and annotations.

OBJECT.

"The object of the Association shall be to establish a Federated Republic of the States of India by an organised and armed revolution.

"The final form of the constitution of the Republic shall be framed and declared by the representatives of the people at the time when they will be in position to enforce their decisions.

"The basic principle of the Republic shall be universal suffrage and the abolition of all systems which make any kind of exploitation of man by man possible.

"MEMBERSHIP: Rules of—

"All members shall be recruited by D. Os. in charge of different districts.

"Every member must be ready to devote his whole time and to risk his life if necessary. He must obey the commands of the D. O. implicitly.

"He should develop his own initiative and remember that the success of the Association depends much on the resourcefulness, the initiative and the sense of duty of its individual member.

"He must behave in a manner that may (may) not prejudice the cause for which this Association stands or may not do harm directly to this organisation.

"No member shall belong to any other (secret) organisation without the consent of the D. O.

"No member shall leave his station without informing the D. O.

"Every member must remember that his individual behaviour and mistakes might lead to the ruin of the whole organisation. He must try to avoid being suspected of revolutionary connection by the Police or public.

"No member shall conceal anything from the D. O. as far as his public life is concerned.

"Member who will *betray* shall be punished either with *expulsion* or *death* (not according to the offence only which he has committed but according to the amount of danger which is apprehended from him).

"The authority of punishment shall rest entirely with the Provincial Council."

When Ram Dulare was arrested there was found in his room a post card Ex. P-5

which had been sent to him by Gopi Nath the approver while Ram Dulare Trivedi was at Allahabad attending a Rally of Boy Scouts. This post card refers to a letter from Niranjana which the writer says may be urgent but which he cannot send to him. The letter came from Bengal. On the 27th September, 1925, Ram Nath Trivedi was arrested and his house was searched. Two copies of this Yellow Leaflet were found at his house. Further there was found Ex. P-162. This was in the handwriting of Rajendra Nath Lahiri. It is called the "Twelve Points." These are the contents:—

"1. A list of non-co-operators of the district is to be prepared and their present attitude of mind is to be studied.

"2. Total population of the district, its number of villages (including the population of each village, its institutions, if any, number of rich men and their professions), *Tahsils*, *Thanas*, Roads (connecting other districts and also Roads passing from one direction to the other), Rivers, Railway lines and stations, Railway bridges and river bridges, if any, (a map is to be drawn giving all the above informations), number of hospitals, their situations.

"3. Number of Police men in each *Thana* and the *chauki* under it, number of armed and unarmed, the amount of arms and ammunitions at their disposal and the places where they are kept. Their names and villages from which they come.

"4. If there is army in the district its number, Indian and European, the amount of arms and ammunition at their disposal and the places where they are kept. The names and villages of the Indian soldiers.

"5. The names and houses of C. I. D. officers, informers, and *spies*, their activities.

"6. A list of arms in possession of persons in the district with description. If there are shops of arms and ammunition, their situation. List of arms and ammunitions, their owners, homes and houses.

"7. The number of associations, *samitis*, clubs, *sabhas*, *sanghas*, etc. The number of members in each association. Their objects and their organisers.

"8. The number of schools and colleges and their number of students. School—High, Middle, Primary, Municipal, Girl and Night Schools.

"9. The number of factories, their description of products, the number of labourers in each factory, labourers in other

capitalistic concerns too is to be taken note of.

"10. The number of Posts and Telegraph Offices, Banks, Capitalists. Their names and situations, number of persons employed in it, their names and houses.

"11. The number of motor vehicles with description, the number of boats, bullock carts and other vehicles. The names and houses of the owners of the above vehicles.

"12. The names of Government Officers and their houses. The posts they hold. The number of Europeans (civil), their names and houses."

After the arrest of Ram Nath Pande a letter arrived from him which was opened by Rai Bahadur J. K. Mukerji, Deputy Superintendent of Police. This letter is Ex P-43. These are the contents:—

Shahjahanpur,
26th September.

"Dear brother,

"Rudra's (R. P.) house has been searched and he is arrested this morning. Many papers and documents, lists of name addresses including the address of this letter are found. A letter to you asking for the following books is taken by the Police.

"1. India in transition, 2. Mukti Kon Pathe, 3. Biplab Bali, etc.

"Be careful.

(Sd.) Indu."

Indu Bhushan Mittra admits that this letter is in his handwriting. Indu Bhushan has given evidence explaining how he came to send the letter. He says that he was present at the time of Ram Prasad's arrest and that Ram Prasad had communicated to him unobserved by the Police Officers that he was to warn the intended recipient of Ex. P-41 and that he sent this letter accordingly.

On the 30th September, 1925, Indu Bhushan Mittra was himself arrested. Exhibit P-45, a paper in which he had written out himself a prospectus for a society which he wished to form, and a large amount of revolutionary literature were found in his house. Between the receipt of Ex. P-142 and Indu Bhushan's arrest more letters had arrived addressed to him as the Post Office of Ram Prasad and these letters had been opened by Khan Saheb Idris Ahmad and copies taken. The

letters in question were Exs. P-143, P-144 and P-145. They run as follows:—

Exhibit P-143.

"My dear friend,

"The orphan whom I intended to send for carpentry training won't be able to proceed towards the shop owing to his engagements in his house. Either you or I must go to the shop. Kali Babu the proprietor of the shop has not sent any letter as yet. As soon as he writes to start one of us must go. So please decide and reply soon. If you have no leisure I may go as I will have ample time during my long vacation.

"We are all right here quite hale and hearty.

"My love to you.

Yours,

(Sd.) Mathura Prasad."

Exhibit P-144.

"My dear brother,

"I left Moradabad in the morning and got down at Hathras in the evening to see a friend of mine. He has been suffering from malarial fever and has grown very weak. He got very angry on me because I have altogether forsaken him. It means that I did not take any work from him. He pressed me very much and I have promised him to take some work from him in near future. He hopes to get stronger within few days. I, therefore, request you to let me know 15 days beforehand the fixed date for the tournament and the exact directions in clear language as to lead him to the proper place. I hope to send two or three players at least one of whom is an expert man. He will be of a great use to you. All is well. I hope you will not forget to send an intimation to me.

Yours brotherly,

(Sd.) Brij Kishore or Brij Kishan."

Exhibit P-145.

"My dear friend,

"I received your letter to-night. Yours and Kali Babu's have arrived at the same time. He has written to reach him on 26th morning. I think you will have my letter on 24th and if you can start on the same day by mail you can arrive here the same day, and after taking his address &c., you can start on 25th morning and reach him in time.

"Owing to the importance of the business I shall wait for you up to 24th night, if you do not come by that time I shall start on 25th early in the morning. Otherwise

we shall lose the profit of the business and hope to come back auditing the books after 15 to 20 days. In the meantime if you come here please see Lalaji, Nawab, and Quicksilver to gather everything of this place. Quicksilver has some business which you will be able to know when you ask him.

"Business centres are very good according to his version and others where we shall have large profit. Mool Ram said that his time of interview has not yet arrived, he expects the time to be at least after 15 to 20 days.

"Kartick is the usual time he said. He has taken up an employment. Quicksilver has gone out for a fortnight. If you come here you can put up with Lalaji, a good and suitable place for you.

"I have forgotten Badri's old address. I shall ask Nawab if he knows he will write to you in time.

"The things which Vidyarthi brought have been locked up in a gentleman's room who is expected to come by the middle of next month.

"After my going if you come to this side please bring my shirt and pen from Chaudhuri.

"Old Panditji is absent from this place. Rewah gentleman has gone to his father's place and he is expected to inform everything in a short time. If he is ready Lalaji will write to you for the gun, please send it in time so that we may have them. Nawab Sahib is too kind to me now. He is all right. My grandfather is suffering from an attack of influenza you know. I am always at trouble for these old men and women in my family, for these reasons I cannot give you my time, all are alright quite hale and hearty.

Yours affectionately,

(Sd.) Mathura."

It is to be noted that none of these letters reached Ram Prasad for the following reasons. They were not delivered to Indu Bhushan owing to the closing of the school for the Dusehra holidays until after Ram Prasad had been arrested. Exhibit P-143 and Ex. P-145 are shown by general evidence to have been sent by Rajendra Nath Lahiri. As will be seen later Rajendra Nath Lahiri was subsequently arrested in Calcutta in a house which was being used as a Bomb factory. Exhibit P-143 would show that Rajendra Nath Lahiri had intended to send some

man unknown to Calcutta to train in bomb making. As this man was unable to go he wrote to Ram Prasad that either he or Rajendra Nath should go. As Ram Prasad was not able to answer the letter Rajendra Nath went. Exhibit P-145 contains two passages of importance. One of them brings the letter home to Rajendra Nath Lahiri. That is the passage "After my going if you come to this side please bring my shirt and pen from Chaudhuri." We have already noted that when Govind Charan Kar (known as D. N. Chaudhuri) was arrested he was found in possession of a fountain pen and there is evidence to which we shall advert later which proves that this fountain pen was the property of Rajendra Nath Lahiri. The other important passage is "The things which Vidyarthi brought had been locked in a gentleman's room who was expected to come by the middle of the next month." It would be seen that the "things" in question were two rifles and the handle of an entrenching tool which were found locked up in a room which had been taken by Raj Kumar Sinha. After the arrest of Indu Bhushan Mitra a letter arrived addressed to him which was taken by Khan Sahib Idris Ahmad and handed over to the Police. This letter is Ex. P-147. It is as follows:—

Exhibit P-147.

"My dear brother,
 "Arrived here safely. Don't be anxious for me. I am enjoying sound health. The progress of this place is daily increasing. I have made connection with other college students. I will reach to my destination within this week. Sir, you will have to send for me ten rupees more after reaching there. Just now reply by the following address, kindly tell my best compliments to all my friends.

Yours as ever,
 (Sd.) Narendra."

Chanda,
 1st October 1925.
 On the back,
 "My address:—

C/o M. S. Khattri,
 Cloth Merchant,
 Chanda."

This letter has been proved to be in the handwriting of Ram Kishan Khattri, appellant. It further shows that Ram Kishan used to write under the name of Narendra and thereby connects Ram Kishan with

Ex. P-140 and Ex. P-142. On the 31st October, 1925, Raj Kumar Sinha was arrested in Cawnpore. At the time of his arrest he scribbled off four letters in Bengali of which the Police took possession. These are they:—

Exhibit P-309-A.

Dated 31st October 1925.

"My dear Modak,
 "I am going. When I write this letter our house is being searched. My brother will come to you with this letter. You will make him understand everything about my room. I think it is best to have the room emptied now. I have Rs. 10 with Prahlad Das. You will get every information from Kiranda. Please take care, no article is damaged or lost. My brother will stay there for a day or two. My mind is very much disturbed about my room there. I shall remain extremely anxious until I get news about it. Now farewell.

Raj Kumar."

Exhibit P-309-B.

Dated 31st October 1925.

"Brother Sushil,
 "All on a sudden to-day I have to go away from your midst. If I say I am going to Jail I think you will be astonished. But it is a fact, I am going to Jail, why, even that I do not know. Well don't think your Raju is very anxious on that account. My only anxiety is that at home mother will be worried to some extent. If you can manage, please come to Cawnpore and console mother a bit.
 (Two lines scratched out.)

Please accept my regards.

(Sd.) Raj Kumar."

Exhibit P-309-C.

Dated 31st October 1925.

"To all my friends,
 "Brothers. All on a sudden to-day I have to go away from your midst, why probably you know.

Exhibit P-309-D.

Dated 31st October 1925.

"To all my friends,
 "Brothers to-day all on a sudden, I have to go away from your midst. I do not know when I shall meet you again. Accept my love, all of you.

"Brothers. Do not forget your friend.
 Farewell then.

Raj Kumar."

Before his arrest in Cawnpore the Police had searched a room in Benares which he had taken on rent and left locked up. Their attention had been drawn to this room by the passage in the letter Ex. P-145 as to the things brought by Vidyarthi. In this room were found a Sherwood rifle and a Winchester rifle and the handle of a military entrenching tool.

Ram Kishan Khattri had been previously arrested in Poona on the 18th October, 1925.

The warrant for the arrest of Rajendra Nath was unserved. His whereabouts were unknown. On the 10th November, 1925, he was, however, arrested in Calcutta, in a house known as Dakshineshwar House. He was arrested at 5-30 A.M. He was in the house between the door and the staircase leading to the roof. The Police had gone to search the house for suspects in the Train dacoity case. They had not suspected that the house itself was a centre of revolutionary activities. When the house was searched there were found in it a live bomb, a cast-iron shell resembling a mill's grenade, a loaded revolver, a pistol, cartridges, gun powder, explosive chemicals and there were also found certain masks. Rajendra Nath Lahiri is proved to have been convicted in respect of the discovery of these explosives. The judgments convicting him have been placed upon the record. We consider that we should not use these judgments against him in this case. We are entitled to use and do use the fact that he was arrested in this house in which there were a large number of explosives. The house may fairly be called a Bomb Factory. But we have not considered the judgments against him as in our opinion, their consideration would have taken us into matters unconnected with the case before us.

On the 2nd November, 1925, there occurred an explosion in Allahabad. Bhupendra Nath Sanyal, a younger brother of Sachindra Nath Sanyal, was then a student in Allahabad. He has been convicted in this case and has not appealed. The evidence in respect of this explosion is that Bhupendra Nath Sanyal had been inciting some of his friends towards the revolutionary party and that taking some of his friends out for a walk one day he had shown them explosives. He gave some of these explosives to a friend to carry and while they were walking there was an accident and his friend

was severely burnt. On the 11th December, 1925, Parnawesh Kumar Chatterji was arrested in Jubbulpore. Two important drafts were discovered in his possession. These drafts were Ex. P-166 and Ex. P-167. They are also variations of the revolutionary rules (The Yellow Leaflet) There is an important variation in Ex. P-166 for, whereas Ex. P-280 states that funds, should be collected generally by means of voluntary subscription and occasionally by contributions exacted by force, Ex. P-166 states "funds should be collected generally by means of voluntary subscription and occasionally by robberies, i. e., when subscriptions are not coming or a large sum of money is required instantly which cannot be had by voluntary subscription." Exhibit P-166 and and Ex. P-167 are for the most part typewritten. There are some interlineations in handwriting. There was also discovered in the possession of Parnawesh Kumar Chatterji a Corona Typewriter. We are satisfied that Ex. P-153, Ex. P-166 and Ex. P-167 were all typewritten from this Corona Typewriter. The connection between Manmatha Nath and Parnawesh Kumar Chatterji is further shown by the fact that Ex. P-171, the post card in the handwriting of Manmatha Nath Gupta, was found at the time of the search in the possession of Parnawesh Kumar Chatterji.

On the 11th of December, 1925, Bhola Nath handed over to Police Officers a trunk which had been left with him by Banwari Lal. In this trunk were a rifle, a pistol and some cartridges. Banwari Lal was arrested on the 12th December, 1925.

Makundi Lal was arrested on the 6th January, 1926.

The remaining evidence as to the existence of the general conspiracy is partly in the evidence of the approvers and accomplices who have been already mentioned, partly in the evidence of others and partly in the evidence of corroborating witnesses. We have already referred to the evidence of Kunwar Bahadur. He gives evidence which connects Rajendra Nath Lahiri with Banwari Lal. Jagdish Chandra is an important witness. He is a youth who lives opposite to Ram Prasad's house in Shah-jahanpur. Ram Prasad approached him and lent him books of a subversive nature, but the witness had not joined the Revolutionary Society at the time that Ram Prasad was arrested. Ram Prasad undoubtedly hoped that he would join, as we find that in

the letter Ex. P-41 Ram Prasad suggested that letters could be sent to him to the care of this youth. Jagdish Chandra has deposed that he used to see Ashfaquallah and Prem Kishan Khanna entering Ram Prasad's house and that after they had entered the house the doors used to be locked. Ram Charan lived in the house of Benarsi Lal in Shahjahanpur. He deposed to having seen Manmatha Nath Gupta and Ram Kishan Khattri visiting Banarsi Lal. Gauri Shankar is a priest in a temple in Shahjahanpur. He deposed to having seen Manmatha Nath Gupta and Ram Kishan Khattri in the company of Banarsi Lal. Ram Lal is a Shahjahanpur man who was in charge of what is known as a Tikasar. This is a rest house. He deposed to Manmatha Nath Gupta having stayed in the rest house.

In order to connect Govind Charan Kar with the conspiracy Mahesh Narain Sinha was called to corroborate Jadu Nath Sen. He is a shorthand writer who at one time lived in the Rameshwar Hindu Hotel. Govind Charan Kar approached him, but did not succeed in enlisting him as a member of the Revolutionary party. He has deposed to having seen Banwari Lal in the company of Govind Charan Kar. Kunwar Bahadur's evidence connecting Rajendra Nath Lahiri with Banwari Lal is corroborated by Dwarka Prasad. The evidence showing the connection of Bhupendra Nath Sanyal with the conspiracy is mainly that of Ram Chandra Chatterji, Gopi Pada Shastri and Rishi Kesh Bhattacharji.

We now come to the evidence as to the dacoities. The first dacoity was the Bamrauli dacoity which was committed on the 25th December, 1924. Bamrauli is a large village about four or five miles from the Zindpura Railway Station on the metre gauge line between Shahjahanpur and Pilibhit. Zindpura is nineteen miles from Shahjahanpur. Bamrauli is a place of sufficient importance to be mentioned in the Gazetteer of the Pilibhit District. It was originally a small town but is not as prosperous or as populated as it was in former days. The population is, however, still more than two thousand and it is not a place so small as to justify the conclusion that every inhabitant of Bamrauli would know every other inhabitant. The evidence as to the commission of the dacoity in Bamrauli is very strong. The principal witness is Baldeo Prasad, a man on whose house the dacoity

was committed. Other witnesses who may be mentioned as proving the commission of the dacoity are Lalta Prasad, who lives next door to Baldeo Prasad, Jagannath, son of Baldeo Prasad, and Kalka Prasad and Kanhai who came to the scene, while the dacoity was being committed. Ram Dayal, the *chaukidar* of the village, did not approach the scene closely. He made the first report of the occurrence of the dacoity. This is Ex. P-388. He had seen the attack from some little distance. His report ends with the words "some times more light is visible on the roof and in the house as if fire is lighted."

The evidence in support of the conclusion that this dacoity was committed by members of the revolutionary conspiracy and in pursuance of the object of the conspiracy is as follows:—

It is proved by the evidence of Sub-Inspector Chatter Singh that the following articles were found on the scene of the dacoity:

Seven '300 empty metal cartridge cases bearing the mark on the base

D W M

K 403 K,

Five empty '450 cartridge cases,

Two loaded '450 cartridges intact,

One '450 loaded cartridge misfired.

The significance of the discovery is this. Dacoities are not infrequent in the United Provinces. Dacoities in which fire-arms are used form the minority. As the criminals who commit dacoities are usually villagers, and as such villagers cannot usually obtain access to small bore rifled fire-arms and would have great difficulty in obtaining ammunition for small bore rifled fire-arms, it is almost unknown for such fire-arms to be used in the commission of dacoities in this Province. Here the discovery of these cartridges and empty cartridge cases on the scene of the dacoity indicate that small bore rifled fire-arms were used and this fact is very significant. What is even more significant is that seven empty cartridge cases were found of the exact make which had been purchased by Ram Prasad on the 7th August, 1924, from P. N. Biswas & Co., in Cownpore. The cartridges of this manufacture were not cartridges which it was easy to procure in the United Provinces or anywhere else in India. They were of special manufacture by a German firm and were not stocked in large quantities.

Certain of the men who committed the dacoity were considered by witnesses from their appearance not to be villagers but townsmen. Baldeo Prasad has deposed that some of the dacoits spoke in the language of villagers and some in the language of townsmen and that the townsmen wore *khaki* clothes with English shaped shoes and in some cases short knicker bockers and *puttees*. Lalta Prasad has deposed that he also considered some of the dacoits to be townsmen and Kalka Prasad stated that that was also the result of his observation. He said he knew the difference between villagers and townsmen from their clothes and from their method of talking and the method in which they cut their hair.

The dacoits used lights of an unusual kind at the time they committed the dacoity. Baldeo Prasad deposed that something was turned on Mohan Lal which looked like a candle and gave a great light. Lalta Prasad deposed that the "candle things" which the dacoits lighted suddenly, lighted up without matches. Kalka Prasad deposed that the dacoits had a thing which they lighted and that the best light was the light which they had. Kanhai deposed that the dacoits had lights which gave at times more light and gave at times less. We have already noted the passage in the first report in which the *chaukidar* at the very commencement said that sometimes more light is visible on the roof and in the house as if fire is lighted. These villagers were persons who had never been in a position to see an electric torch. The description which they give of the light used by the dacoits is a fairly accurate description of an electric torch. Banarsi deposed that an electric torch was used in the Bichpuri dacoity.

We have already adverted to Banarsi Lal's evidence in which he states that shortly after Christmas 1924 Ram Prasad gave him ornaments of silver and gold to melt. We have in evidence Ram Prasad's accounts with the Shahjahanpur branch of the Allahabad Bank. The copies of the accounts are Exs. P-191 and P-192. These accounts show that although Ram Prasad had paid nothing in cash into his private account between the 22nd of May, 1924, and Christmas 1924, he paid in on the 29th December Rs. 100 in cash, on the 2nd January, 1925, through Deokinandan Rs. 100 in cash, and on the 5th January, 1925, Rs. 550 in cash.

Finally we have found in this case that Raushan Singh participated in the com-

mission of this dacoity and we have found in Ashfaqullah's Appeal No. 380 of 1927, (which we are deciding with these appeals) that Ashfaqullah also took part in the commission of this dacoity.

We now come to the evidence in respect of the Bichpuri dacoity which was committed on the 9th March, 1925. The evidence as to the commission of this dacoity is again overwhelming. We need only refer to the evidence of Toti Kurmi, the man upon whose house the dacoity was committed, the evidence of his brother Behari, who was present at the time that it was committed, and the evidence of a woman called Rani who was present at the time that it was committed.

The evidence to show that this dacoity was committed by a gang which included some of the conspirators and was committed in pursuance of the objects of the conspiracy is as follows:—

Banarsi Lal has deposed that he himself took part in the commission of this dacoity. He deposed that Ram Prasad had told him that a dacoity would have to be committed as funds were required. When Banarsi Lal asked him what had become of the money which had been obtained from the sale of the melted ornaments, Ram Prasad replied that all that had been spent on printing copies of the "Revolutionary." Banarsi Lal continued that he agreed to join and that he with Ram Prasad, Ashfaqullah, Manmatha Nath Gupta, Ram Kishan Khattri and others went by train from Shahjahanpur to the Sherganj Railway Station which is on the metre gauge Railway between Shahjahanpur and Pilibhit. Other men also accompanied them. They descended at Sherganj Railway Station where they met other persons ten or twelve of whom were local bad characters who had been recruited to assist in the commission of the dacoity. The intention of the gang was originally to commit a dacoity on the house of a man in a village other than Bichpuri. When the gang approached that house it was found that a large party was taking place and that many people were collected. It was thought too dangerous to commit a dacoity on that house, so at the suggestion of one of the bad characters a move was made to Bichpuri village and the house of Toti Kurmi was attacked and robbed. Banarsi Lal's evidence has been corroborated, as will be seen later. We need only add at present to show the connection of the dacoity with the re-

volutionary conspiracy that we have found in these appeals that Ram Prasad, Manmatha Nath Gupta and Ram Kishan Khattri participated in the commission of this dacoity and have found in Appeal No. 380 of 1927 that Ashfaquallah also participated in its commission.

We now come to the Dwarakapur dacoity which was committed on the 24th May, 1925. The evidence of Sheoratan, the man on whose house this dacoity was committed, corroborated as it is by the evidence of other witnesses, establishes absolutely the fact of its commission. Although none of the appellants have been convicted of participation in this dacoity, no one having been identified, there is evidence which shows that it was committed in pursuance of the revolutionary conspiracy. It is proved that there were discovered on the scene of the dacoity :—

One loaded Mauser cartridge of
D W M
the K K mark,
403

One empty cartridge of the same pattern,
One misfired 300 cartridge of K. B. make,
One empty cartridge, 300 of G. G. & Co.,
763,

One empty cartridge of the same make, and
One empty fired cartridge 765 of the
D W M
mark K K

479-A

There was also found the head of a military entrenching tool. The head is of the usual pattern, one side being capable of use as a pick and the other as spade or shovel. The dacoits had used this tool in order to dig up the floors and walls to discover the property. It will be remembered that in the locked room of Raj Kumar Sinha there was found a handle. Mr. Horton tried the handle to see if it would fit this head. It fitted perfectly. We have made the same test and we find that the handle and the head are made to fit one another. It is true that such military entrenching tools can be procured fairly easily in India since the War, as they were issued in very large numbers during the War, but the fact is nevertheless noticeable.

We now come to the Train dacoity which was committed on the 9th August, 1925. There is a mass of evidence to prove the commission of this dacoity, and it is established beyond doubt that it was committed.

It is only necessary to refer to the evidence of Jagannath Prasad who was a guard on the train. The murder of Ahmad Ali is proved by the evidence of Mirza Ahmad Shah, Saiyid Jan, and Police Constable Lachhman Ram.

The evidence to show that this dacoity was committed by the members of the conspiracy and in pursuance of the objects of the conspiracy is as follows :—

Banwari Lal in his retracted but subsequently repeated confession has deposed plainly as to having taken part in the commission of the dacoity and as to a large number of the other conspirators having taken part in the commission of the dacoity and as to the dacoity having been committed in pursuance of the objects of the revolutionary conspiracy. There is the following other evidence :—

Radhe Lal is the manager of the Ohhedi Lal Dharamshala in the Aminabad quarter of Lucknow. This is a rest house for the use of persons making a temporary stay in Lucknow. Such persons have to sign a visitor's register. Radhe Lal has proved that on the 7th of August, 1925, a party of six males stayed at the Dharamshala. They left on the 8th. One of the members signed in the register under the heading of the names and description of the party, "Din Dayal son of Chandra Manohar, caste Brahman, of Moolganj, Cawnpore" accompanied by five boys. Object of visit "For education." This entry is Ex. P-476-B. Later on on the 8th the same party returned and the same man made a similar entry at Ex. P-476-A. They did not return after the 9th. We find it proved that both these entries were in the handwriting of Ram Prasad.

Alamnagar Railway Station, which is on the broad gauge line of the East Indian Railway, is three miles from Lucknow Central Railway Station. Kakori Railway Station is five miles further on. Both Alamnagar and Kakori are within easy access of Lucknow City. Public conveyances which can be procured for hire ply between Lucknow and Kakori and Lucknow and Alamnagar. There are metalled roads to both places. On the 8th of August, 1925, Mendu Lal, who is employed at Alamnagar Railway Station, and Baiju, who is a porter at the Alamnagar Railway Station, deposed that three Indians of a respectable class who were wearing European clothes came to the

Railway Station and entered into conversation with the Station staff at sometime between 7-30 P. M. and 8 P. M. His evidence is corroborated by Sital Prasad, Assistant Station Master. Kallan, an *ekka* driver, was that evening at Alamnagar Station looking for passengers. He deposed that three Indians who were wearing European clothes came to him at the Alamnagar Station and asked him to drive them to the *chauk*, a central part of Lucknow City. He agreed to drive but asked for a rupee as his fare. They offered him six annas and as they refused to give more he refused to take them. He has identified these three men as Ram Prasad, Banwari Lal and Suresh Chandra Bhattacharji. After Kallan refused to take the men he drove his empty *ekka* towards Lucknow. On the way he passed Police Constable Ram Sunder Singh who was patrolling on the road. He told him that he did not like the looks of the three men who had tried to engage his *ekka* and went on his way. Police Constable Ram Sunder Singh has deposed that later on he saw eight or ten men going down the road. He asked them who they were and where they were going. They said that they were medical students at the King George's Medical College, Lucknow. He identified Banwari Lal as one of those men. It would appear from this that the three men in question had been joined by five others.

There are two villagers Desi and Jodha of Amethia which is close to Kakori. They have given evidence of seeing young Indians in European clothes in the precincts of Amethia the day before the dacoity. They are, however, uncertain as to the date.

We now come to the events of the 9th August, 1925. Three boys Badlu, Kalwa and Sitalwa of Amethia village were grazing cattle about a mile from the Kakori Railway Station when they observed ten or twelve Indians collected near a bridge who were evidently endeavouring to keep their presence concealed. They were seen at about 2 P. M. They stayed till about 4 P. M. moving from one place to another and then went away in the direction of Kakori.

Sarju Prasad is the manager of the Kashmiri Hindu Hotel in the Aminabad quarter of Lucknow. This hotel is about two hundred yards distant from the Ramshewar Hindu Hotel and a little over a hundred

yards from the Chhedi Lal Dharamshala. On the 10th August, a man came to the Kashmiri Hindu Hotel and registered his name as "Banarsi Lal Agarwala of Shahjahanpur Katia." He stated that he was visiting Lucknow for treatment. He arrived at 8 A. M. and went away after a day or so. The entry is Ex. P-26. It is clearly proved that Banarsi Lal was not in Lucknow. The entry in question is proved to be in the handwriting of Makundi Lal appellant.

There is internal evidence that the dacoits were fully acquainted with the fact that money would be found in a safe of a particular make and that they came equipped with tools capable of forcing it. The safe in question is of a standard pattern. These safes are made by the East Indian Railway Company in their own workshops in Lucknow. It weighs something over two hundred weight, and a certain amount of skill was necessary to heave it from the brakevan on to the permanent way. There were recovered on the spot two pairs of blacksmith's tongs, two cold chisels and one heavy axe complete with a head which weighs over seven lbs. and one axe head in a broken shaft which weighs five lbs. The appearance of the safe shows that the persons who were trying to open it had cut certain rivets and forced other rivets in. They were not able to remove all the rivets holding the lock. They then prised the metal door open and in so doing forced a portion of it back. The method adopted was clearly by the use of cold chisels held in the tongs and by the hammering of them in and by prising using the chisels or the axe edges as wedges. The dacoits may have had other tools apart from those which they left behind. It is noticeable to show the skill with which the crime was committed that this heavy safe was removed from the brake and forced open in about half an hour. The dacoits made clear from the commencement that their intention was to rob State property and not to rob private persons. Banwari Lal's confession of course makes the whole matter clear if accepted as we shall show later. It is amply corroborated in material particulars. Banarsi Lal in his evidence deposed that after the commission of the Train dacoity he saw Ashfaquallah who told him that the dacoity had been committed by himself and other members of the gang

This is not very important in view of the other evidence upon the point. The account given by Banarsi Lal as to the details of the dacoity differs on material points from the account revealed by the evidence which we have considered. It does not, however, follow in any way either that Ashfaqullah gave Banarsi Lal a correct account of the manner in which the dacoity was committed or that Banarsi Lal remembered the details accurately.

We now come to the discovery of property on the scene of the dacoity. There were found one loaded brass cartridge and 11 empty brass cartridge cases of

D W M
the K K pattern. There were found
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six empty 300 cartridge cases of a mark R. M. S. and two empty 300 cartridge cases of mark 1914. Finally we have found upon the evidence in these appeals that Ram Prasad, Rajendra Nath Lahiri, Manmatha Nath Gupta, Govind Charan Kar, Makundi Lal, Raj Kumar Sinha and Banwari Lal participated in the commission of this dacoity and we have found in Appeal No 380 of 1927 that Ashfaqullah also participated in the commission of this dacoity.

We now come to the evidence corroborating the accomplices in respect of the general conspiracy. The first man whose evidence we shall consider is Banarsi Lal. We find his evidence as to the organization of the conspiracy and specially as to the participation of Jogesh Chandra Chatterji in the conspiracy corroborated strongly by the discovery of Ex. P-198 in the possession of Jogesh Chandra Chatterji at the time of his arrest. It was through Banarsi Lal that the Police obtained information that copies of the "Revolutionary" had been posted from Benares. As we have already seen the evidence of the Sub-Post Master Kalka Prasad and the evidence of the entries in the Post Office registers and other evidence establish the same fact. He deposed that he posted copies of the "Revolutionary" from certain places. Post marks upon certain covers corroborate this statement. He deposed that he rented a house in which he collected members of the party who had assembled before the Train dacoity. He is corroborated here by Kishan Lal, the owner of the house. He first gave the clue to the Police that certain members of the

party had stayed in a Dharamshala near the Amin-ud-doula Park in Aminabad. He did not give the name of that Dharamshala. Banwari Lal revealed the name. The Dharamshala was the Dharamshala of Chhedi Lal where it is established from the entries in the register that Ram Prasad stayed with five other persons giving his name as Din Dayal. He informed the Police Authorities that his own name had been entered in the register of the Kashmiri Hotel. It is proved that his name was so entered and that the entry was in the handwriting of Makundi Lal. Until he gave the Police information no one had suspected that the Bamrauli dacoity was the work of the revolutionary gang. It was on this information that the Police were able to work out the remaining evidence in connection with the Bamrauli dacoity. Until he gave information no one had suspected that the Bichpuri dacoity was the work of the revolutionary gang. The fact that he took part in the Bichpuri dacoity is established very strongly by the evidence of Saiyid Ainuddin, the Special Magistrate. When he stated that he had taken part in the Bichpuri dacoity Saiyid Ainuddin took him on the 10th November, 1925, to Bichpuri. Banarsi Lal guided him from Sherganj to Bichpuri, showed him on the way the house he had stated the dacoits had originally intended to rob, and after the arrival at Bichpuri communicated distinguishing points in the locality which could not possibly have been known had he not taken part in the dacoity. Further he picked out the two rifles which were discovered in the room of Raj Kumar Sinha from amongst several other rifles as the rifles which had been used in the Bichpuri dacoity. He had stated in his evidence that on his return from the Bichpuri dacoity he had met a certain legal practitioner of Shahjahanpur and had travelled with him. Shiam Lal, the legal practitioner in question, has corroborated this.

In respect of Indu Bhushan Mittra the main evidence of corroboration is to be found in the contents of the letters which are proved to have passed through his hands as "post box", but in addition his evidence is strongly corroborated by the discovery of the letter Ex. P-43 which he wrote to Ram Nath as "post box" of Rajendra Nath Lahiri. His evidence is

further corroborated by the fact that a large number of revolutionary books were found in his possession and is also corroborated by the evidence of Jagdish Chandar.

The evidence of Kunwar Bahadur is corroborated by the fact that he received certain money orders from members of the revolutionary party on behalf of Banwari Lal. It is further corroborated by the fact that he signed the receipt Ex. P-61 in respect of the parcel which arrived from Benares. His evidence is also corroborated by the evidence of Bhola Nath.

The evidence of Gopi Nath is corroborated by the fact that letters and one post card from Gopi Nath to Indu Bhushan's brother were found in the house of Indu. These are Exs. P-48, P-49 and P-50. His evidence is also corroborated by the discovery in the possession of Ram Dulare of the post card Ex. P-59 sent by Gopi Nath to Ram Dulare. It is further corroborated by the fact that Suraj Bali signed Ex. P-53, the receipt for the parcel from Cawnpore, signing the receipt on behalf of Gopi Nath.

The evidence of Jadu Nath Sen is corroborated by Jagannath his Head Master and is further corroborated by the evidence of Sita Ram and Mahesh Narain Sinha.

We now come to the evidence of Banwari Lal. We do not consider that this man has disclosed all he knows and in some cases he has clearly, in our opinion, omitted to mention the names of persons whom he desired to shield, but the statements in his confession are corroborated in regard to the general conspiracy to a satisfactory extent. In respect of Jogesh Chandra Chatterji his evidence is corroborated by the discovery of Ex. P-198 in Jogesh Chandra Chatterji's possession, and also by his identification of Jogesh Chandra Chatterji, a circumstance which would be surprising if he was not telling the truth.

From the information given in his confession the following facts were discovered for the first time. All these facts were subsequently proved by outside evidence. Rajendra Nath Lahiri had sent money to him in the name of Kunwar Bahadur. Banwari Lal lived in Benares under the false name of Tara Singh. This is proved from Ex. P-480 A. Ram Prasad had been at Benares the first week of June,

when money was paid to Rajendra Nath Lahiri.

His confession in so far as it relates to the commission of the Train dacoity is corroborated by the following facts:—

(1) It was on the information that he gave that it was discovered that money order Ex. P-92 had been sent by him to Himmat Bahadur.

(2) It was on the information that he gave that it was discovered that Makundi Lal had sent a money order from Shahjahanpur to his wife.

(3) It was on the information which he gave that it was discovered that Ram Prasad had written his name as Din Dayal in the Ohhedi Lal Dharamshala register.

(4) It was on the information that he gave that it was discovered that the debris of the property stolen in the dacoity had been thrown into a well in the Victoria Park, Lucknow. The evidence upon this latter point will be found in the deposition of Inspector Govind Behari which is corroborated by the evidence of Mr. Horton. Inspector Govind Behari has deposed that a mass of articles which were of no value to the dacoits that had been stolen at the dacoity were found on the information of Banwari Lal in a well in the Victoria Park. Mr. Horton was present at the time of its discovery.

The evidence of these accomplices has accordingly been corroborated sufficiently to enable it to be considered upon its intrinsic value. We here state our conclusion as to the value of the evidence. Banarsi Lal is, in our opinion, a reliable witness. He was to a considerable extent in the secrets of the party though he was not in the inner circle. We do not consider him to be a reputable or respectable person and we are not impressed by his protestations of repentance. We consider that he has made his revelations in order to save himself; and that his frequent assertions that the methods adopted by the conspirators went against his conscience savour of hypocrisy. There is, however, this much to be said in his favour. He did his best to give information which would otherwise not have been obtained. He had nothing to gain by informing the Police that the Bamrauli and Bichpuri dacoities were the work of the conspirators. This much is clear that he did not actually take part in the Train dacoity. We consider that his action in making the confession was prob-

ably influenced by the fact that Makundi Lal had entered his (Banarsi Lal's) name in the register of the Kashmiri Hotel. It is very difficult in a case of this kind to know what the actual feelings of members of the party are to one another, and Banarsi Lal may well have been sore in respect of occurrences which we know nothing about. After a careful consideration of his evidence we accept it. He has not been broken down on any material point in the course of a very long cross-examination. He is undoubtedly a bad man but we consider that we can rely upon his evidence.

Indu Bhushan Mittra was a small boy when he was first drawn into the movement. We are not sure that he is really very penitent. We consider that his action in warning Rajendra Nath Lahiri after Ram Prasad's arrest was not consistent with a genuine determination to lead a new life. His ruling motive in making the confession was to our mind to save himself but we see no reason to distrust his evidence. He was also exposed to a lengthy cross-examination which has failed to discredit him.

Kunwar Bahadur is somewhat older than Indu. He is a young man of much the same type. He has not been broken down in cross-examination and we see no reason to distrust his evidence.

Gopi Nath is a feeble person who is nearly blind. He was never likely to have been a valuable member of any party. His evidence has not been broken down in cross-examination and we see no reason to distrust him.

Jadunath Sen appears to us to be a respectable little boy who has told the truth. Although technically an accomplice he had gone very little into the matter and we consider that his evidence requires very little corroboration. He has not been broken down in cross-examination.

We find Banwari Lal's confession in the main reliable.

We have now stated the case of the prosecution in respect of the general conspiracy and the dacoities and we now come to the case for the defence.

Not one of the eight learned Counsel who addressed the Court argued that the evidence for the prosecution had failed to establish the existence of the general conspiracy. We put the point clearly to every one of them and we asked in particular Mr. H. N. Misra who had appeared

in the Court below to discuss the prosecution evidence in respect of the general conspiracy. He addressed us on that subject for the greater part of day, but he criticised very little and did not put forward the suggestion that this evidence had failed to establish the existence of a general conspiracy. All that the learned Counsel argued was that their own respective clients were not proved to have taken part in the conspiracy. Criticism was directed to the evidence in respect of the meeting at the Vaishya Orphanage in Meerut. It was argued that the evidence of identification was unreliable, and that even if the evidence of identification were reliable, the evidence as a whole was insufficient to establish that a meeting of a revolutionary nature had taken place at Meerut.

Mr. Chatterji and Dr. J. N. Misra argued on behalf of Raushan Singh that there was not sufficient reliable evidence to justify the conclusion that the Bamrauli dacoity was the work of the conspirators. They laid great stress upon the fact that certain persons were tried after a Police inquiry by the then Sessions Judge of Pilibhit (an officer who has since retired) on a charge of complicity in the dacoity and that they had been acquitted. They endeavoured to establish from evidence given in that case that the suggestion that some of the dacoits in that dacoity were townsmen and that an electric torch had been used were subsequent additions which had found no place in the original story. They also argued that the failure to prosecute Raushan Singh in the first instance (although his name had been mentioned as one of the dacoits) showed that the dacoity was not the work of revolutionaries. It was not, however, argued that the Bichpuri, Dwarkapur and the Train dacoities were not the work of revolutionaries.

No attempt was made to meet the evidence for the prosecution in respect of those dacoities.

Our conclusions on the main evidence as to the existence of a general conspiracy are

these:— We find that it is proved overwhelmingly that a conspiracy came into being in the United Provinces in July, 1924 to deprive the King-Emperor of the Sovereignty of British India, and that the per-

sons who were controlling the conspiracy as the inner circle further conspired to commit dacoities in which fire-arms were intended to be used, in order to obtain funds with which to purchase arms and ammunition, and to carry on revolutionary propaganda. We find that the evidence clearly shows that those persons contemplated that fire-arms should be used in order to enable the dacoities to be committed effectively and with impunity, that they foresaw and realised that murder was a probable and likely consequence of those dacoities and that thus it is established that there was within the conspiracy to deprive the King-Emperor of the Sovereignty of British India a conspiracy to commit dacoities with murder.

In respect of the meeting at the Vaishya Orphanage at Meerut we find after having heard the arguments of the learned Counsel and considered the evidence for the defence, which has been produced upon the point, that certain members of the revolutionary party amongst whom were Ram Prasad, Rajendra Nath Lahiri and Suresh Chandra Bhattacharji collected at Meerut in the residential quarters of Vishun Saran Dublis in the Meerut Orphanage and there held a secret meeting taking precautions to conceal their presence. We believe the evidence of Sub-Inspector Brahma Singh and Pheru Singh whom we find to be reliable witnesses. Their identifications were in each instance supported by their picking out the man identified from a crowd in the Jail and repeating the identification in Court. The only construction which we can place upon the documentary evidence on this point is that the meeting was a pre-arranged meeting of the Revolutionary Society. We find that an attempt was made to mislead by stating that on the 13th September, 1925, the date of the meeting, there was to be an innocent meeting of a Committee of the Orphanage, whereas no such meeting was in contemplation and whereas no such meeting was held. We interpret the reference in the intercepted letters sent by Rajendra Nath Lahiri to the unknown person in Calcutta as a request to that person to join this meeting. The letter Ex. P-482 which was in the handwriting of Ram Prasad requesting the recipient to attend a meeting at the Orphanage on the 13th September 1925 of the *shradh* ceremony of their grandfather.

was a summons to this meeting in Meerut. The *shradh* ceremony amongst Hindus is a ceremony held usually annually in which surviving male relations offer oblations to the memory of deceased male ancestors. There could have been no such ceremony in which Ram Prasad and the unknown recipient of the letter could have shared and the use of the word Orphanage is very significant. We shall refer later to the incident of the Meerut meeting in connection with those of the appellants who we find participated in it.

There can be no doubt as to the fact that the Bamrauli, Bichpuri, Dwarkapur and Train dacoities were committed. The evidence that the Bichpuri and Train dacoities were committed in pursuance of the objects of the revolutionary conspiracy is very strong. We are satisfied that the Dwarkapur dacoity was also committed in pursuance of the objects of the conspiracy. That conclusion does not materially affect any of the appellants as none of them have been proved to have taken part in the commission of that dacoity and as far as we are concerned in respect to the conclusion as to conspiracy to commit dacoities with murder, it would be sufficient to establish, as has been established, that the Bichpuri and Train dacoities were committed in pursuance of the conspiracy.

We come finally to the decision as to whether the Bamrauli dacoity was committed in pursuance of the objects of the conspiracy. This point is of importance in connection with the appeal of Raushan Singh and will be considered again when we are dealing with that appeal. Here it is sufficient to note generally the arguments of Raushan Singh's learned Counsel. The fact that certain persons other than the appellants before us were tried by the Sessions Judge of Pilibhit for complicity in this dacoity and acquitted is absolutely irrelevant and immaterial. We do not propose to examine that point as there is no force in it. It is clear from the evidence that has been rightly placed before us that at the time of the trial in Pilibhit the witnesses to the dacoity did not state explicitly that any of the dacoits were townsmen and they did not make any reference to facts which would have indicated to the learned Sessions

Judge trying that case that an electric torch had been used. But these omissions in no way support the suggestion that the statements, that townsmen took part in the dacoity, and that something of the nature of an electric torch was used by the dacoits, are untrue additions to the original story. The explanation of the omissions is a simple explanation which is not creditable to the intelligence of those members of the Pilibhit District Police who took part in the original investigation. The original investigation was perfunctory and unintelligent. The first point which we have to note is that in that investigation no officer considered the circumstance that no less than seven empty '300 brass cartridge cases, five empty '450 cartridge cases and three loaded '450 cartridges were discovered on the scene of the dacoity was in any way significant. The omission to observe this point says very little for the intelligence of the officers concerned. The discovery of these articles should have been sufficient to show a Police Officer of reasonable intelligence that the Bamrauli dacoity was not an ordinary dacoity. It should have shown him that amongst the dacoits were persons who were in possession of arms such as seldom or never find their way into the hands of the ordinary miscreant who commits crimes of this nature. It should have shown him something further. Even if rifled fire-arms of '300 and '450 bore had come into the hands of ordinary dacoits the provision of ammunition for such weapons would be very difficult. Some ammunition might be stolen but ammunition of this kind rapidly deteriorates and after a certain number of years becomes unserviceable. The difficulties in the way of ordinary criminals procuring ammunition of this class are almost insuperable, so the conclusion to have been adopted by a Police man of intelligence from the discovery of these articles was that the dacoits were not ordinary criminals but men of a superior class, in other words, that they were probably, as a villager would call them, "townsmen." But not the slightest attempt was made apparently to elicit from the persons who were present at the time of the commission of the dacoity who the dacoits were.

Again although in the first report the *chaukidar* who had seen the commission of

the dacoity from some little distance had remarked on the peculiarity of the light used by the dacoits which was sometimes dim and sometimes bright, the Police responsible for the inquiry was satisfied in leaving these villagers to describe the lights used by the dacoits as "wax candles." A very slight use of the intelligence was necessary to show that wax candles would not be usually a satisfactory illuminant for the use of the dacoits in the commission of a dacoity. A villager who had never seen an electric torch and whose knowledge of artificial light used in a village (apart from the lights which he might have seen at Railway Stations and in towns) was confined to what he had seen would divide artificial lights into oil lights, torches and wax candles and what was not an oil lamp or a torch would be considered a "wax candle." Although in the investigation not a single piece of wax candle was discovered and no burnt matches were found, there was no attempt made in the examination of these village witnesses in the trial in Pilibhit to ask them as to why they believed the dacoits to have been using wax candles. We see no reason to suspect the statements made by these witnesses after an intelligent investigation had been made as to the speech, the costume and the lights used by the dacoits. In order to accept the conclusion pressed before us by Mr. Chatterji and Dr. J. N. Misra it would be necessary to find that there has been a dishonest attempt to add evidence for the purpose of this case and inasmuch as we are satisfied that the investigation of Mr. Horton and the subordinate Police Officers in this case has been scrupulously honest, we reject the argument. The failure to proceed against Raushan Singh originally in connection with the Bamrauli dacoity will be examined by us later when we come to the decision of his appeal. It is sufficient to say here that our finding is that the failure to proceed against Raushan Singh originally while it tells greatly against the Pilibhit Police Officers who investigated the case, does not tell in any way in favour of Raushan Singh. We find upon the evidence that the Bamrauli dacoity was committed in furtherance of the objects of the revolutionary party.

We now proceed to decide the appeals of the fifteen appellants separately.

1. *Ram Prasad Bismil.*

As we have already stated, this appellant is a full grown man, who up to the time of his arrest was in business in Shahjahanpur. The evidence against him in respect of the charges of conspiracy is contained largely in the evidence of Banarsi Lal and Indu Bhushan Mittra. If this evidence is sufficiently corroborated against him and believed, it shows not only that he was one of the conspirators, but that he was the provincial organiser for the Province and the head of the Shahjahanpur branch. It is unnecessary to discuss this evidence. It has been discussed already and it is a question only whether it should or should not be accepted against him. The first piece of evidence corroborating the evidence of these two accomplices is to be found in the fact (which Ram Prasad himself admits) that he purchased the fifty cartridges, to which reference has been made, on the 7th August 1924 at Cawnpore from the firm of P. N. Biswas & Co., using, in order to obtain the cartridges, the arms license of Prem Kishan Khanna and signing "Prem Kishan" in the register as the recipient of the cartridges. The corroboration further consists in the evidence that seven empty cartridge cases of this pattern were found on the scene of the Bamrauli dacoity, one empty cartridge case and one full cartridge case of this pattern were found on the scene of the Dwarikapur dacoity and eleven empty cartridge cases and one loaded cartridge of this pattern were found on the scene of the Train dacoity. He was acquitted on the charge of participation in the Bamrauli dacoity but on the evidence of Banarsi Lal, a short time after the commission of this dacoity, Ram Prasad gave Banarsi Lal ornaments to melt, and the evidence of Banarsi Lal in this respect is corroborated by the fact that Ex. P-191 Ram Prasad's private account with the Allahabad Bank at Shahjahanpur shows that shortly after the commission of the dacoity he paid in a total amount of Rs. 750 in cash into his account. The evidence that he was instrumental in circulating copies of "The Revolutionary" which is given against him by Banarsi Lal is not corroborated especially against him, but he is connected with "The Revolutionary" by the evidence of Indu Bhushan Mittra and the recognition by

Indu Bhushan Mittra of "The Revolutionary" corroborates this evidence. The corroboration of the evidence of Indu Bhushan Mittra against him is in the main found in the fact that Indu Bhushan Mittra has been proved by evidence which we believe to have been acting as "post office" for some one, and that letters were received by Indu Bhushan Mittra, the contents of which have been proved and the internal evidence of which goes to show that they were intended for Ram Prasad as Indu Bhushan states they were. The contents of these letters corroborate Banarsi Lal's statement also. We have already detailed the contents of these letters. Exhibit P-138-A had apparently come from Rajendra Nath Lahiri. It was posted at Dasasummedh, a local Post Office in Benares (Rajendra Nath Lahiri lives in Dasasummedh). It contains the passages, "You have not written about Lalaji. I am really surprised. There is no able man to represent No. 7 and methinks he is the fittest man and he has got resources in that side too. He will be able to have his assistants in a short time in that side. I proposed to him and he is ready. Now he is anxious to go to the assembly. If I do not take him with me he will be wounded, and he has been already wounded by some persons. I am now in a false position. If you do not object I shall take him too with me."

Whether this letter was or was not written by Rajendra Nath Lahiri, its contents clearly indicate that it was written by some conspirator. It is suggested that "Lalaji" was Damodar Sarup. He may or may not have been Damodar Sarup but "Lalaji" was clearly a conspirator. "The assembly" in our opinion can only mean the meeting at the Vaishya Orphanage at Meerut. Exhibit P-140 is a letter from a person who was engaged in mysterious activities in Hardwar, and who writes under the name of "Narendra." A letter has been subsequently discovered in the handwriting of Ram Kishan Khattri in which he signs his name as Narendra. It is impossible, in our opinion, to form a conclusion other than that the "Narendra" of Ex. P-140 was a conspirator who was in Hardwar. Exhibit P-141 is a letter which purports to come from the Vaishya Orphanage, Meerut, and which was signed by some one who called himself the Superin-

tendent (Supt). It refers to a meeting of the Executive Committee of the Orphanage when no such meeting was proposed and no such meeting ever took place, and requested the recipient to see that his friends put up in various Dharamshalas the place of the function having been after due deliberation fixed at the writer's own place. Exhibit P-142 is another letter from "Narendra" which is apparently arranging a meeting on the 16th September, 1925. Then there is Ex. P-143 to which we have already referred with peculiar reference to the orphan who was intended for carpentry training—a reference which we understand to mean that some person was required to go to Calcutta to study bomb manufacture. That person must either be the writer (who, in our opinion, was Rajendra Nath Lahiri) or Ram Prasad himself. The letter Ex. P-144 is also a letter written by a conspirator. It contains the passage, "I hope to send two or three players at least one of whom is an expert man." The reference can only be here to dacoits or manufacturers of bombs. Exhibit P-145, the letter from "Mathura" who on internal evidence of the letter was Rajendra Nath Lahiri is almost conclusive as to association in a revolutionary conspiracy between the writer and the recipient, and finally in this connection there is a letter Ex. P-147 received after Indu Bhushan Mittra's arrest which is proved to have been written by Ram Kishan Khattri. There is further the letter Ex. P-41 which, as we shall show afterwards, is proved to be in Ram Prasad's own handwriting which was found under the pillow at the time of his arrest. This letter was clearly intended for Rajendra Nath Lahiri being sent to Ram Nath Pande as his "post office." It commences, "You know that I am enjoying the *pūja* vacation as my school has been closed." Ram Prasad had no connection with any school. He was by trade the manager of a shop which sold silk. It continues, "If you receive any news from Kali Babu, please inform direct to my office only call me to your place from there I shall start." "Kali Babu" is clearly a revolutionary. The letter continues asking for the despatch of certain specified books some of which were of a revolutionary nature "and other books in English which you think proper, mostly of communistic ideas." It then suggested the name of

Jagdish Chandra the boy who lived opposite to him as a new "post office." There was also found in his possession a slip of paper written in Hindi, Ex. P-259, which contains the names amongst others of Ash'aqullah, Banarsi Lal and Prem Kishan. There was also found in his possession, Ex. P-260, a memorandum of accounts.

Before we come to the evidence against him contained in Ex. P-482 we note our reasons why we are satisfied that certain documents are in his handwriting. We have considered the evidence of Mr. Stott in this connection, but in this particular instance there was no necessity to obtain the assistance of a handwriting expert for the similarities are so clear that we have been able to arrive at an independent conclusion without the slightest difficulty. The prosecution had considerable trouble in discovering any piece of handwriting which could be proved unmistakably as the handwriting of Ram Prasad. After his arrest he made every effort to avoid providing specimens of his handwriting. Although while under trial he submitted a very large number of written applications, he was always careful to have them written by a person other than himself, or to write them himself in Urdu, his Urdu handwriting not being in question. He gave it as his reason for this abstention that as he had hurt his wrist in wrestling, he had been unable for many years to write English without great difficulty. The value of the statement as to his having a permanently injured wrist can best be judged by the fact that after his conviction he submitted to this Court written arguments in his defence in English in his own handwriting which printed into seventy-six pages. But while endeavouring to avoid leaving any evidence of his handwriting on the record he made one slip. While he was in custody in the Shahjahanpur Jail shortly after his arrest he sent a petition which has been proved to be in his own handwriting, dated 6th September, 1925, to the Sub-Divisional Officer, Shahjahanpur, complaining that the local Jail Authorities had put him in solitary confinement and were describing him as dangerous upon his history ticket. This is Ex. P-512. We have found on the evidence that this clearly was in his handwriting, and it is by comparison of the handwriting here with the handwriting in the questioned documents, that

we have arrived at the conclusion that Ex. P-41 and Ex. P-482 were also in his handwriting. Exhibit P-482 is the letter which was handed to Mr. Horton by an undisclosed informant. We have referred to it already. It was written by Ram Prasad to some one whom he calls Undel requesting him to be present at the *shradh* ceremony of their grandfather at the orphanage on the 13th September, 1925.

Exhibit P-601 contains some correspondence between Ram Prasad Bismil and the Allahabad Bank branch at Benares. He sent them a letter from Benares City on 2nd June, 1925, which emanated from house No. 78 Dasasumedh requesting them to direct their Shahjahanpur branch to remit Rs. 60 to the Benares branch and credit it to his account. The Bank complied and the Rs. 60 were paid at Benares. These facts are proved clearly by other evidence. The significance is in the evidence which proves that Rajendra Nath Lahiri resided at 78 Dasasumedh.

The evidence which connects Ram Prasad with the Meerut meeting is his clear identification by Sub-Inspector Brahma Singh and Pheru Singh combined with the evidence afforded by the documents to which we have already referred. There is further general evidence of corroboration against Ram Prasad in the evidence of Jagdish Chandra.

We now come to the Bichpuri and the Train dacoities in respect of which he has been convicted. In regard to the Bichpuri dacoity the evidence of Banarsi Lal is conclusive to prove Ram Prasad's complicity in the dacoity, if it is properly corroborated and believed. We need go no further in respect of the corroboration than the evidence of Behari, the victim of the dacoity, and Lila who was grazing cattle in the neighbourhood of Bichpuri on the night of the dacoity and saw certain men collected there. Behari picked Ram Prasad out of a crowd in Jail identification proceedings as one of the men who took part in the dacoity. He identified him again in Court. We have already detailed the circumstances in which these Jail identifications were held, and we need not repeat our remarks upon them here or elsewhere. Lila similarly picked Ram Prasad out of a crowd in the Jail but was unable to repeat the identification in Court.

In respect of the Train dacoity there is first the evidence of Banarsi Lal, which proves the collection of some of the dacoits in Shahjahanpur, and the arrangements made by Ram Prasad for their entertainment. Banarsi Lal took a house for the use of the conspirators. He is corroborated on this point by Kishan Lal.

We have next the evidence of Radhe Lal who proves that a certain person with five others stayed at the Ohhedilal Dharamshala in Lucknow from the 7th to the 8th of August, 1925, and again from the 8th to the 9th of August, 1925, and that the head of the party signed his name in the register at places Ex. 476 B and Ex. 476-A as Din Dayal of Cawnpore. It is proved to our satisfaction that the handwriting of these two entries is the handwriting of Ram Prasad. Kallan the *ekka* driver picked Ram Prasad out of a crowd in the Jail as one of the men whom he had seen close to the Kakori Station on the 8th of August, 1925, the day before the dacoity. He repeated the identification in Court. Badlu, one of the boys who were grazing cattle in Amethia on the day of the dacoity, identified Ram Prasad in the Jail as one of the men whom he had seen in the neighbourhood in suspicious circumstances. He was unable to repeat this identification in Court.

In addition there is against Ram Prasad the important evidence of a man called Abdul Wadud. We have not referred before to Abdul Wadud. He is a vendor of aerated waters and ice who travels on certain trains selling his goods. At the time of the Train dacoity he was in No. 8 Down and when the train came to a standstill he got out of his compartment to see what had happened. He was in a good position to identify persons who were present among the dacoits, as there was light in the sky at the time, and as a man who is accustomed to travelling by Railway trains, and whose work would make him somewhat more observant as to the features of the people he sees than many others, he was able to give evidence of identification somewhat more extensively than that given by other people. When we say that his work would make him more observant, we mean this. A seller of aerated waters and ice on a Railway train is continually going from one carriage to another sometimes in a very bad light, leaving glasses, coming back to collect them and for payment and seeing his customers from time to time.

Such a man would in the nature of his work be likely to become observant. He has identified altogether eight persons as having taken part in the dacoity. He made four identifications, which were not accepted, three of men who clearly had not taken part in the dacoity, and one of a man who, although he had not taken part in the dacoity, had a strong facial resemblance to Rajendra Nath Lahiri. He identified Ram Prasad as one of the dacoits. He picked him out of a crowd in the Jail, and repeated his identification in Court.

In addition there is against Ram Prasad the fact that Banwari Lal has implicated him as one of the ring-leaders in the dacoity. There is also the evidence of Sri Ram Pande, the Sub-Agent of the Allahabad Bank at Shahjahanpur to the effect that shortly after the Train dacoity Ram Prasad was in possession of funds. This is the evidence against Ram Prasad.

We now come to his defence. His defence before Mr. Hamilton, when it was not confined to accusations against the integrity of the Special Sessions Judge, the prosecuting Counsel and the Police, consisted mainly in a denial of nearly everything. Before the Committing Magistrate he refused to make any statement. Before Mr. Hamilton he made a full statement. He admitted that he had purchased the cartridges in Cawnpore on behalf of Prem Kishan. He said he purchased them to oblige Prem Kishan. That was all the explanation he offered on that point. He attacked Banarsi Lal upon the following points. He said that Banarsi Lal was Secretary of the Congress Committee and that he was Auditor and that in 1921 Banarsi Lal had taken certain English clothes belonging to Thakur Indra Bikram Singh to burn, as a mark of disapproval of the use of cloth other than Indian made cloth, and that Banarsi Lal had misappropriated certain of these clothes and used them for his own purposes. He further stated that Banarsi Lal had gone to the Ahmedabad Congress and there stolen a bucket and a lantern. He stated that Banarsi Lal had committed other acts of dishonesty and that he was also a drunkard. He said that he had made these accusations to the members of the Congress party with the result that Banarsi Lal had lost his reputation. He went on to say that Banarsi Lal had formed a gang of dacoits, and that

he was committing dacoities on his own account. He said that for this reason he and Banarsi Lal were enemies. In respect of Indu Bhushan Mittra the case that he put forward was that Indu Bhushan Mittra's father was a Headmaster of a Government School and a Government spy. In respect of Banwari Lal he had only to say that Banwari Lal was acting under the orders of the Police. He made a violent attack upon the Criminal Investigation Department, and said that the reason why he had been implicated was because he had been writing to the newspapers suggesting that the Criminal Investigation Department were fabricating false cases throughout the Province, in order to prevent a reduction in their personnel. His case was that they were afraid that their number was going to be reduced, so they were bringing all the false cases that they could think of. He said that the Criminal Investigation Department in revenge for his attacks upon them has implicated him in a false case and names as his arch enemy a leading gentleman in the Department Khan Bahadur Tasadduq Husain. He stated that Mr. Horton was honest as far as he went, but that he was too stupid to be able to get at the truth. He concluded that he had no hopes of a fair trial in the Court of Mr. Hamilton. In respect of his handwriting his case was that he had never written the petition which was sent from the Shahjahanpur Jail. He stated that the Jailor had substituted for the petition which he had written a petition which was forged by a person unknown. When he appealed from Jail to this Court he first, as we have said already, requested that Pt. Gobind Ballabh Pant should be appointed to appear for him, or that in the alternative he should be allowed to argue his appeal himself. On the 13th May, 1927, he applied to this Court for various copies. On the 4th June, 1927, he sent an application stating that he had received the copies. On the 28th June, 1927, he applied to this Court from the District Jail, Gorakhpur requesting that he should be transferred to the Lucknow Jail. On the 7th July, 1927, he sent an application requesting permission to argue his appeal in person. On the 18th July, 1927, he applied to this Court, objecting to the appointment of Mr. L. S. Misra as his Counsel and demanding that he should be allowed to argue his appeal in person. A Bench of this Court

refused his application to be permitted to argue his appeal in person, and informed him that he would be represented by Mr. L. S. Misra. On the 20th July, 1927, he submitted another application adding to it arguments which printed into seventy-six pages. On 21st July, 1927, he applied again to this Court stating that he had no complaints against the good faith and honesty of Mr. L. S. Misra, but that the time for preparation of the case was so short that no lawyer could go through the record of the case during that period. There was no justification for the latter remark. On 25th July, 1927, he put in an application to the effect that he now accepted Mr. L. S. Misra as his Advocate and left the conduct of the appeal in his hands. He had previously instructed Mr. L. S. Misra. On 6th August, 1927, he submitted a further petition in which, while not withdrawing his defence in any way, he quoted extracts from certain books on eugenics and other subjects with the object of showing that in no circumstances should he be sentenced to capital punishment. He uses these words in this application:

"Therefore, your humble petitioner prays for mercy only on the ground that he is repentant. This sense of repentance he had shown on 5th June, 1927, by submitting a memorial to His Excellency the Governor-in-Council for the United Provinces of Agra and Oudh. The copy of this memorial he might have sent to the Hon'ble Court but he is afraid that if it is submitted before a Court of Justice it will become a public document which will not be proper at this stage."

He has since sent other petitions but they do not add materially to the case. Before the learned Special Sessions Judge, he withdrew all his witnesses. We are unable to reconcile the various contradictions, inaccuracies and irrelevancies which permeate his private defence and, ignoring his conduct, and substituting for his own arguments the arguments that his learned Counsel Mr. L. S. Misra has advanced on his behalf we proceed to decide the appeal. Mr. L. S. Misra devoted a considerable period to a close criticism of the evidence against his client. He admitted that he was unable to justify the personal attack upon Banarsi Lal by anything which had been elicited in cross-examination of the witnesses. It is obvious that,

if Banarsi Lal had been guilty of the conduct of which Ram Prasad alleged that he was guilty, there would have been no difficulty in obtaining evidence to prove such conduct. Ram Prasad has made an additional allegation, that he has been implicated in this case because, as a zealous supporter of the Hindu religion, he has incurred the enmity of Muhammadans. There is so foundation for the allegation that he has incurred the enmity of Muhammadans, but it is clear upon his own showing that he is a man who was largely connected with Indian politics and that his sympathies were on the side of the Hindus. Such being the case, he would have had no difficulty, if it were true, in proving that Banarsi Lal had been a traitor to his own side. He made no attempt, however, to prove this. After stating at first that he desired to call a large number of witnesses, he eventually withdrew them and he has no grievance as to the fact that his witnesses were not produced, for by his own act they were not produced. His personal attacks upon Indu Bhushan Mittra, Banwari Lal and others are equally unsupported, but his learned Counsel has criticised wherever he could criticise, and has pointed out some incidents which he urged tell in his client's favour. Upon the point of handwriting, he has been unable to say anything. The appellant's suggestion that the petition Ex P 512 was forged at the instance of the Police and prosecution is ludicrously untrue, and upon a comparison of the handwriting, his learned Counsel has been unable to say anything. He has pointed out to us that according to Banarsi Lal's evidence Banarsi Lal was given copies of "The Revolutionary" very early on the morning of 26th of January, and he has referred us to certain Police reports (Ex D-23 and others) which would go to show that Ram Prasad left Shahjahanpur that morning for Lucknow by a train that left at 5 A. M. Exhibit D-22 was the report of a certain Police constable Abbas Khan; Ram Prasad being at that time under Police surveillance and Abbas Khan being the constable who was entrusted with his surveillance. Police constable Abbas Khan admits having made this report. He made it at 5 P. M., but it is clear that no one had seen Ram Prasad leaving Shahjahanpur by the 5 A. M. train and Abbas Khan in making the report was evidently relying upon information which

he had received from some body else. There is nothing to show that the information was correct, and we do not consider that Banarsi Lal's evidence has been in any way affected on this argument. In respect of his identifications he has endeavoured to make out that those identifications were obtained unfairly. He has completely failed to establish this point. His learned Counsel made only a faint hearted attempt to show that Ram Prasad had not taken part in the general conspiracy. He directed the greater part of his arguments to endeavouring to show that he had not taken part in the Bichpuri dacoity or the Train dacoity. We are satisfied that the identifications were honest identifications, and upon these identifications and the evidence of handwriting, we have no difficulty in arriving at conclusions on these appeals. Banarsi Lal undoubtedly took part in the Bichpuri dacoity. His evidence that Ram Prasad was a ring-leader in this dacoity might go far very little, if it stood alone. But it does not stand alone. The fact that Behari has identified Ram Prasad as taking part in the dacoity would alone be sufficient corroboration of Banarsi Lal's evidence upon the point. But in addition to Behari's evidence, there is the evidence of Lila and we are satisfied that Ram Prasad took part in the Bichpuri dacoity. The evidence against him in respect of the Train dacoity is even stronger. He has been unable to explain away the fact that the entries in the register of Ohhedi Lal Dharamsala are in his own handwriting. This fact alone shows that Ram Prasad was in Lucknow on 8th and 9th August, 1925. He has been unable to explain away his identification by Kallan, Abdul Wadud and Badlu. These identifications alone are sufficient to show that he took part in the Train dacoity. Upon the above evidence we find that he was rightly convicted upon all the charges on which he has been convicted by the learned Special Sessions Judge.

2. *Rajendra Nath Lahiri.*

As we have already stated this appellant is a full grown man who in 1924-25 was working in Benares in a dispensary which is conducted by his brothers and was also reading as a student in the Hindu College. The main evidence to connect him with the general conspiracy is that of Banarsi Lal, Indu Bhushan Mitra and

Kunwar Bahadur. He is further implicated in Banwari Lal's confession. He was an associate of Banwari Lal. He had relations with Ram Prasad who visited him at Benares and he is proved to have been present at the Meerut Orphanage meeting. He was eventually captured in a house in Calcutta which was a bomb factory. The corroboration of the evidence of the accomplices against him is very strong. In the first place Banwari Lal, Banarsi Lal and Kunwar Bahadur have all identified him out of a crowd in the Jail and also in Court. Indu Bhushan Mitra has also identified him out of a crowd in the Jail and also in Court. He has admitted that the handwriting which has been taken as his standard handwriting is his own. After a careful personal comparison of the documents which implicate him, and which are alleged to be in his handwriting we agree with Mr. Stott in the conclusion that those documents are in his handwriting, and the corroboration afforded by these documents is in itself sufficient to establish that he was one of the conspirators. We take in the first place the facts that on three separate occasions he sent money orders to Kunwar Bahadur, the money being intended for the use of Banwari Lal. On all these occasions he remitted the money orders under a false name signing himself either as Kashi Nath Bajpai or Kunwar Bahadur Srivastava. It is in evidence that he despatched from Rae Bareilly a suspicious telegram Ex. P-110 to Benares. The words of the telegram were, "Marriage postponed until further news." This is signed under the false name of Jugal Kishore. We further find that Ex. P-162 "The Twelve Points" is proved to have been in his handwriting. This shows that he had left with Ram Nath Pande certain points upon which information was to be required. These points were a list of non-co-operators in the District, the population of the District, the number of Policemen and other points which would not be desired by ordinary persons. We have again the evidence which connects him with Govind Charan Kar. This is contained in Banwari Lal's confession and there is corroboration here in the evidence of Mahesh Narain Sinha. There is the evidence that the letters which were intercepted in Calcutta addressed to K. C. Guha were in his handwriting. There are the intercepted letters to Ram

Prasad and there is particularly in Ex. P-145 the remark "Please bring my shirt and pen from Chaudhuri". When Govind Charan Kar, known as D. N. Chaudhuri was arrested there was found in his possession an "Apollo" fountain pen and on the evidence of Batak Nath Dey, Sarat Chandra Mukerji, Kamal Indu Sanyal and Amar Nath Chakravarti all witnesses of Benares that pen was the property of Rajendra Nath Lahiri. He has been clearly identified as having been at the meeting at the Vaishya Orphanage at Meerut on 13th September, 1925. The evidence of Sub-Inspector, Bhupendra Nath Sarkar proves that he was arrested in a bomb factory in Calcutta. Thus the evidence of the accomplices is corroborated absolutely. Even in the absence of the evidence of the accomplices there is other evidence sufficient to justify the conclusion that he was a member of the conspiracy. He called no witnesses. His competent Counsel Mr. Chatterji of the Calcutta Bar and Mr. H. O. Dutt made practically no attempt to discuss the evidence connecting this appellant with the general conspiracy. It is true they did not admit that he had taken part in the conspiracy but they did not trouble to criticise the evidence connecting him with it.

We now come to his connection with the Train dacoity. According to the evidence of Banarsi Lal and Indu Bhushan Mittra he was one of the persons who collected in Shahjahanpur before the commission of the Train dacoity. This would go for very little in itself. He has further been implicated in Banwari Lal's confession as having taken part in the Train dacoity. This would not be sufficient in the absence of corroboration, but his complicity in the Train dacoity is established on evidence which in itself would be sufficient if it stood alone. As has already been said No. 8 Down was brought to a stand still by a passenger in a second class compartment pulling the alarm. Dr. Chandrapal Gupta was travelling in the compartment in question. He is a Medical Officer employed by the East Indian Railway Company whose duties are largely to proceed from one Railway Station to another on medical attendance on members of the staff. On the evening in question he was returning in that train from Balamau to Lucknow. At Kakori he left his compartment for a few minutes and on his return

discovered that three Indian passengers— young men dressed in *khaki* shirts, short knicker-bockers and stockings—had taken places in the compartment. The compartment in question was a second class compartment. The train left Kakori and had proceeded about a mile and a half when the alarm chains were pulled. The chains were pulled on both sides by two separate men. Then, when the train stopped those three men got out of the train and took part in the dacoity. Dr. Chandrapal Gupta picked out Rajendra Nath Lahiri from a crowd in the Jail and identified him again in Court as one of the three men who were in the compartment. The evidence of Dr. Chandrapal Gupta, in our opinion, is very strong. It does not stand alone however. It corroborates the evidence afforded by the depositions of Banarsi Lal and Indu Bhushan Mittra and the statements in Banwari Lal's confession. The learned Counsel for this appellant have, as might be expected, directed their criticisms mainly against the evidence of Dr. Chandrapal Gupta. They have been unable to throw doubts on this gentleman's integrity. They have been unable to show that he is other than an intelligent witness. We have it then, that this intelligent and honest witness has picked out of a crowd in the Jail Rajendra Nath Lahiri as one of the three men who were in the carriage and repeated this identification in Court. The main argument of the learned Counsel was that Dr. Chandrapal Gupta might have made a *bona fide* mistake in identifying this appellant. The evidence as to how this identification was made is as follows.

When Dr. Chandrapal Gupta saw the appellant in the Jail he at once took hold of him, saying that he was one of the men in question. He then told Saiyid Ainuddin that he would have to think over the matter because Rajendra Nath Lahiri was not dressed in Jail in the clothes similar to those which he had been wearing in the Railway carriage and also because Rajendra Nath Lahiri when the witness saw him in the train had a moustache whereas the man before him had shaved his moustaches. In the witness box he stated before the Judge "I identify him here. After the dacoity I first saw him at the Jail identification. He has no moustache now. He had a very small moustache at the time of the dacoity. When I picked him out in the Jail he was not wearing

the same clothes as in the dacoity and he had no moustache. I am absolutely certain now that I saw him in the Train dacoity." We thus have it that this witness identified the appellant at once as soon as he saw him in the Jail. He then thought over the question carefully in order to make up his mind whether his identification was or was not correct and after careful consideration decided that it was correct. As the witness is both intelligent and honest, it would, in our opinion, be difficult to get a better identification. We are satisfied upon this evidence that Rajendra Nath Lahiri took part in the Train dacoity and that he has been rightly convicted by the learned Special Sessions Judge on all charges.

3. Raushan Singh.

As we have already stated this man is a man of nearly forty years of age, who holds some landed property in the Shahjahanpur District. He was admittedly a friend of Banarsi Lal and also knew Ram Prasad. Banarsi Lal, while stating that Raushan Singh was a friend of Ram Prasad, was not of opinion that Raushan Singh was a member of the revolutionary party. Indu Bhushan Mitra, however, has given evidence that in his opinion Raushan Singh was a member of the revolutionary party. He says, "My reason for thinking that Raushan Singh was a member of the revolutionary society was that one day I went to fetch a book from Ram Prasad and Raushan Singh was there. I got a book which I think was 'Bolshevikon ke Kartut' (the deeds of the Bolsheviks). "He said to me, 'My child! why are you taking such books away? Do not read them!'" He said this laughing. He also was a frequent visitor to Ram Prasad. Also they used to speak together after closing the door.....I got a book, 'Life of Mazzini', from Raushan Singh, a fact which I had forgotten to state up till now. This has come back to me this very minute. I got this book in January, or February, 1925. I asked for this particular book from Ram Prasad and he said Raushan Singh could give it. Raushan Singh does not know English. Raushan Singh was in front of the house of Ram Prasad with the book and I got it from him there. It was in the street. I had asked for this book a week previously. I have seen Raushan Singh locked in with Ram Prasad more

than once but I cannot say how often. He also used to sleep there often. I cannot give the date or month of any of these secret conferences. Once I saw Hargovind with Raushan Singh and Ram Prasad on such a secret talk. This is the only occasion on which I saw a third person with them. I do not remember how often I was told to go out.....The life of Mazzini which I got from Raushan Singh was really Mazzini ki Lekh and was written in Hindi".

This is the only evidence to prove that Raushan Singh was a member of the Revolutionary party with the exception of the evidence connecting him with the Bamrauli dacoity. The evidence connecting him with the Bamrauli dacoity is strong evidence of identification. Lalita Prasad who knew him before deposed that he saw him participating in the commission of the Bamrauli dacoity. Kalka Prasad and Kanhai who did not know him before identified him in Jail identification proceedings out of a crowd as one of the men who had taken part in the Bamrauli dacoity and repeated the identifications in Court. Puttu Singh who knew him before stated that he was present in Bamrauli on the morning of the dacoity.

Raushan Singh was defended by Mr. Chatterji of the Calcutta Bar and Dr. J. N. Misra. The first point taken by Mr. Chatterji was that it was not sufficient to justify the convictions in this case for it was to be proved that Raushan Singh had taken part in the Bamrauli dacoity, that it was necessary further to prove that he was a member of the Revolutionary party and that the dacoity had been committed in pursuance of the objects of that party. We have already decided in a previous portion of this case that the Bamrauli dacoity was committed in pursuance of the objects of the party and we should have arrived at that conclusion, even if we had found that Raushan Singh was not a member of the Revolutionary party. We agree, however, with Mr. Chatterji in the conclusion that, unless it is established that Raushan Singh was a member of the Revolutionary party the conviction against him of participation in the Bamrauli dacoity could not be upheld, as this Court would not have jurisdiction to convict him of participation in that dacoity, unless he were a member of the party.

The evidence in these matters is very closely interrelated. The evidence of Indu Bhushan is sufficient in itself, if corroborated and believed, to show that Raushan Singh was a member of the party. The reasons which Indu Bhushan gives in support of his conclusion that he was a member of the party are, in our opinion, sufficient, but Indu Bhushan's evidence requires corroboration. We see no reason to distrust him as far as Raushan Singh is concerned. His evidence has not been shaken in cross-examination and it has not been made out that Indu Bhushan has any reason for wishing to implicate Raushan Singh falsely. The corroboration will largely depend upon our finding as to whether Raushan Singh took part in the dacoity. He has called evidence to support his defence. The evidence against him has been criticised at length by his learned Counsel. The main points that they have taken are that in the previous case the proceedings resulted in an acquittal, that their client was not prosecuted originally, that upon their reading of the evidence it was not he who was present in Bamrauli on the morning of the dacoity, and that there was not sufficient light by which to make an identification. We have already dealt with the first argument in a previous portion of the judgment, and found that there is no force in the argument that other men were tried for complicity in this dacoity and acquitted. In regard to the second point the fact that Raushan Singh was mentioned at the commencement as having taken part in the dacoity tells strongly against him. The circumstance that he was not proceeded against has been explained by the Police Officer, who was responsible for not proceeding against him, as due to the fact that the Police Officer in question was given to understand during the investigation that Raushan Singh's name had been mentioned falsely on account of enmity. The Police Officer who was responsible for omitting to prosecute Raushan Singh was Sub-Inspector Ram Chandra Sharma. He has given evidence in this case. His attempt to explain his omission is absolutely unsatisfactory. He said, "I did not arrest nor prosecute Raushan Singh. I did not do so as people said that there was enmity. Before this occurrence I had heard nothing of such an enmity." We have never heard a more lame or more unsatisfactory explanation for failure to

proceed against a man who had been mentioned by persons present at a dacoity as having taken part in it. A Police Officer in the position of Sub-Inspector Ram Chandra Sharma who had in his possession evidence that a certain man had been identified on the spot as having taken part in the commission of a dacoity was under an obligation to investigate the case against him further, and not to drop the case at its very inception on the ground of a possible defence. He has been unable to give any coherent explanation of what was the nature of the enmity to which he referred. The attempt in this case to prove enmity has been pitifully weak. The case put forward by the competent Counsel for Raushan Singh on the question of enmity can be reduced to the following short statement. There had previously been a fight between some relations of a man called Gajraj Singh in Bamrauli and some other persons. Lalta Prasad was not on good terms with those relations of Gajraj Singh. Raushan Singh's father's sister's husband Nathu Ram was a servant of Gajraj Singh. The fight had taken place three years before the commission of the dacoity. All that the learned Counsel are able to say is that when a dacoity was committed in the house of Baldeo, Lalta Prasad must have gone out of his way to accuse falsely Raushan Singh of having taken part in the dacoity, because Raushan Singh's father's sister's husband had been a servant of Gajraj Singh, and because Lalta Prasad was not on the best of terms with certain relations of Gajraj Singh. This was the best case that the learned Counsel were able to put up, and Sub-Inspector Ram Chandra Sharma was unable to produce anything as coherent. Nevertheless he refused to take action against Raushan Singh. Raushan Singh has put forward an explanation as to why he has now been implicated in this case. This explanation is not supported by evidence but we note what it is. He says that he had worked as a Police spy for the Special Police, who were engaged in the suppression of organized dacoity in the Pilibhit and other districts and that the fact that he worked as Police spy for these Police has caused him to incur the enmity of the District Police and the Criminal Investigation Department. There is everything to show that so far from having incurred the enmity of the District

Police the District Police shielded him when his name was originally mentioned. Absolutely no suggestion is made as to why the Criminal Investigation Department should go out of their way to implicate a Police spy on a false charge. There is, of course, no evidence to show that Raushan Singh is a Police spy. We have now sufficiently examined the facts as to why he was not proceeded against originally. In our opinion the conduct of Sub-Inspector Ram Chandra Sharma requires investigation and we trust that it will be investigated by the Police Authorities.

The next point taken up on behalf of Raushan Singh is based upon an inaccurate reading of the evidence, the suggestion being that Raushan Singh was not the man who visited Bamrauli that day but that another man visited Bamrauli that day. Upon this point it is sufficient to note the following evidence. Raushan Singh had originally relations in Bamrauli. He does not live in Bamrauli. He lives in a village in the Shahjahanpur District which is several miles distant from Bamrauli which is in the Pilibhit District. Puttu Singh deposed that Raushan Singh, who had some local knowledge of Bamrauli but who had been there very seldom in the past few years, came to Bamrauli on the morning of the dacoity and was seen by him at 8 A. M. Puttu Singh and Gajraj Singh have houses in the same enclosure. Raushan Singh had come to the house of Gajraj Singh. Baldeo Prasad had stated, that on the morning of the dacoity he had gone to the house of Puttu Singh to borrow a cart, and that he had seen in Puttu's compound a man of another village whom he did not know. The argument here is that the man of the other village whom he did not know was the man who took part in the dacoity, and was not Raushan Singh. There is no foundation for this suggestion. Lalta Prasad had deposed that he had seen Raushan Singh that morning in Bamrauli and saw him again taking part in the dacoity. He was the man who mentioned Raushan Singh's name to the Police. He said that when he saw Raushan Singh in the morning Shankar Singh, the son of Gajraj, was with him.

In respect of the fourth point we are clearly satisfied that there was ample light by which an identification could have been made. Sugar boiling was in process at the time. There was further a light from

the fires and there was further the light of the electric torch.

The evidence produced by Raushan Singh in his defence has not succeeded in helping him. The evidence which attempts to prove enmity is not worth discussion. The evidence which he has produced to prove that he was in Bamrauli not on the day of the dacoity but on the day before is that of Gajraj Singh. We do not believe it. We accordingly find that it is proved that Raushan Singh participated in the commission of the Bamrauli dacoity. We have already found that the Bamrauli dacoity was committed in pursuance of the aims of the Revolutionary conspiracy. We find that Raushan Singh was an intimate friend of Ram Prasad, and we find on the evidence of Indu Bhushan Mittra that he used to have meetings with Ram Prasad behind closed doors and that his conduct was such as indicated that he was a member of the conspiracy. We have found in Appeal No. 380 of 1927 that Ashfaquallah who is one of the conspirators participated in the commission of the Bamrauli dacoity. We consider that these facts sufficiently corroborate the evidence of Indu Bhushan Mittra and we, therefore, find that Raushan Singh has been rightly convicted on all the charges on which he has been convicted by the learned Special Sessions Judge.

4. Jogesh Chandra Chatterji.

This man as has already been stated is a resident of Bengal of over thirty years of age. The evidence against him which shows that he was one of the conspirators is that of Banarsi Lal. He is also mentioned by Banwari Lal in his confession. If this evidence is accepted there cannot be the slightest doubt as to the fact that he was a member of the Revolutionary party. It is corroborated by the fact that both Banarsi Lal and Banwari Lal picked him out of a crowd in Jail Identification proceedings as the man to whom they referred. This evidence, however, is not the main evidence against him. The main evidence against him which corroborates the evidence contained in Banarsi Lal's deposition and Banwari Lal's confession is the evidence that when he was arrested on the 18th October, 1924, Ex. P-198 containing an account of the meeting of the Revolutionary party was found in his possession. This evidence not only strongly corroborates the evidence of the accomplices but in itself would be sufficient

for his conviction if believed. It is as follows:—

Inspector Muhammad Ismail of the Bengal Criminal Investigation Department has deposed that he was on duty in the neighbourhood of the Howrah Bridge, Calcutta, on the 18th October, 1924. He saw Jogesh Chandra Chatterji in the precincts of the Howrah Railway Station. He says that he had heard his name before but did not know him before. He considered his behaviour suspicious and followed him over the Howrah Bridge to the junction of Harrison Road and Strand Road. There he apprehended him as a suspect and took him to a shop close to the place of the arrest where he searched him in the presence of two witnesses who were selected at random. Jogesh Chandra Chatterji was made to sit on a bench in front of the shop. While the Inspector was searching his inside pocket Jogesh Chandra Chatterji took a paper from his lower left hand outside pocket and let it fall on the *takht* (platform) beneath the bench.

This paper was Ex. P-198. We have already given the contents of this paper. If this story is believed, there cannot be the slightest doubt as to the guilt of the appellant. Kabiraj Bhuban Mohan Das, a search witness, was called to prove the discovery of Ex. P-198 from the possession of the appellant. He has corroborated Inspector Muhammad Ismail absolutely. In his statement before the Special Sessions Judge, the appellant put up the defence that Ex. P-198 had not been found in his possession. His case was that the Police Officers, who had arrested him, had brought this paper with them, and had planted it on him. He called the other search witness Kali Das Ghose in his defence. He also called two other witnesses to show that on certain dates he could not have been in the United Provinces. He was defended in this Court by Mr. N. C. Dutt who confined himself to criticising the evidence for the prosecution. He has been unable to explain how Banarsi Lal who is a resident of Shahjahanpur and Banwari Lal who is a resident of Rae Bareilly could have been in any position to identify Jogesh Chandra Chatterji as they did identify him, if they had not known him before. In respect of the discovery of Ex. P-198 Mr. Dutt has been unable to shake the evidence of the prosecution witnesses. Kali Das Ghose, the witness to the search who was called as a defence witness, has not supported the appellant's story. He says

that he was a witness to the search and that he saw Ex. P-198, but that he did not see it drop from the appellant's pocket. He was clearly not in a position to see the paper drop from the appellant's pocket as it was dropped from the side of the appellant opposite to the side on which the witness was standing. Kabiraj Bhuban Mohan Das has stated that he saw the appellant let fall the paper and that he picked it up. His words are, "At the search while the Inspector was searching his pockets Jogesh let fall a paper on the *takht* on which I was sitting. I picked it up while both I and the Inspector tried to do so and I gave it to the Inspector." This was Ex. P-198. The appellant stated that when the paper was discovered he protested loudly. Kali Das Ghose has no recollection of his making any protest. The other two witnesses Profulla Chandra Chakrabarti and Jitendra Chandra Bhattacharji do not appear to us to be reliable witnesses and in no circumstances would their evidence be of great value. The appellant appears to have taken some exception to the fact that a certain witness whose evidence he desired was not called. We find there is no foundation for this objection. A summons was issued for the attendance of his witness. The witness who resided in Calcutta sent a medical certificate stating that he was unable to attend and no further steps were taken by the appellant to procure his evidence. The suggestion that Ex. P-198 was planted upon the appellant is apart from the evidence a suggestion which can hardly be argued seriously. On the date of the appellant's arrest the 18th October, 1924, neither the United Provinces Police nor the Bengal Police had any suspicion that there was a specific Revolutionary party in the United Provinces with an organization that had developed as far as the holding of meetings. As has already been noted, the clue afforded by Ex. P-198 was not followed up at the time. It is true that Rai Sahib Durga Prasad, Deputy Superintendent of Police in the Criminal Investigation Department, who has given evidence in the case, stated that he had heard possibly as early as July, 1924, that there was some sort of a Revolutionary society and that a man who called himself "Roy"—that is to say the appellant who passed under the name of Roy—was visiting the United Provinces. But he did not communicate his suspicions otherwise than

in his confidential diaries to any one until the 19th November, 1924, (a month after the appellant's arrest and the discovery of Ex. P-198) when he warned the Superintendent of Police, Shahjahanpur, in Ex. P-658 of the possibilities of dacoities being committed by political criminals in the Shahjahanpur District. We believe the evidence of Banarsi Lal and the statement of Banwari Lal and we believe Inspector Muhammad Ismail and Kabiraj Bhūban Mohan Das as to the account which they give of the discovery of Ex. P-198. We accordingly find that the appellant Jogesh Chandra Chatterji has been rightly convicted on the charges on which the learned Special Sessions Judge convicted him.

5. Suresh Chandra Bhattacharji.

This man as we have already stated is a Cawnpore man who is employed as a sub-editor in a newspaper. He has been convicted on the charge of general conspiracy but acquitted on the charge of complicity in the Train dacoity. The evidence against him is partly contained in the evidence of Gopi Mohan who has deposed to his association with Ram Dulare appellant. We are satisfied that the entries in a certain note-book found at the time of his arrest are in the appellant's handwriting and from a comparison with the handwriting in this note-book we are satisfied that he despatched a money order, Ex. P-96, on 28th November, 1924 for Rs. 10 to Kunwar Bahadur with the intention that the money should be given to Banwari Lal. This money order was sent under the false name of "N. Prasad." The main evidence, however, against this appellant is in the evidence that he attended the meeting at the Vaishya Orphanage. He was not present at the Vaishya Orphanage on 13th September, 1925. The evidence of Police constable Sarju Dayal, which is corroborated by other evidence, shows that this appellant left Cawnpore on 13th September, 1925, and arrived at Meerut at 7-30 A. M. on 14th September, 1925. Police constable Sarju Dayal had been ordered to shadow this appellant to Meerut, Suresh Chandra being at the time a political suspect. He has deposed that he did follow him to Meerut. At Meerut the appellant went to a Dharamsala and then Police constable Sarju Dayal lost trace of him un-

til the afternoon when he shadowed him back to the Railway Station and followed him to Cawnpore. Sub-Inspector Brahma Singh and Pheru Singh have deposed that Suresh Chandra Bhattacharji was one of the men who entered the Superintendent's residential quarters at the Orphanage at 10 A.M. on 14th September, 1925. Pheru Singh has deposed that Suresh Chandra Bhattacharji left these quarters at 2 P.M. Sub-Inspector Brahma Singh and Pheru Singh picked the appellant out of a crowd at Jail identification proceedings and identified him again in Court. He was defended by Mr. H. N. Misra. He admitted that he had left for Meerut on 13th September, 1925, and that he arrived there on 14th September, 1925, but he denied that he had ever gone to the Vaishya Orphanage. He called a large number of witnesses. His witnesses Dr. S. N. Sen, Sital Prasad, Mohit Kumar Mukerji and Hari Gopal Roy were to prove that he was in Cawnpore on the day when the Train dacoity was committed. As he has been acquitted on the charge of having participated in the commission of the Train dacoity, we need not discuss their evidence. His remaining witnesses were called to prove, that Gopi Mohan was not telling the truth. The evidence of Gopi Mohan against this appellant is comparatively valueless. We do not, however, believe the evidence of these witnesses. He has taken an objection that his brother whom he wished to call as a defence witness was not heard by the learned Special Sessions Judge. We note that he had ample opportunity of producing his brother as a witness during the period in which his witnesses were being heard, and that he abstained from calling his brother during that period, but wished to call him after his case was closed. We consider that the learned Special Sessions Judge rightly refused to hear that witness. At the time that it was proposed to call him the whole of the evidence was closed and arguments were about to commence. We see no reason to disbelieve the evidence of Gopi Mohan, though it does not prove very much against this appellant. We believe the evidence of Sub-Inspector Brahma Singh and Pheru Singh against him. We find that he visited in Meerut the residential quarters of Vishnu Saran Dublis in the Vaishya Orphanage and remained there between 10 A. M. and 2 P. M. on 14th September, 1925.

As we have already found, a secret meeting attended by members of the inner circle of the Revolutionary party was being held at that time in those quarters. The appellant has been unable to explain to our satisfaction what he was doing in Meerut at the time and it is very noticeable that though he has called a large number of witnesses he has called no witness to prove his activities in Meerut on that date. He has further been unable to explain why he should have sent a money order under a false remitter's name to Kunwar Bahadur. We consider that he has been rightly convicted on the charges on which the learned Special Sessions Judge has convicted him.

6. *Vishnu Saran Dublis.*

He is a full-grown man who was Superintendent of the Vaishya Orphanage at Meerut. He admittedly was in the Orphanage on 13th and 14th September, 1925, and, if the evidence of Sub-Inspector Brahma Singh and Pheru Singh against him is believed, he was receiving in his residential quarters men who are proved to have been members of the Revolutionary conspiracy and concealed their presence. If the evidence of these two witnesses be believed he has been rightly convicted of complicity in the conspiracy unless he can give a satisfactory explanation of these facts. We have already stated our conclusions that Sub-Inspector Brahma Singh and Pheru Singh have told the truth. We find them to be reliable and intelligent witnesses.

We have waited until we came to the appeal of the present appellant to consider the objections raised in defence against the evidence of these witnesses. The defence in the lower Court apparently assailed their evidence in every possible manner. They went as far as to suggest that Sub-Inspector Brahma Singh had never visited Meerut. As against Pheru Singh it was stated that he had hopes of entering Police service, and that, therefore, he was ready to tell any untruth which would oblige the prosecution. In this Court the position was modified and it was not suggested that either Sub-Inspector Brahma Singh or Pheru Singh were altogether dishonest witnesses, but it was suggested that they were partially dishonest and had embroidered their stories somewhat. It was suggested that they had not kept as

strict a watch upon the Orphanage as they said they had. It was suggested that they would have no light in the evening by which to identify anybody. It was suggested that from the place where they stood they could have seen nothing. We have considered all these suggestions, and we find that there is no force in any one of them. Vishnu Saran Dublis is a man of some position in Meerut, and he clearly had no difficulty in procuring a mass of persons to give evidence in his favour. He has thus been able to procure the evidence of a coolie called Chhidda, who has deposed that just at the particular time that Sub-Inspector Brahma Singh and Pheru Singh were watching the premises, the Municipal lamp outside the premises was broken. It was broken shortly before the 13th September, 1925, and mended after a few months. It is only necessary to say that we do not believe Chhidda to be telling the truth.

The appellant's appeal was argued by Mr. Kapila Beva Malaviya of the Allahabad Bar who addressed us an intelligent and careful argument. He has, however, been unable to explain away the facts against his client. The defence evidence may be divided into two parts—evidence which does not help the appellant if believed, and evidence which, if believed, would help the appellant. The most respectable witnesses who have been called on behalf of the appellant are Pt. Debi Sahai, Mahabir Prasad, Har Sarup, Amar Singh and Nirmal Sarup, but there is nothing in their evidence which contradicts the story that Vishnu Saran Dublis had collected revolutionaries in his own residential quarters, and that a meeting was being held there by the members of the inner circle of the Revolutionary party. Even if these witnesses be believed their evidence would only show that Vishnu Saran Dublis was not always with his associates, and that he was carrying on his duties as Superintendent during business hours. This would not prevent his joining the deliberations outside his own business hours when he had his friends collected in his own private residential quarters. Baldeo Chaube, Mohan Lal, Durga Prasad, Murari Lal and Chhidda have given evidence which if believed would be of more value but we do not believe these witnesses. We believe Sub-Inspector Brahma Singh and Pheru

Singh. This being our conclusion on the evidence we now proceed to consider the remaining arguments raised by Mr. Malaviya. Mr. Malaviya's case was that even if the evidence of Sub-Inspector Brahma Singh and Pheru Singh were accepted as absolutely reliable, there was nothing to show that his client had been guilty of any offence. His first point was that these persons might have been collected in the appellant's residential quarters without his knowledge. Mr. Malaviya's arguments were usually better than this. We do not criticize him for taking any point which he considered might help his client, but this suggestion can hardly be entertained seriously. The residential quarters which are proved from a plan are fairly spacious. Combined with certain office accommodation which can be approached and which could be utilised out of office hours for the accommodation of guests they would provide for seven outsiders, Vishnu Saran Dublis and members of his household. But the space is not such as would render it possible for seven men to have been residing in those quarters without the knowledge of the appellant. His next point was that, even if those persons were residing in those quarters in the manner stated by Sub-Inspector Brahma Singh and Pheru Singh, and amongst those persons were Ram Prasad Bismil, Rajendra Nath Lahiri, Suresh Chandra Bhattacharji and Domodar Sarup, there was nothing to show that they were collected there for other than an innocent purpose. We cannot accept this contention. Having found as we have done, that Ram Prasad Bismil and Rajendra Nath Lahiri (apart from Suresh Chandra Bhattacharji and Damodar Sarup) were members of the conspiracy, and the evidence further showing that they were leading members of the conspiracy, and having further found from the documentary evidence that an important meeting of the Revolutionary party had been arranged at the quarters of Vishnu Saran Dublis in the Vaishya Orphanage at Meerut to commence on 14th September, 1925, the evidence of Sub-Inspector Brahma Singh and the evidence of Pheru Singh establish sufficiently that the persons on the premises of Vishnu Saran Dublis had collected in order to hold an important meeting of the Revolutionary party. We have formed no conclusion as to Ex. P-141 having been

written by Vishnu Saran Dublis. We do not find that it was written by him. We have no evidence to support a finding that it was written by him. But this letter purported to come from the Vaishya Orphanage, Meerut. It was signed by a person who called himself the Superintendent, and that letter makes certain points very clear. It stated a complete untruth to the effect that there was to be an executive meeting of the Orphanage Committee on that date. It stated that a person who was called an "upadeshak" or lecturer from Lahore had promised to attend and it arranged for places where the persons who were coming to the Orphanage were to assemble and it further stated that the place had been after due deliberation fixed at the Superintendent's "own place." We have already referred to this letter and also to the other letters which indicate that a meeting of the Revolutionary society was to be held on that date in Meerut. When we have upon the evidence of Sub-Inspector, Brahma Singh and Pheru Singh the fact that as darkness was coming on, eight men, amongst whom were Ram Prasad, Rajendra Nath Lahiri and Vishnu Saran Dublis, emerged from the residential quarters of the last named; went away for an hour and a half, then returned to those quarters, and apparently remained there for the whole night, and that Suresh Chandra Bhattacharji with another man came to those quarters on the following day and stayed there for some hours, we can only form the conclusion that there was such a meeting in those residential quarters at that time. Mr. Chatterji on behalf of Rajendra Nath Lahiri and Mr. Malaviya on behalf of Vishnu Saran Dublis asked us to note that there were eight voluntary workers attached to the Orphanage and suggested that the eight men who were seen by Sub-Inspector Brahma Singh and Pheru Singh emerging from those quarters might have been the eight voluntary workers. We have examined this point and we find that there is no force in the suggestion and that in no circumstances could eight voluntary workers have been emerging from the Superintendent's quarters as darkness was coming on on the night of the 13th September, 1925, which was a Sunday night. After considering the arguments of Mr. Malaviya and giving them full attention we state again the conclusion which we have already stated that on the evidence it is clearly

established that there was a meeting of the members of the inner circle of the Revolutionary Society in the quarters of Vishnu Saran Dublis at the Vaishya Orphanage at Meerut on 13th and 14th September, 1925. We are satisfied that Vishnu Saran Dublis had full knowledge of the meeting, that he was present at the meeting and that he took part in the deliberations. We find that he has been unable to explain away anything connected with these facts. We accordingly find that he has been rightly convicted on the charges on which the learned Special Sessions Judge has convicted him.

7. Manmatha Nath Gupta.

This appellant is a Bengali youth who resided with his father at 62, Ganesh Mahal, Benares. He was studying in a private institution in Benares in 1924 and 1925. At the time of his arrest he was a little over eighteen years of age. The evidence which shows that he was a member of the conspiracy is the evidence of Banarsi Lal and Indu Bhushan Mittra. This evidence, if accepted, establishes absolutely that he was a member of the conspiracy. He was known under the name of "Nawab." His handwriting has been proved from Ex. P-156 and Ex. P-449. The corroboration of the accomplices' evidence against him is to be found in the evidence of Ram Charan, Gauri Shankar, Ram Lal and Jagdish Chandra. Ram Charan, Gauri Shankar and Ram Lal, who are all Shahjahanpur men, deposed that they had seen him in Shahjahanpur. Further it is established to our satisfaction that he wrote the post card Ex. P-171 which was found in possession of Parnawesh Kumar Chatterji. This corroboration would in itself be sufficient but apart from that there is against him some very important evidence, which not only corroborates the evidence of the accomplices, but which in itself would be sufficient for his conviction. As we have already stated, when he was arrested there were found in his possession Ex. P-153, a typed excerpt from the Revolutionary Rules, and Ex. P-154, a translation in Hindi, proved to be in his handwriting, of Ex. P-153. It is further proved that Ex. 153 had been typed on the Corona typewriter found in the possession of Parnawesh Kumar Chatterji. He is proved to have taken part in the Bichpuri dacoity. Banarsi Lal has given evidence to that

effect and this evidence has been corroborated by the fact that Gokul and Lila identified him in Jail identification proceedings (though they were unable to repeat the identification in Court) as a man whom they had seen in the neighbourhood just before the commission of the dacoity. He has also been proved to have participated in the commission of the Train dacoity. Banarsi Lal has deposed that he was present at Shahjahanpur when the appellant with other persons had collected to commit that dacoity. Banwari Lal in his statement before the learned Special Sessions Judge said that Manmatha Nath Gupta had taken part in the Train dacoity but that he had at first refused to mention his name as he wished to shield him. There is independent evidence that he took part in that dacoity. Abdul Wadud picked him out in Jail identification proceedings as one of the men who had taken part in the Train dacoity and repeated the identification in Court. Radhe Lal, the manager of the Chhedi Lal Dharamshala, identified him in Jail identification proceedings as one of the men who had stayed at the Chhedi Lal Dharamshala on the 7th, 8th and 9th August, 1925. Kallu, Desi and Sitalwa identified him in Jail identification proceedings as one of the men they had seen at Amethia. Radhe Lal, Kallu, Desi and Sitalwa were unable to repeat their identifications in Court. The appellant's statement before the learned Special Sessions Judge consisted of an assertion that Ex. P-153 and Ex. P-154 had been planted upon him at the time of the search of his house. He called, however, no witnesses to support this assertion, and nothing was elicited in cross-examination to justify it. He denied participation in the conspiracy or in the dacoities. He was represented before us by Mr. N. C. Dutt. Mr. N. C. Dutt commented on the evidence of Ram Lal. Ram Lal had deposed that he saw Manmatha Nath Gupta at Ram Lal's house at Tikasar on the Parewa. The Bichpuri dacoity was committed on 9th March, 1925. Mr. Dutt's suggestion was that the Parewa was on the morning of the 10th March, 1925, and that in those circumstances it would have been impossible for Manmatha Nath Gupta to have been at Bichpuri on 9th March, 1925, and in Shahjahanpur on the morning of the 10th March, 1925. Mr. Dutt was, however, under a misapprehension. The Parewa as we have ascertained from the calendar was on the 11th March, 1925. So Ram Lal's statement

is not affected. We find that it is clearly established that Exs. P-153 and P-154 were found in the possession of the appellant. They alone are sufficient to prove in absence of an explanation that he was a member of the conspiracy. No explanation was offered. Mr. Dutt did not press his defence in respect of the complicity in the conspiracy. We further find that Ex. P-171 was in the appellant's handwriting. We believe the evidence of Banarsi Lal, Indu Bhushan Mittra, Ram Charan, Gauri Shankar and Ram Lal against him. Upon this evidence he was clearly a member of the conspiracy. In respect of the Bichpuri dacoity we find that the evidence of Banarsi Lal, corroborated as it is by the evidence of Gokul and Lila, sufficiently establishes that he took part in that dacoity. In respect of the Train dacoity we find the evidence of Abdul Wadud alone sufficient to establish that this appellant took part in the commission of the Train dacoity. It does not, however, stand alone. We accept the evidence of Radhe Lal, Kallu, Desi and Sitalwa as correct and as corroborating it. Banarsi Lal's deposition against him is sufficiently corroborated and Banwari Lal's final implication of him in his confession is also sufficiently corroborated. We accordingly find that the appellant has been rightly convicted by the learned Special Sessions Judge on all charges.

8. Govind Charan Kar.

This man is a resident of Bengal. He was at the time of his arrest about thirty years of age. It is proved that he was living under the false name of "D. N. Chaudhuri" in the Rameshwar Hindu Hotel. The main witness against him is Jadunath Sen whose evidence if accepted would be sufficient to establish the appellant's participation in the conspiracy. As Jadunath Sen is an accomplice his evidence requires corroboration. It is corroborated by the evidence of Jagannath Prasad, Jagannath Sen's Head Master, Sita Ram and Mahesh Narain Sinha. There is further ample other corroboration. At the time of Govind Charan Kar's arrest a fountain pen belonging to Rajendra Nath Lahiri was found in his possession. This is the pen to which reference has been made in the intercepted letter Ex. P-145. The most important evidence against this appellant, which alone would be sufficient to convict him in absence of explanation is the dis-

covery. at the time of his arrest in his room in the Remeshwar Hindu Hotel of a copy of the Revolutionary Rules which has been described as the "Yellow Leaflet." He has further been found guilty of complicity in the Train dacoity. He was picked out of a crowd in Jail identification proceedings by Desi as one of the men seen by him at Amithia. Desi was not certain as to the date. We are of opinion that he is testifying as to what happened on the 8th August. After the dacoity there was found in the brake-van a *khaddar chaddar* or sheet bearing a particular washerman's mark. Lalta *dhobi* who washed clothes for the Remeshwar Hindu Hotel has identified this washerman's mark as being the mark used by the appellant for whom he had washed. Banarsi Lal had stated that when he saw Ashfaqullah after the commission of the Train dacoity Ashfaqullah told him that an unfortunate oversight had happened, namely, that a *khaddar chaddar* had been left behind. Banwari Lal in his confession stated that he had met the appellant on 8th August, 1925, in the Aminabad Park, at Lucknow and that after the Train dacoity he took notes of about Rs. 880 from the appellant in Lucknow and handed them over to Rajendra Nath Lahiri at the Railway Station at Allahabad. Mahesh Narain Sinha has corroborated. He knew Banwari Lal. He knew the appellant under the name of D. N. Chaudhuri. He deposed to having met Banwari Lal in the appellant's room in the Rameshwar Hindu Hotel. Jadunath Sen deposed that on 9th August, 1925, the date of the dacoity, he saw the appellant leave his room in the Rameshwar Hotel at about 4 p. m. and lock the door, and that when he went to sleep at about 9 p. m. the appellant had not returned. He deposed that he did not see the appellant until the following afternoon at 4 p. m., and that that day he went into his room where he ate sweets with him and that at the time when he was eating sweets he noticed that as the appellant moved there was a tinkling sound from his pocket as though he had a good deal of money in it. He deposed that he asked the appellant (using a slang expression) what he had struck his hand to or what had he struck, suggesting that the appellant had made a haul. The appellant was annoyed with him for asking the question.

Mr. N. C. Dutt represented the appellant in this Court. Certain witnesses were called on behalf of the appellant the purport of

whose evidence was intended to show that the boy Jadunath Sen was telling an untruth when he stated that he had occupied a room in the Rameshwar Hotel on the same floor as the room which was occupied, by the appellant. It is difficult to understand how Jadunath Sen's evidence would have been affected seriously whether he occupied, as he stated he occupied, a room on the same floor as the room in which the appellant resided, or a room on a different floor to the floor in which the appellant resided. But we need not follow this point as we believe Jadunath Sen and do not believe the defence witnesses on the point. The main defence taken however, was not in respect of the charge of complicity in the conspiracy but in respect of the charge of complicity in the Train dacoity. Mr. Dutt on behalf of the appellant laid great stress on the entry in the meals register of the hotel which went to show that on 9th August, 1925, the appellant had taken his second meal in the hotel. The learned Special Sessions Judge refused to accept the defence as true upon this point, and has given sufficient reasons for refusing to accept it as true in his judgment from O. P. 46 onwards. Although the appellant's case on this point was supported to some extent by two receipts which were found at the time of his arrest, we are satisfied that the entry in the meals register is most suspicious, that the receipts had been prepared in advance to assist the appellant in event of his apprehensions, and that the learned Special Sessions Judge took a correct view upon this point. The preparation of the receipts to assist his defence would not have been a difficult matter, as there is every reason to suppose that the manager of the Rameshwar Hotel, Sheo Shankar Sahai was an active partisan of the appellant. The defence, however, upon this point is of little or no avail. We have it on the evidence of Jadunath Sen that the appellant did not leave his room in Rameshwar Hotel till some time between 3 and 4 P. M. on 9th August 1925. He would have had ample opportunity to arrive on the scene of the dacoity before it was committed if he had left the hotel even as late as 5 P. M. on 9th August, 1925. The distance from the hotel to the scene of the dacoity is not as much as eight miles and there is a metalled road the whole way, along which vehicles ply for hire. Ram Karan, called as a defence witness, who is a cook at the Rameshwar Hotel, has given evidence which shows

that the second meal is ready for the inmates at any time between 4 P. M. and 9 P. M. Thus it could well be served half an hour before 4 P. M. In these circumstances even if the appellant had taken his second meal at the hotel on 9th August 1925, he could have easily eaten it and left the hotel in time to reach the scene of the dacoity, before the dacoity was committed.

The evidence of the appellant's complicity in the conspiracy is very strong. We believe that Jadunath Sen has told the exact truth. We have already found that the fountain pen belonged to Rajendra Nath Lahiri. It was found in the possession of the appellant. We find that Ex. P-280, "The Yellow Leaflet," was also found in his possession. He has been unable to give any satisfactory explanation of the evidence connecting him with the conspiracy. In respect of the evidence connecting him with the Train dacoity we see no reason to distrust Desi's evidence. He is very uncertain as to the date but clearly saw the man whom he identified as the appellant the day before the dacoity. We find that the appellant had left the Rameshwar Hotel shortly after 4 P. M. on the date of the dacoity and that he had not returned until after 9 P. M. We believe the statement of Banwari Lal, corroborated as it is that he met the appellant in the company of Rajendra Nath Lahiri the day before the dacoity and that after the dacoity he received Rs. 880 in notes from the appellant which he handed over to Rajendra Nath Lahiri. We find that a *khaddar chaddar* belonging to the appellant was found in the brake-van after the dacoity had been committed. We find that after the dacoity was committed Jadunath Sen noticed that the appellant had a good deal of money, the possession of which he refused to explain. It is true that Banwari Lal does not mention having seen the appellant taking part in the dacoity but as the dacoits were separated into several groups, some being in the brake-van, some being on the near side of the train, some being on the off side of the train and some being behind the train, the fact that Banwari Lal does not say that he saw him there does not assist him. We find upon the evidence that he participated in the commission of the Train dacoity and that the learned Special Sessions Judge has rightly convicted him on the charges on which he has been convicted.

9. *Makundi Lal.*

As we have already stated this appellant is a man of over thirty years of age from the Etawah District. The main evidence against him is in connection with the Train dacoity. But if this evidence is believed it is clear that he was also a member of the revolutionary conspiracy and not a chance associate in the commission of the dacoity. Banarsi Lal has deposed that Makundi Lal was one of the men who came to Shahjahanpur before the Train dacoity. He picked him out of a crowd in Jail identification proceedings and identified him again in Court. The evidence of corroboration of Banarsi Lal on this point is contained partly in evidence as to the appellant having sent on 3rd August, 1925, a money order Ex. P-378 for Rs. 5 from Shahjahanpur to his wife in Benares City. Attached to this money order was the coupon Ex. P-445 on which is written "I am well. It will take one week more. Your well-wisher Makundi Lal. Do not be anxious at all." He was identified as having taken part in the Train dacoity by the Guard Jagannath. Jagannath picked him out of a crowd in Jail identification proceedings as one of the dacoits. He repeated this identification in Court. He was also picked out of a crowd in Jail identification proceedings by Sitalwa as one of the men who were assembled in Amithia close to the Kakori Station shortly before the commission of the dacoity. Sitalwa was unable to repeat this identification in Court. It is further proved, Ex. P-26, that on 10th August, 1925, the day after the dacoity he took a room in the Kashmiri Hotel, Aminabad, Lucknow, and registered his name as Banarsi Lal Agarwala of Shahjahanpur. He confined himself to a general denial and called no defence witnesses. He was represented in appeal by Mr. H. N. Misra who confined himself to general criticisms. Banwari Lal does not mention this appellant by name as one of the men who took part in the Train dacoity, but the omission does not help the appellant. The appellant admitted that the money order Ex. P-378 was in his handwriting and that he was in Shahjahanpur on 3rd August, 1925. We believe the evidence of Banarsi Lal against him. We believe the evidence of Jagannath and Sitalwa against him. We find that the entry Ex. P-26 was in his handwriting. He has been rightly convicted by the learned Special Sessions Judge on the charges on which he has been convicted.

10. *Ram Kishan Khattri.*

This appellant is a young man who was about twenty-two years old at the time of his arrest. He is a resident of Chanda in the Central Provinces. According to his own statement he has for some time embraced a life of religion. He has been convicted of complicity in the conspiracy, and of having participated in the commission of the Bichpuri dacoity. Banarsi Lal has deposed that he was one of the conspirators who was known by the name of "Ganga Ram" and who visited Shahjahanpur and associated with Ram Prasad and the others. Banarsi Lal's evidence to this effect has been corroborated by Ram Charan and Gauri Shankar of Shahjahanpur who deposed that they had seen the appellant in Shahjahanpur. Gauri Shankar had seen him in the house of Banarsi Lal. Exhibit P-147 is proved to have been in his handwriting. This is the letter which arrived to the address of Indu Bhushan Mittra after his arrest and had thus come into the possession of the Police. It shows that Ram Kishan Khattri who signed himself "Narendra" had returned to Chanda and requested that Rs. 10 more should be sent to him. The contents of two previous intercepted letters Ex. P-140 and Ex. P-142 are signed "Narendra". In Ex. P-147 occurs the phrase, "Don't be anxious for us." Exhibit P-142 contains the expression, "Don't be anxious for me so much." The evidence which shows that he participated in the commission of the Bichpuri dacoity is the evidence of Banarsi Lal which is corroborated by the evidence of Toti, Gokul and Balkua. Toti was the victim in the Bichpuri dacoity. He deposed that he saw the appellant take part in the dacoity. Gokul and Balkua deposed that they saw the appellant close to the scene of the dacoity shortly before it was committed. Banarsi Lal, Toti, Gokul and Balkua picked the appellant out of a crowd in Jail identification proceedings and also identified him in Court. Behari, Toti's brother, picked him out of a crowd in Jail identification proceedings as having taken part in the Bichpuri dacoity. He was unable to identify him in Court. The appellant in his statement before the learned Special Sessions Judge made serious allegations against Mr. Horton which he made no attempt to prove. He called defence witnesses to prove an *alibi*. He was represented before us by Mr. N. C. Dutt.

Mr. N. C. Dutt confined himself to criticising the evidence for the prosecution. He laid no stress on the evidence for the defence. We find that the evidence for the defence is unreliable. We are satisfied that Banarsi Lal's statement against the appellant has been sufficiently corroborated and that it is true. We find that the evidence to prove that he participated in the commission of the Bichpuri dacoity is absolutely reliable. We, therefore, find that he has been rightly convicted on the charges on which he has been convicted by the learned Special Sessions Judge.

11. *Prem Kishan Khanna.*

This appellant is a man who has been working for some years as a contractor in Shahjahanpur. He is the son of an engineer who holds the position of an Executive Engineer in the East Indian Railway Company. Banarsi Lal has deposed that Prem Kishan Khanna was a Shahjahanpur man but stated that he did not know that he was a member of the Revolutionary society. Indu Bishan Mittra has, however, deposed that he considered Prem Kishan Khanna a member of the Revolutionary society. He said that Ram Prasad had at first denied that Prem Kishan Khanna was a member, but that afterwards he suspected that Ram Prasad's denial was not true, that he had noticed three or four secret confabulations between Ram Prasad and Prem Kishan Khanna, that he had entered a room in Ram Prasad's house, when he found Ram Prasad and Prem Kishan Khanna talking behind closed doors, and that when he entered the room the conversation used to stop. Prem Kishan Khanna, as has already been stated, was the owner of a Mauser automatic pistol for which he had obtained a license. Indu Bhushan deposed that Ram Prasad used to talk frequently about this pistol and praise it very highly. Jagdish Chandra deposed that he frequently saw Prem Kishan Khanna going into the house of Ram Prasad and that after he had gone in, the doors used to be closed. The remaining evidence against Prem Kishan Khanna is the evidence that he lent his license to Ram Prasad, in order to enable Ram Prasad to purchase the fifty cartridges of German make which were purchased on the 7th August, 1924, from P. N. Biswas & Co. at Cawnpore. We have already noted how cartridge cases of this make were discovered on the scenes of the dacoities. There is further evidence that at

the time of Prem Kishan Khanna's arrest, he was found to be in possession of a pocket book in which there was the following entry in Urdu.—

"Alamnagar 205 Kanhaiya Lal."

The case for the prosecution in respect of this entry is that it must have some reference to the Train dacoity inasmuch as the dacoity was committed just outside the two hundred and fifth mile from Mughalsarai. There is a post on the spot marked 205. The appellant was represented before us by Mr. J. M. Jackson, Senior Counsel of the Lucknow Bar. He has argued that the incident of the purchase of the cartridges is of no significance. His case is that Ram Prasad and the appellant were great friends and that in these circumstances there was nothing surprising in the appellant asking Ram Prasad to purchase cartridges for him to save him the trouble of going to the shop himself, that he would naturally lend him his license, in order to obtain the cartridges, and that his client was not in a position to know that Ram Prasad had signed his client's name on the register. He argued further that the discovery of the empty cases on the scenes of the dacoities in no way showed that his client had lent his Mauser automatic pistol to the dacoits and that the cartridges used in the dacoities were the cartridges purchased by Ram Prasad, as the cartridges were of a kind commonly procurable which might have been purchased anywhere.

The first point taken by the learned Counsel is that, inasmuch as Ram Prasad and his client were great friends, Ram Prasad might have been ready to oblige his client. But his client had denied that Ram Prasad and he were great friends. When asked by the Committing Magistrate what he had to say in respect of Ram Prasad he said, "I had no association with Ram Prasad" and when asked how he had no association with Ram Prasad when he was present at the time that Ram Prasad was arrested, he said "I took no interest in Ram Prasad. I had stopped at his house on my way to the silk factory of Pt. Iqbal Narain Bakhshi. I saw a crowd at the house of Ram Prasad and stopped there." When the Magistrate asked him for an explanation as to the purchase of the cartridges he refused to answer the question. The appellant when he was examined before the learned Special

Sessions Judge did not suggest that he was a friend of Ram Prasad, but when he was asked the following question:—

"Do you now wish to say anything about the purchase of Mauser pistol cartridges from Messrs. Biswas shop on your license on 7th August, 1924?" he gave the following answer:—

"I went to Cawnpore on that date and stopped at my house. In the bazar I met Ram Prasad accused and as it was necessary for me then to meet Mr. Mahabir Prasad, P. W. D. and to go back to Shahjahanpur I asked Ram Prasad to buy the cartridges for me and bring to me at the station. I met him at the train by which I was to return and he gave them to me."

We do not consider that the learned Counsel has given a satisfactory explanation as to this incident. It would be unusual for a man in the appellant's position ordinarily to hand over a pistol license to anybody. These licenses are granted very sparingly. The appellant was in a position, however, to obtain the license, owing to the fact that his father held a superior position in the service of a Railway Company. A man like the appellant who had received such a license should have been very careful to whom he handed it over. He was a Shahjahanpur man and on his own showing he knew who Ram Prasad was, though he was not intimate with him. His case is that he happened to be in Cawnpore, that he wished to buy cartridges, that he was in a great hurry and that he could not wait. This sounds to us an unlikely story. It would not have taken him a long time to have gone to the shop of Biswas and Co. He could have left the license, ordered the cartridges, and called back for them. He could have obtained the cartridges by post. Under the rules, if he had written to Biswas and Co., enclosing his license the cartridges could have been sent to him by post. So the incident is difficult to understand in ordinary circumstances. But if Ram Prasad and he were members of the same revolutionary conspiracy the incident is not difficult to understand. He has given no satisfactory explanation for his conduct. Further we do not agree with the learned Counsel that the discovery of cartridge cases of this pattern on the scenes of the dacoities does not connect these particular cartridges

with the Revolutionary conspiracy. The learned Counsel has argued that these cartridges are very easily procurable. The evidence on the subject, so far as it goes, shows that these cartridges are not easily procurable. On their face they are of a special marking manufactured only by one firm in Germany. Mr. Horton has deposed that he had the greatest difficulty in obtaining similar cartridges.

In respect of the entry in the pocket book the learned Counsel has argued that in the first place the reference to Alamnagar is meaningless in reference to the Train dacoity as the post No. 205 is some miles from Alamnagar Railway Station and a little over a mile from Kakori Railway Station and that the entry has been satisfactorily explained by the evidence called on behalf of the appellant which is to the effect that "205 Alamnagar Kanhaiya Lal" refers to the address of a relation Kanhaiya Lal who was at that time residing in a house in the Alamnagar Muhalla of Sitapur City which bore the census number 205. Inasmuch as the learned Special Sessions Judge has found the appellant not guilty of complicity in the Train dacoity (a decision in which the Crown has acquiesced as it has not appealed against it) the force of the argument for the prosecution which is based upon this entry is considerably weakened. The only construction that it would appear to us possible to place upon the entry that could tell in favour of the prosecution would be that the note was a memorandum made to remind the writer that a certain "Kanhaiya Lal" (the name could, of course, be a fictitious name) was to be near mile No. 205 in the neighbourhood of Alamnagar. The dacoity was committed in the neighbourhood of telegraph post No. 204/21—there are twenty-four such posts to the mile—but number 205 would be a sufficient indication. It is, however, very difficult to understand even if this view were to be accepted why such an entry should be made by a person other than one of the persons who participated in the dacoity. We agree with the learned Special Sessions Judge that the appellant has been unable to explain this entry away satisfactorily. But the fact remains that the entry upon the finding that he did not participate in the commission of the dacoity carries us nowhere, and we thus do not propose to consider this portion of the evidence against him. As he has been

acquitted in the Train dacoity and as we are not holding this entry against him the evidence which he called which was in the main to explain away this entry and to prove an *alibi* becomes immaterial. The case against him, however, remains that the evidence of Indu Bhushan Mittra stands corroborated by the evidence of Jagdish Chandra and stands corroborated, in our opinion, very strongly by the facts that he lent his license to Ram Prasad, that Ram Prasad purchased on this license fifty cartridges of a make difficult to procure in India, and that empty cartridge cases of the same pattern were discovered on the scenes of the dacoities. We are satisfied upon this evidence that the appellant was a member of the Revolutionary conspiracy. We are not, however, satisfied upon this evidence that he was privy to the conspiracy to commit dacoities either with or without murder. The conspirators desired arms and ammunition for revolutionary purposes as well for the purpose of committing dacoities. There is nothing to show that the appellant was more than one of the less important members of the conspiracy. Therefore, while considering that he has been rightly convicted on the charge under s. 121-A we would accept his appeal and acquit him on the charge under s. 120-B, Indian Penal Code.

12. *Raj Kumar Sinha.*

Raj Kumar Sinha is a Bengali youth who was about twenty at the time of the trial. His father lives in Cawnpore. He was pursuing his studies in Benares. The main evidence against Raj Kumar Sinha is in respect of the discovery of property in a room which he had taken on rent at Benares. He took this room on rent and then left it having locked the door. Prahlad Das proves having let him the room. When this room was broken open, there were found in it a Sherwood rifle, a Remington rifle and an entrenching tool handle. Banarsi Lal in the presence of S. Ainuddin picked out the Sherwood and the Remington rifles from among other rifles as two of the rifles which had been used in the commission of the Bichpuri dacoity. The entrenching tool handle found in the room is proved to fit the entrenching head which was left on the scene of the Dwarkapur dacoity. In addition to this evidence against him is evidence that at the time of his arrest he wrote in Bengali certain letters of

which the Police took possession. We have already referred to these letters in a previous portion of our judgment. This is the evidence against him as to participation in the Revolutionary conspiracy. He has further been found guilty of participation in the Train dacoity. Abdul Wadud picked him out of a crowd at Jail identification proceedings as one of the persons who had participated in the dacoity. He repeated this identification before the Court. Kalua one of the herdboys picked him out of a crowd at the Jail identification proceedings as one of the men he had seen in Amethia close to the Kakori Station just before the dacoity. He repeated this identification in Court. Badlu, another herdboy, picked him out of a crowd at the Jail identification proceedings as one of those men but was unable to repeat the identification in Court. The appellant was charged with participation in the Bichpuri dacoity but has been acquitted on that charge. He called one witness to prove an *alibi* in respect of the Bichpuri dacoity, but as he has been acquitted on this charge we need not discuss the evidence of that witness. He desired to call at the very end of the proceedings Bijai Kumar Sinha in his defence. The learned Special Sessions Judge rightly refused to permit this witness to be produced, as the appellant had already closed his defence and as all defences were closed at that period. He has been represented in this Court by Mr. H. N. Misra who has been unable to explain away the discovery of the rifles and the entrenching tool handle or the statements in the letters which he wrote at the time of his arrest. In respect of the Train dacoity he points out that Mr. Horton and Pandit Jagat Narain did not press this charge against the appellant in the trial Court. It is correct that they did not press this charge against him, but we consider that their refraining from pressing this charge against him was based on a misapprehension of the value of the evidence against him. As we have stated in an earlier part of this judgment the prosecution in this case has been unnecessarily scrupulous. We might almost call it chivalrous. There has been a tendency on the part of the prosecution to press points in favour of the accused persons. While we greatly appreciate the spirit which prompted the desire to be as fair as possible we consider that in this particular instance it was carried too

far. The learned Counsel has suggested that as the prosecution was not pressing the charge of complicity in the Train dacoity against the appellant his client may have been lulled into a false sense of security and thus failed to call evidence to meet the charge. We cannot accept this plea as on the face of it the conduct of the appellant shows that he was not lulled into a false sense of security. As we have noted he was charged also with complicity in the Bichpuri dacoity. The prosecution did not also press the charge against him of complicity in the Bichpuri dacoity. Nevertheless he called a witness to prove his *alibi* in that case thus showing that he was under no false impression as to the gravity of the charges against him. Upon the evidence the appellant is clearly proved to have been a member of the Revolutionary party. He is further clearly proved upon the evidence to have participated in the commission of the Train dacoity and he has been rightly convicted by the learned Special Sessions Judge on the charges on which he has been convicted.

13. *Ram Dulare Trivedi.*

The appellant is a young man, a resident of Cawnpore, Banarsi Lal and Indu Bhushan Mittra have given evidence against him which if accepted proves absolutely that he was one of the conspirators. Gopi Mohan has also given evidence against him which if accepted proves clearly that he was one of the conspirators. Exhibit P-46, a letter written by the appellant to Indu Bhushan Mittra's brother and Ex. P-47, a post card written by the appellant to Indu Bhushan Mittra and his brother which were recovered from the house of Indu Bhushan Mittra at the time of his arrest corroborate Indu Bhushan Mittra's evidence sufficiently. The evidence both of Banarsi Lal and of Indu Bhushan Mittra as against Ram Dulare Trivedi is corroborated by the fact that they were able to identify him. Gopi Mohan's evidence against him is not corroborated to any great extent. The appellant is represented before us by Mr. H. N. Misra. He called one witness whose evidence is of no value. We consider that it is established sufficiently against him that he was a member of the conspiracy. He was not altogether a minor member and we consider that it is established that he was privy to the conspiracy to commit dacoities. We, therefore, find that he was rightly con-

victed on the charges on which the learned Special Sessions Judge convicted him.

14. *Ram Nath Pande.*

Ram Nath Pande is a youth who was in a school at Benares. He has been represented before us by Mr. H. N. Misra. It is proved very clearly that the incriminating document Ex. P-162 written in the handwriting of Rajendra Nath Lahiri was found in his possession. It is further proved that Indu Bhushan Mittra wrote to him Ex. P-43 giving information as to Ram Prasad's arrest. The evidence against this appellant establishes sufficiently that he was a member of the Revolutionary conspiracy. He was the "post office" of Rajendra Nath Lahiri. There is nothing to show that he was privy to the conspiracy for committing dacoities and while upholding his conviction on the charge under s. 121-A we allow his appeal in respect of his conviction on the charge under s. 120-B, Indian Penal Code.

15. *Parnawesh Kumar Chatterji.*

During the hearing of the appeals Parnawesh Kumar Chatterji submitted to this Court the following petition in his own handwriting from which it will be seen that he not only admits the correctness of his convictions but that he has admitted complicity in the commission of a dacoity which had never been mentioned in the proceedings. This dacoity is said to have been committed in the Allahabad District, but there is no allegation in these proceedings that such a dacoity was committed or that the Revolutionary party was connected with it. The petition is as follows:—

"In the year 1923 I was living in the boarding house of Kashi Vidya Pith Sagra, and was reading in ninth class. Manmatha Nath Gupta was also reading in tenth class. One day he asked me my address and my ins and outs and said I have come to know your feelings and ideas that is why I asked your ins and outs. However we will meet every evening in the Carmichael Library. I went to the Library as I was told. There I met him and was given a book, life of Mazzini and Garibaldi. After reading this book I was given many other books Banglaya Biplav, Kanhai Lal, Khudi Ram, Jotindra Nath, Bandi Dwara. When I finished these books he began discussions about them. After a few days he said to me that there is still

such kind of party, do you want to enter. I said yes. Because from the very boyhood I used to hear stories about revolutionaries, of their wonders and risks, of bombs and revolvers. When I accepted all he said to me then he said from this day you are the member of this party the branch of Dacca Anushoolan Samiti. Then I said how shall I be able to know that I belong to the party? He said you will have to work in recruiting department as I recruited you. After few days Manmatha Nath asked me if I want any teacher he can give one. But he will take Rs. 10. I consented and asked my mother too, she also gave permission. One day in the Library I met Jogesh Chandra Chatterji and Manmatha Nath Gupta introduced him to me. Daily he used to come and teach me. After a month or two he vanished. I do not know where he went. Then after some days he himself came to my house and said I am going back to my home. I had been to Gaya. So I have come to inform you. Then I gave Rs. 10 to him and he went away.

"After passing a month or two Manmatha Nath introduced me with Rajendra Nath Lahiri. He asked me if I am asked to go anywhere shall I go without asking question. I said yes. Then we came back and after a fortnight both Gupta and Lahiri came to me in the evening, asked me to come soon with a towel and a *dhoti*. I did as they said, then I and Manmatha Nath, with a lad unknown to me, went to the Railway Station and had three tickets for Allahabad. We reached Allahabad, there I came to know that we were going for dacoity. I was not at all surprised because I knew that occasionally revolutionaries do commit dacoities. And I was very anxious to see and hold a revolver, pistol, bombs, etc. When we reached Allahabad we settled in a Dharamshala. In the noon time Jogesh Chatterji with a lad (named Banwari Lal) came and had a talk with Manmatha and went away again both of them. At 2 o'clock we again went to the Railway Station and I and Banwari started to unknown place changing many stations, at last in the evening we got down in some unknown station, where many people were getting down from the train. Banwari began to follow them so did I, covering their faces and mine, they took me to a far distance from the Railway Station and reached near a house and some of them

jumped in from the roof and opened the door, then we all entered the house. I was not at all in a sense at that time. Anyhow we came safely to our home. In the year 1924 I with all my family members came to Jubbalpur. From there I had connection with Manmatha through letters. In the end of year 1925 I received a registered parcel containing revolutionary leaflets. I burned them off. When I was returning from Bengal in the way I took the rules and regulations of the H. R. A. from Manmatha Nath.

I have seen the error of my ways and I am extremely sorry for any part that I have taken in the Revolutionary Society and I would have made my confession long ago excepting that I was threatened with life by some of my colleagues.

(Sd.) Parnawesh Kumar Chatterji,
24th July, 1927."

We find apart from this petition that Parnawesh Kumar Chatterji has been rightly convicted on the charges on which the learned Special Sessions Judge has convicted him. The question of his sentence will be considered later.

Before we consider the question of sentences, we propose to state in detail the findings, at which we have arrived upon the evidence. We find, that in the year 1924, certain persons in Bengal, amongst whom were Sachindra Nath Sanyal and Jogesh Chandra Chatterji, entered into a conspiracy of a revolutionary nature. In furtherance of the aims of this conspiracy, Jogesh Chandra Chatterji came to the United Provinces to recruit and to organize the movement. One of the meetings at which the organization was discussed and developed was held at Shahjahanpur about July 1924. There may have been other meetings at other places in the United Provinces. This much is certain. After July 1924 the movement in the United Provinces took a concrete shape. The central organization remained in Bengal, whence the policy was directed and controlled. Considerable powers were delegated to a provincial organization, two important head quarters of which were in Shahjahanpur and Benares. A meeting of this provincial organization was held in some place in the United Provinces in October, 1924. Jogesh Chandra Chatterji was arrested in Calcutta, with the proceedings of this meeting in his possession,

There may have been several other meetings of the provincial organization. The only other meeting which is proved to have taken place is the meeting at the residential quarters of Vishnu Saran Dublis in the Vaishya Orphanage in Meerut on the 13th and 14th September, 1925. It is not proved that there were activities in the United Provinces after the arrests of the 26th September, 1925.

The aim and methods of the conspirators are disclosed in a guarded manner in the "Revolutionary", and are disclosed specifically in the Rules of the Hindustan Republican Association. There is other evidence as to what these aims and methods were.

The ultimate aim is stated in the Rules as follows :—

"The object of the Association shall be to establish a Federated Republic of the United States of India by an organized and armed revolution."

The methods proposed for the attainment of this object were :—

(1) The recruitment of active members. The methods here were to be by the use of personal influence ("private conversation") upon individuals, and upon the masses by publications in the press, which was to include subsidized weekly newspapers, and through a secret press, by speeches from public platforms, by recitation of religious poems, and by the show of magic lantern slides. Emissaries were to be sent to villages, to factories and to coal mines to enlist the sympathies of agriculturists and labourers on the side of the revolutionary movement and to form organizations amongst them. Members were to utilize and influence the Congress and other public bodies towards the advancement of their objects.

(2) In order to provide the movement with the necessary striking force, arms and ammunition were to be manufactured in India. Members were to be sent abroad to obtain training as soldiers or munition workers so as to be able to conduct military operations or direct ammunition factories at the time of open rebellion, other members were to enlist in His Majesty's Forces in India. Every effort was to be made to arm all members. Co-operation was to be sought towards these objects from Indian revolutionaries outside India.

(3) In order to obtain the necessary funds to carry out the programme the organizers

were to make every effort to collect subscriptions from members and sympathisers. But funds were also to be collected "occasionally by contributions exacted by force."

(4) The Central Council was to have absolute powers, and its principal function was "to supervise, adjust and co-ordinate the activities in the different Provinces of which it shall have full knowledge." "It was also to be in direct charge of the work to be carried out in countries outside India."

The exact steps leading to the desired armed revolution are not revealed in these rules, but provision is made for one possible eventuality :—

"In extreme cases of repressions by agent or agents of a foreign Government it shall be the duty of the Association to retaliate in whatever form it shall consider suitable."

The objects of the movement according to Indu Bhushan Mittra were :—

"To overthrow the British Government by an armed revolution and to establish an independent Indian Government in its place. The means were a revolt. For this revolt men and arms and ammunition were required. Men were to be obtained from the youths of India by societies and clubs as Libraries, Sewa Samitis, Athletic Clubs, Boy Scout Associations. Money was to be obtained by subscriptions from members and by dacoities. With such money, libraries, etc. were to be formed, preaching was to be arranged and arms and ammunition were to be bought."

We have considered the question whether the object of the conspiracy was in itself so impracticable as to justify a conclusion that the aims of the conspirators can be taken to be little more than the comparatively harmless vapourings of misguided men, some of whom were mere youths, such vapourings being begotten of a mistaken but honest conviction that all was not well in India. But we are unable to regard the movement as thus innocuous. The fact that the activities of these conspirators were confined to a period between July, 1924, and September, 1925, was in itself sufficient to prevent the organization reaching an advanced stage of development but we find sufficient indication that substantial progress was made in the period. Arms and ammunition are proved to have been collected, bombs are proved to

have been found in the process of manufacture, and four gang robberies were committed. In every one of these human life was taken wantonly. Had the movement been allowed to continue undetected for a longer period, the results might have been very serious. There are many stages short of an armed revolution which could have been reached by the conspirators, at each one of which the public safety could have been more acutely affected.

One of the bad features revealed by the evidence as to the methods of the conspirators is the manner of recruitment of youths and the conversion of the recruit into the recruiter. The following are illustrations:—

We have it proved that Ram Prasad approached Indu Bhushan Mittra according to the latter's own words in the following manner:—

"There is a playing field next to the Arya Samaj building of which I have spoken. I used to play hockey there. Ram Prasad was learning Bengali and he asked me the meaning of words. He was there at the Arya Samaj *chabutra*. Ram Prasad can speak and understand Bengali, but cannot write save a very little. First he used to give me detective novels to read in Bengali. Later he also gave me books to read. These other books he first gave to me of his own accord and then I asked for them. Such books were Kanhai Lal Bandjiwan (second volume), 'Bangla Biplobbad' (Revolution in Bengal) in Bengali. In Hindi *Balshevik ki Kartut* and *Rus ki Dadi Katharin*..... I can understand and speak Urdu and can write it a little. The effect caused by my reading those books was that the English were ruling India by force and by a revolt they should be driven out of India by force."

After that Indu Bhushan Mittra, who was then barely fourteen years of age, was able to progress further. He formed a plan of constituting a club of boys at which they should be taught manly exercises in order to make them more efficient revolutionaries. He began to take a keen interest in the movement and made himself useful by receiving letters for Ram Prasad; but as he was arrested before he was sixteen years of age, his activities came to an end.

Ram Prasad similarly approached the little boy Jagdish Chandra who was about thirteen. Jagdish Chandra says:—

"Since about two years ago I have been a friend of Ram Prasad. My visiting him began when I was in the ninth class. I was then in bad health and Ram Prasad said I should do physical exercise and I should go to him and he would teach me. I had not gone to his house before that and it was this which began my going there. I went to his house and he showed me Ram Murti drill and I thought it hard. Then he told me to do press ups and rising exercises. I then did them at my own house.

"On this question of physical exercise we got into the way of conversing. Ram Prasad asked me if I read books that were not text books and I said I often read books from the school library. He then told me he would give me a book which I should read. I took the book called *Swadhinta ka Pujari*. I read it and returned it. The title means the worshipper of freedom. When he gave me the book he had asked me to return it. When I returned it he asked me what I had read and what effect it had made on me. I told him that the impression I had received was that every man should serve his country. The book was about the lives of Gandhi, Tilak, Gokhale and others.

"Then Ram Prasad said I should open a club and get books and newspapers for it. He said such books should be got as incited one to serve one's country. He said he would give the books and Indu Bhushan Mittra was to start such a club and I should help him. I knew Indu as he was my class-fellow. He is the witness in this case.

* * * *

"In the vacation I was away from Shah-jahanpur in Moradabad, Bareilly, etc. I returned at the beginning of July 1925.

"I met Ram Prasad and he again told me my health was bad and I should do physical exercises. The same day he gave me a book 'The Little Grandmother of the Russian Revolution' in English. I read it and it took me one or two months to finish it."

"Catherine was a woman who preached in the village against the rule of the Tsar and wanted to start a Republican Government. She was sent to Jail. When I returned the book he said there was need in India too to have a revolution and put up

a Republican Government I said that revolution in India was impossible as we had no arms nor army. He said that he and his society collected arms and all arrangements would be made. I asked how they got arms and he said they were getting them by forcible means, that is to say, by taking them by force from those that had them.

"I asked him about the society and he said he would not tell me as I was still a boy. He told me not to tell this to anyone otherwise it would not be good for me."

Ram Prasad was arrested before he succeeded in enlisting Jagdish Chandra.

Indu Bhushan Mittra approached Jagdish Chandra also. This is the manner in which Govind Charan Kar ("Chaudhuri") approached Jadu Nath Sen, another school boy. Jadu Nath Sen says: "On my arrival from the holidays the next day I began to salute Chaudhuri and after two or three days we talked.

"The talk started as he came into my room and asked me who I was and whence I came. I said I studied at the Church Mission School and I told him what my father was. I asked him what he did and he said he was an agent. He said he was an agent of razors, knives, and underwear from Delhi. This he said later. The first day he said only that he was an agent.

"He asked me if I read novels on the first day. I said I had no time for that. He told me I should find time and read. Then he also told me that I should learn to deliver lectures.

"I said there was no need for me to lecture as I was a student. He told me then that I should learn at once. He told me I should go to the Ganga Prasad Library to read papers and novels. I said I had not time and I would go when I had time. This was all the talk the first day.

"On the second or third day we talked again. This took place in my room. Then he began to lecture to me about our country. He told me how freedom was to be acquired. For several days he kept on lecturing me on this subject. During the time of these lectures he gave me a book called 'Desh Udhār' (Salvation of our Country) in Hindi with Sanskrit in it. Sewn on to this was another book 'Ghulami ka Nasha' (The Drunkenness of Slaves). Chaudhuri made me read two pages of 'Desh Udhār'. Then he told me to keep the book and

read it and take help from him when necessary, that is, to question him about it. Then he also lectured me about Swadeshi and foreign clothes. He told me I should wear country clothes which were cheap and not foreign clothes which were expensive and I should support home manufactures. I said I would wear what my father gave me. He also added that such a lot of grain was exported and the Indians were dying of hunger."

We find Bhupendra Nath Sanyal (who has not appealed) at the age of about nineteen perverting his fellow students in Allahabad.

But every incident connected with this conspiracy pales into comparative insignificance in the light of the evidence as to the four gang robberies with murder. These crimes came under the heading of "Occasional contributions exacted by force."

At Bamrauli the victim was a Brahman whose only importance in the eyes of the conspirators consisted in his possession of money, which they desired. The robbers indulged in an orgy of gun fire. One man Mohan was killed. Seven were wounded. The circumstances of the death of Mohan were these:—

Baldeo Prasad deposes:—

"Mohan Lal died in my village. He was killed that night. He was a wrestler and cultivator. He was one of the villagers who came with me. Mohan Lal shouted to the dacoits that if they were brave they should fight with him with bare arms or else give him too a weapon to oppose them. The dacoits on the roof told him to stand up and then they turned on him something which looked like a candle and gave a great light and they shot him in the side. He fell on the spot."

In the Bichpuri dacoity the victims were selected as the result of a change of plan. The original intention was to rob a house in different village but the conspirators finding that that venture would be attended with some danger turned under the advice of local bad characters to the house of Toti and Bihari, who claimed their attention solely because they were said to have money and to be less protected. Here torture preceded murder. Toti says:—

"Then Bihari was seized by the dacoits and brought where I was. Then the dacoits made me stand up and took me into the room and asked me to show them where the money was. I said I had none. Then

the dacoits began to beat me. They also put a knife on the throat of my boy and said 'Cut his throat'. They said that without it I would not disclose my money. They also pressed my neck and put a knife to my eyes and said they would gouge them out if I did not tell. They also lit a cloth with oil between my legs. I was then in the verandah of my room. When I put out my hand to ward off the knife from my eyes I got a slight cut near the eye. My child did not have his neck cut as it was forbidden by one of the dacoits on the roof of Sobhi. I cannot say which of the two men on the roof prevented it."

Two men were shot. One Sham Lal died. This was the manner of his death. Sobha says:—

"I saw Sham Lal come out of his house and he asked me why I was standing there. I said that they had guns and we would be killed. Sham Lal said that they were only fire-crackers, not guns. Sham Lal advanced and abused one man and said he had recognised him. The man said 'If you have recognised me, take this.' Sham Lal turned and then he got a bullet in the buttocks and fell where he was struck. In fear I ran to the fields."

Sheoratan Bania of Dwarkapur similarly owed the attack upon his house to the fact that he had money which his assailants wanted. He was bitten in the arm and struck three times with a hatchet. One Dwarkapur villager was killed. Four were wounded.

In the Train robbery the attackers maintained a fusillade of shots on each side of the train. The unfortunate Ahmad Ali met his death in the following manner. His friend Mirza Ahmad Shah says:—

"Ahmad Ali got down and said he would see after his wife who was sitting in a different compartment. I told him not to go but he said he would come back at once. Our compartment was three to five coaches from the engine. This compartment was in front of the first and second class one. Ahmad Ali did not come back into the compartment before the train started."

He was shot dead apparently as soon as he got out.

Thus in a little over a year some of the accomplices of this conspiracy were the deaths of four men killed by fire arms, the wounding of twelve others with fire-arms and torture of a brutal nature.

Some attempt has been made to extenuate these atrocities by urging that the intention of the conspirators was never to murder, and that their desire was only to keep outsiders from interfering with their removal of the property and to save themselves from detection. It was further urged, that their activities might have been worse, and we have been referred to statements in the evidence to show that in the Bichpuri dacoity the action of the dacoits has some trace of humanity. These are the statements: Toti has already stated that when one dacoit threatened to cut his child's throat another dacoit forbade him to do so. Banarsi Lal's deposition is as follows:—

"When I went in, I found a man and a woman on a cot in a thatch in the yard and I threatened him. He did not disclose anything and I went elsewhere. There I saw a bad character pulling a woman by the hair and 'Quicksilver' held a *kukri* against the throat of a child, and said to Ram Prasad that he might be allowed to cut the throat of the child else the woman would not speak. Ram Prasad was on the roof there. Ram Prasad told him not to do so as the woman would speak anyhow. Ganga Ram and Nawab were taking property from the rooms. These things struck me unfavourably and I went in another direction. There was a room with fodder inside and a woman was hiding in the fodder. She had a child in her lap and there was another bigger child there. A bad character was seizing the woman by the breasts. I told the bad character, being very angry, that I would tell the captain (that is, Ram Prasad) what he was doing and the bad character went into another room and I went outside. By outside, I mean, outside the house."

"When I again went into the house I saw some bad characters feasting on molasses. I showed all these rooms to the Deputy Magistrate. Villagers outside collected round the house and began shouting and the bad characters by the order of Ram Prasad fired and he and Ashfaqullah fired from the roof. Ram Prasad said 'Havaldar! Warn the people three times and if they do not obey shoot them down.'"

"Ram Prasad from the roof shouted that he who wanted to die should advance, otherwise he should go back. Shots were fired all this time from the roof and from below. No pistols or revolvers were fired."

as Ram Prasad had told those who had them not to use them unless personally attacked."

'Quicksilver' is said to be the nickname of a conspirator against whom a warrant has been issued but who has not been apprehended.

It was further urged that these robberies were committed not for the personal gain of the robbers, but solely in order to obtain funds for the furtherance of the cause which they had at heart. These arguments should not, in our opinion, affect the question of sentence. It appears to us that the distinction in gravity between the act of a man who shoots because he desires to kill another, and a man who shoots to kill, because he desires that another man should not interfere with his committing a robbery, is too fine to form the basis for a difference in sentence and we can find nothing to make the robbery of inoffensive people, such robbery being accompanied by murder, appreciably excused by the fact that the perpetrators desired funds for the purpose of conducting revolutionary propaganda. It is established clearly that at every dacoity perpetrators went armed with lethal weapons with the intention of using these weapons, if there was any interference with the taking of the property of others, that as soon as they apprehended such interference or became anxious as to the chance of detection, they used their weapons with callous deliberation and with complete indifference to the loss of life caused.

Our conclusion is that the conspiracy was of a very serious nature, having as two of its proved effects—the deterioration and ruin of young and impressionable boys, and the ill-treatment, robbery and murder of country men of the conspirators against whom individually the conspirators had no possible ill-feeling or grievance. The men who are proved to have been in the inner circle who originated and instigated the commission of robberies with murders should receive exemplary punishment. Such men when proved in addition to have taken part in the commission of offences attended with the loss of human life deserve more stringent treatment. Men who were not in the inner circle but nevertheless took a leading part in the taking of life, should receive as stringent treatment as any. Those who are proved to have taken a minor part in the movement may in some instances be made the objects of clemency.

We have been asked to consider the youth of the appellants. We shall take their youth into account in the instances of those who are youths. But it is to be noted that the worst offenders are full grown men. At the time of the commencement of the trial,

Ram Prasad	...	was 28 years of age.
Rajendra Nath Lahiri	" 24	" "
Raushan Singh	" 36	" "
Jogesh Chandra Chat- terji	" 30	" "
Suresh Chandra Bhat- tacharji	" 28	" "
Vishnu Saran Dublis...	" 26	" "
Govind Charan Kar...	" 30	" "
Makundi Lal	" 33	" "
Sachindra Nath San- yal	" 32	" "

We have been asked to consider the penitence of certain individual appellants. We shall when deciding on the sentences take into account the question of penitence, where we believe that the appellants really are penitent, but we consider that in almost all instances there is no penitence, and the allegation has been added formally to the arguments.

Finally, it has been urged before us that at the worst the appellants are misguided men of good material who have taken a wrong course under a mistaken conception of their duty, and who will prove themselves worthy recipients of a wise clemency by a steadfast intention to lead a new life. There is, however, a circumstance in the case itself, which shows that there is danger in accepting this view. We have referred already to Sachindra Nath Sanyal, one of the inner circle and main promoters of the conspiracy. He has been sentenced to transportation for life and has not appealed against his conviction and sentence. He cannot appeal now. In view of the fact that he has not appealed he is not prejudiced by our stating a fact which appears on the record of the case: In 1916, Sachindra Nath Sanyal was convicted by a Special Tribunal at Benares of complicity in a revolutionary conspiracy and sentenced to transportation for life. He subsequently received an unconditional pardon as a matter of clemency. After his release in 1920 he wrote on his own admission the book called "Bandijiwan" or "The Prisoner's Life" which is on the record. It is a eulogy of his previous activities containing a de-

finite incitement to others to commit similar crimes. He subsequently entered into this conspiracy as one of the main promoters.

We now come to the question of sentences.

(1) *Ram Prasad.*

We find this man upon the evidence to have been one of the most dangerous conspirators. He was the head of the provincial organisation in the United Provinces. He and Rajendra Nath Lahiri, in our opinion, formed the innermost provincial circle of the conspiracy. It was he, we consider, who organised the dacoities and issued the directions as to when death was to be caused and when death was not to be caused. We agree with the learned Special Sessions Judge that in the Bichpuri dacoity he was the captain and ring leader, that he directed when the firing was to take place and that he himself was using fire arms. He was again one of the main directors and controllers in the Train dacoity. He is a full-grown man of mature age, complete understanding, and distinct mental ability. He has utilized a not indifferent intellect towards the worst purposes. Now when the proceedings have come to an end he has made an almost abject appeal for lenient treatment. He has pleaded that if given a remission of all sentences he will be a good, loyal and useful citizen. He has withdrawn all allegations against persons in authority, and has to a large extent thrown his defence to the winds, although he has been careful to note at the same time that he does not withdraw a word of it. We do not believe in his repentance or in his sincerity. We consider that he is a man who, if he were let loose, would commit exactly the same crimes on his release. He has made in the course of his arguments a strong appeal for lenient treatment on the ground that it is not established that a shot from his weapon killed any one, but we are not disposed to consider this fact as of any consequence. He fired himself, he controlled the fire of others. It can only be taken that when he fired he understood the consequences of his act and it can only be taken that when he fired he aimed. The accuracy of his aim is unimportant. The gravity of this man's offences does not consist so much in the fact that he was engaged in a conspiracy to subvert the

British Government. That is bad enough, but that offence is of minor importance in comparison with the other offences that he is proved to have committed. He has shown himself to be a deliberate callous murderer. He was ready to murder harmless fellow citizens against whom he had no possible grudge for the sake of his own objects. The Special Sessions Judge has very rightly sentenced him to death. We have already upheld his conviction on all charges and we dismiss his appeal, confirm the sentence of death passed against him in respect of the dacoity with murder committed at Bichpuri, and the dacoity with murder committed on the train. The result is that he will be hanged by the neck till he is dead. His remaining sentences will not be carried out if the death sentence is carried into effect.

(2) *Rajendra Nath Lahiri.*

This man stands second in depravity to Ram Prasad in this case. He and Ram Prasad formed the inner circle of the conspiracy. He was responsible for the policy of dacoity and the policy of murder. He is not as old as Ram Prasad but he has arrived at full intellectual maturity being as he is a man now of some twenty-five years of age. He has shown the greatest activities in all the objects of the conspiracy. He took part himself in the Train dacoity where he used fire arms. In the Train dacoity he was one of the ring leaders. We do not know which shot it was that deprived Ahmad Ali of his life, but every man who fired a shot on that occasion is equally deserving of the death penalty. We consider that the Special Sessions Judge took a correct view in sentencing this man to death. We dismiss his appeal, confirm the death sentence passed against him and direct that he be hanged by the neck till he is dead. The remaining sentences will not be carried out if the death sentence is carried into effect.

(3) *Raushan Singh.*

This man was not one of the inner circle. He is over thirty-six years of age. He is a villager rather than an intellectual, but it is clear that in the Bamrauli dacoity he was one of the ring leaders and he was one of the men who took part in the continuous firing which resulted in the death of one man and the wounding of seven others. In our opinion it would

not be undeserved if every man who took part in the Bamrauli dacoity in which there was a guilt of firing had received the death sentence. It has not, however, been inflicted in every instance. In this case Raushan Singh is the only man who has been convicted of complicity in the Bamrauli dacoity. He has been rightly sentenced to death. We dismiss his appeal, confirm the sentence of death against him and direct that he be hanged by the neck till he is dead. The other sentences passed against him will not be carried out if the death sentence is carried into effect.

(4) *Jogesh Chandra Chatterji.*

We are satisfied upon the evidence that Jogesh Chandra Chatterji was one of the persons who originally conceived the idea of the conspiracy and that he was a member of what the rules call "The Central Council" which operated in Bengal. In these circumstances he must be held responsible for all the very serious offences committed by the conspirators. We consider that the Special Sessions Judge has passed on him too lenient a sentence. We enhance the sentences passed upon him under each section to sentences of transportation for life. They will run concurrently. His appeal is dismissed.

(5) *Suresh Chandra Bhattacharji.*

This appellant is a full-grown man who had a responsible position upon an Indian newspaper. We are satisfied that he was one of the inner circle in the Province and in these circumstances we consider that the sentences passed upon him by the Special Sessions Judge are inadequate. We enhance the sentences passed upon him under each section to sentences of ten years' rigorous imprisonment. They will run concurrently. His appeal is dismissed.

(6) *Vishnu Saran Dubli.*

We are satisfied that this man also was one of the inner provincial circle and his case appears to us to stand on the same footing as that of Suresh Chandra Bhattacharji. We enhance his sentences similarly to sentences of ten years' rigorous imprisonment on each charge. These sentences will run concurrently. His appeal is dismissed.

(7) *Manmatha Nath Gupta.*

Manmatha Nath Gupta is a youth, but he is a youth of singular precocity in crime. Not only is it established that he was one of the party to whom important secretarial work was committed but he is proved to have taken part in no less than two dacoities. The Government has applied for the enhancement of his sentences. We consider that if he had been an older man he should have received very much heavier sentences but in view of the fact that he is only a youth we do not propose to enhance his sentences. We do not propose, however, to reduce them. His appeal stands dismissed.

(8) *Govind Charan Kar.*

We look upon this man as a particularly dangerous member of the conspiracy. He had come from Bengal to work the conspiracy up. Not only had he done so but he took part himself in the Train dacoity. He is a man of about thirty and we consider that the Special Sessions Judge has passed too lenient a sentence upon him. We enhance the sentences passed upon him to sentences of transportation for life under each charge. These sentences will run concurrently. His appeal is dismissed.

(9) *Makundi Lal.*

Makundi Lal is proved to be not an important conspirator but he is proved to have been a very dangerous dacoit. He took a prominent part in the commission of the Train dacoity. The Special Sessions Judge has remarked about him that he is now at least thirty five and so the chances are that he will not in future join in other dacoities, and that as regards conspiracy he does not think that he has brains to do much himself. We do not consider, however, that the fact that the man is thirty-five years of age is sufficient reason for passing a light sentence upon him when he is proved to have taken a prominent part in a serious dacoity accompanied with murder. We enhance the sentences passed upon him to sentences of transportation for life on each charge. These sentences will run concurrently. His appeal is dismissed.

(10) *Ram Kishan Khattri.*

He has been convicted of conspiracy and has also been convicted of participation in

the Bichpuri dacoity. He appears to us a dangerous man. He is not very old but he is not very young. He was at the commencement of the trial twenty-two years of age. The Crown has not applied for enhancement of his sentences. In the circumstances we could not enhance his sentences but we see no reason to reduce them. His appeal is dismissed.

(11) *Prem Kishan Khanna.*

The appellant is a man who was twenty-six years of age at the commencement of the trial. He had been working for some years as contractor. He is a man of good family and of good position. There is nothing to extenuate his joining a conspiracy of this nature and we see no reason to reduce his sentence on the charge under s. 121-A. We have already accepted his appeal on the charge under s. 120-B. This disposes of his appeal.

(12) *Raj Kumar Sinha.*

His case is not as bad as the case of Manmatha Nath Gupta. He is some years older than Manmatha Nath Gupta, but was not as prominent a conspirator as Manmatha Nath Gupta, but he is proved to have taken part in the Train dacoity. The Special Sessions Judge has sentenced him to sentences lower than those passed upon Manmatha Nath Gupta. We consider the sentences passed upon him neither too high nor too low. We accordingly refuse to reduce these sentences and dismiss his appeal.

(13) *Ram Dulare Trivedi.*

Ram Dulare Trivedi was one of the original participants in the conspiracy but since then has taken a very minor part; but he was one of the original conspirators and we see no reason to reduce his sentences. His appeal is dismissed.

(14) *Ram Nath Pande.*

We have already allowed Ram Nath Pande's appeal in respect of his conviction under s. 120-B. In respect of his appeal on the conviction under s. 121-A, we find that he took a minor part in the conspiracy and we reduce his sentence from five years' rigorous imprisonment to three years' rigorous imprisonment. His appeal is otherwise dismissed.

(15) *Parnawesh Kumar Chatterji.*

As has already been stated this youth has withdrawn all his protestations of innocence and we have only to consider his appeal on the question of sentence. While we are inclined to believe that he is sorry for what he has done, we cannot lose sight of the fact that he had important duties in the conspiracy and was clearly one of the men entrusted with secretarial work. We feel, however, that we should do something for him and we reduce the sentences passed upon him under each section to sentences of four years' rigorous imprisonment which will run concurrently. His appeal is otherwise dismissed.

A. N. A.

Appeals dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1160
OF 1927.

November 21, 1927.

Present:—Mr. Justice Harrison.

LAL BADSHAH—COMPLAINANT—
PETITIONER
versus

EMPEROR THROUGH LAL HUSSAIN

AND ANOTHER—RESPONDENTS.

Forest Act (VII of 1878), ss. 2, 39, 41—"Timber" and "forest produce," meanings of.

The words "timber" and "forest produce" in s. 41 of the Forest Act are used in the widest sense as given in the definitions to be found in s. 2 of the Act and not in the narrow and restricted sense specially introduced to define and limit the powers described in Chap. VII of the Act. [p. 791, col. 2; p. 792, col. 1.]

Petition for revision of an order of the Sessions Judge, Rawalpindi, dated the 8th of November 1926, affirming that of the Magistrate, First Class, Rawalpindi, dated the 5th of August, 1926.

Mr. Prakash Chandar for Mr. B. A. Cooper, for the Petitioner.

Diwan Ram Lal, Assistant Legal Remembrancer for the Crown.

JUDGMENT.—One Lal Badshah is the owner of a private forest and is in the habit of importing his wood into Rawalpindi City and has not provided himself with a pass of the nature contemplated in s. 41 (c) of the Indian Forest Act of 1878. (4) was convicted by a Magistrate and his conviction was upheld on appeal by the District

Judge of Rawalpindi. On an application for revision being presented I took the view that the words "timber" and "forest produce" should be read as meaning the same thing both in s. 41 and s. 39 and that the restrictive definition contained in s. 39 governed also s. 41. At the hearing of the application for revision the Crown was not presented as is too often the case where a point of any importance or difficulty is involved. After this decision Lal Badshah proceeded to import more timber into Rawalpindi City without a pass, and in order, I am informed, to obtain a ruling of a Division Bench he was again prosecuted and acquitted. Unfortunately the period of limitation for the presentation of an appeal was allowed to elapse and naturally enough Lal Badshah continued to behave as before. His timber was confiscated on a third occasion and he, therefore, lodged a complaint under s. 61 of the Indian Forest Act. This was dismissed under s. 203, Criminal Procedure Code, and his application for a further enquiry was dismissed by the Sessions Judge of Rawalpindi. He now applies for revision of that order.

Whatever view may be taken of the meaning of the words "timber" and "forest produce" in s. 41, the first point to be decided is whether there has been vexatious and unnecessary action on the part of the Forest Officer, who confiscated the wood. Mr. Ram Lal points out that in order to test the previous decision given by me *ex parte* it was considered advisable to get a further pronouncement and it was thought that this could only be done, short of actual legislation, by enquiring another test case and, if possible, an appeal from an acquittal. By an oversight the chance was lost, and it was, therefore, considered necessary to take further action. On the other side it was urged that whatever necessity there may have been for taking action the second time, when the man had been acquitted the second time and no appeal from the acquittal had been presented, he should not have been harassed yet again. In my opinion there is no force in the further contention put forward by Mr. Ram Lal that because the officer taking action was a subordinate and the action was decided upon by his superior officer, the head of this department, he is absolved from all liability. He is absolved from all moral blame of course, but the section still applies if he has acted vexatiously and unnecessarily. Vexatiously

ly he has acted in accordance with the meaning given by Webster to the word. Necessity is rather more difficult to determine. The initial mistake having been made of not taking advantage of the acquittal, I do not think it is going too far to say that in the interests of all involved legislation would not be justified until there had been two decisions or a decision of a Divisional Bench or at least a decision after a full hearing. It appears to me, therefore, looking at it from this point of view, that the action was necessary. The wood which was confiscated, Mr. Ram Lal tells me, will be returned at once to Lal Badshah and, therefore, I do not think any further action should be taken in the matter of his complaint.

I now come, to the merits and on reconsidering the matter I think there can be no doubt that my previous decision was wrong. The view there taken was that the power of the Local Government to levy duty having been restricted in Chap. VII to duty on timber produced in British India in which they have rights, and all timber brought from any place beyond the Frontier the same restriction must be held to govern their powers to control transit. The further restriction, which is to be found in Chap. VII making the levy of duty subject to the control of the Governor-General in Council is not to be found in Chap. VIII. The reason is obvious, namely, that duty is levied both on home grown and foreign timber and the matter is not wholly provincial. Chapter VIII, on the other hand, gives powers to the Local Government, without any control whatever, to regulate transit, and if, the illustrations giving the matters, regarding which such rules can be made be read carefully and I think it is clear from the internal evidence of these explanations themselves that such control must apply to all forest produce whatever its source of origin and to whomsoever it may belong. It would obviously be futile to make rules applying to rivers or roads, which could be ignored by private individuals using such roads and rivers. After the words "forest produce" in Chap. VIII s. 41, there is a full stop and the illustrations and explanations then follow. In Chapter VII s. 39 after the words "forest produce" there is no full stop and the words are qualified by the subsequent sub clauses. This points clearly, in my opinion, to the conclusion that the words "timber" and "forest produce" in

s. 41 are used in the widest sense as given in the definition to be found in s. 2 and not in the narrow and restricted sense specially introduced to define and limit the powers described in Chap. VIII. It is not a question of the impossibility of working the rules on any other interpretation of the words "timber" and "forest produce" but rather of the meaning of the actual words used in the two sections when read together. Duty on the nature of things is only levied on a very limited section of the timber to be made regarding the control and transit of all timber whether privately and wheresoever it may have been grown.

I dismiss this petition.

R. L.

Petition dismissed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1020 OF 1927.

November 18, 1927.

Present :—Mr. Justice Jai Lal.

SIRAJ-UD-DIN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Recording of prosecution evidence piecemeal, legality of.

"In a criminal trial prosecution evidence should not be recorded piecemeal inasmuch as such a procedure would give every opportunity for succeeding witnesses to know what the statements of the previous witnesses are and on what lines the cross-examination of the witnesses is being conducted. [p. 793; col. 1.]"

Criminal appeal from the order of the Sub-Divisional Magistrate, exercising enhanced powers under s. 30, Criminal Procedure Code, District Hissar, dated the 31st August, 1927.

Mr. Abdul Aziz, for the Appellant.

Mr. Feroze Din, for the Government Advocate, for the Respondent.

JUDGMENT.—Siraj-ud-Din, appellant, aged 18 years according to his own statement and 20 years according to the Magistrate has been convicted by a Magistrate, First Class, with enhanced powers under s. 30 of the Criminal Procedure Code, under s. 376 of the Indian Penal Code for having raped *Musammāt* Bakhtawar, the daughter of Nabi Bakhsh, aged 13 or 14

years, on the forenoon of the 13th of April, 1927, and has been sentenced to seven years' rigorous imprisonment. He has appealed to this Court and I have heard Mr. Abdul Aziz who represented him and also Mr. Feroze Din Counsel for the Crown.

The case for the prosecution as stated at the trial is that *Musammāt* Bakhtawar was taking some tobacco for her father, who was working in the fields outside the village and when passing in front of a *kotha* she was suddenly seized by the accused, taken inside the *kotha*, thrown on the ground and ravished. It is alleged that when she was seized on the road she cried aloud and this attracted the attention of her father, Nabi Bakhsh, who actually saw the accused drag his daughter inside. Nabi Bakhsh thereupon ran towards the *kotha* and in the way met Nizam and Imam Din and all the three went and found the accused raping the girl. It is alleged that the *kotha* had no door and was not consequently shut, that the girl was actually crying when these witnesses reached the scene of the crime and that the accused left her when they reached there. An attempt was made to secure the accused but he made good his escape after he had been slapped by the father twice, but he left a shoe and some clothes at the spot.

The statement of *Musammāt* Bakhtawar is that the accused had a discharge before her father and his companions came to the spot. According to her the father was working at a distance of 20 or 25 paces from the place where she was seized, according to the father the distance was about 150 paces, but it is common ground that the place was visible from where the father was. It may also be mentioned that the mother and the brother of *Musammāt* Bakhtawar were also working with her father. It is further alleged that the *ghagri* of *Musammāt* Bakhtawar got stained with blood, as the girl bled as the result of the rape. This *ghagri* was secured by the Investigation Police Officer and sent to the Chemical Examiner, but no blood or semen was found thereon.

The matter was reported at the *Thana* five kos from the village at 7 P. M. and *Musammāt* Bakhtawar stated in that report that she was forcibly taken inside the *kotha* by the accused and was thrown on the ground and that the accused wanted to rape her; but on

hearing her noise her father, Nizam and Imam Din came and released her, and thereupon the accused ran away leaving his shoe and clothes on the spot. She added that "if her father had not arrived the accused would certainly have violated her". In her cross-examination she was confronted with this statement, but she denied that she had made it and asserted that her statement at that time was the same that she had made at the trial. The learned Magistrate has tried to explain away this serious discrepancy between the two statements by remarking that the Head-Constable who recorded the statement was inexperienced, but the learned Counsel for the Crown has not supported the Magistrate in this connection and has admitted that, as a matter of fact, the statement recorded in the First Information Report is exactly as it was made by *Musammât Bakhtawar*. The learned Counsel, however, opined that *Musammât Bakhtawar* was not willing to state that she had been disgraced and it was for this reason that she minimized the circumstances of the assault on her. I am of opinion that the statement made in the First Information Report represents what *Musammât Bakhtawar* stated to the Head-Constable and this view is supported by the manner in which the report is recorded.

The eye witnesses have supported the case for the prosecution as put forward at the trial. Their testimony is almost consistent and is not open to any serious criticism. But the learned Counsel for the appellant has invited my attention to the facts that the evidence for the prosecution was recorded by the learned Magistrate piecemeal, with the result that there was every opportunity for each succeeding witness to know what the statement of the previous witness was and also on what lines, the cross examination of the witness was being conducted on behalf of the accused. There is force in this contention and the record discloses a disregard of the instructions of this Court as to the manner in which the evidence has to be recorded. I consider that there is justification in the complaint of the Counsel for the accused that his client has been prejudiced by the manner in which the evidence was recorded in this case.

The Medical evidence, however, has an important bearing on the case. The Medical witness has stated that the hymen of the girl was ruptured but that this rupture

was not a recent one. He is also of opinion that it was not the first time that the girl had been subjected to sexual intercourse. He noticed one slight injury on the person of the girl and was of opinion that was due to forcible intercourse. But in cross-examination he admitted that the injury might be due to intercourse with the consent of the girl. Under these circumstances, in my opinion, it is not possible to hold that the Medical evidence supports the case for the prosecution. On the other hand, it tends to support the contention of the Counsel for the appellant that if there was sexual intercourse with the girl by the accused on the particular day it was with her own consent and, that, therefore, it was not a case of rape. The contention receives further support from the fact that the parents and a brother of the girl were working in a field about 150 paces from the scene of the occurrence and the place where the girl was seized by the accused was visible from there. It is unlikely that the accused would have dared to forcibly seize the girl under the circumstances. Moreover, it is alleged that on hearing her cries her father immediately ran to the scene of the occurrence and before his arrival the accused had practically finished the intercourse. This story, in my opinion, is improbable and is inconsistent with the allegation that the girl was raped.

The investigation in this case was not started till the 24th April whereas the offence is alleged to have been committed on the 18th of April and the matter reported at the Police Station the same day. The girl was not examined by the Medical witness till the 26th April. The accused naturally asserts under the circumstances that the case regarding him has been fabricated.

Though I am not prepared to hold that the accused did not have intercourse with *Musammât Bakhtawar* on the day of occurrence I am not satisfied that such intercourse was forcible or without the consent of the girl. It is not improbable, as contended by the Counsel for the convict that the girl was a consenting party and that when the matter became public, first a report of an attempt to rape or an offence under s. 34 of the Indian Penal Code was made at the *Thana*, but subsequently the story was developed, as stated at the trial.

Having regard to all the circumstances, I am of opinion that the accused is entitled to the benefit of doubt and accepting his appeal I acquit him and order his release forthwith.

E. L.

Appeal accepted.

LAHORE HIGH COURT. CRIMINAL APPEAL No. 235 OF 1927.

November 22, 1927.

Present:—Mr. Justice Jail Lal.

SIKANDAR—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 503—Witness residing in Native State—Issue of commission to examine witness to officer representing British Indian Government—Duty of such officer—Refusal to execute commission, legality of—Court's discretion to examine witness by commission or summons.

Once a commission has been issued by a District Magistrate or other Court mentioned in s. 503, Criminal Procedure Code, to an officer representing the British Indian Government in a Native State it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence or to delegate his functions under the commission to any officer subordinate to him and competent to execute the commission, and in that case such officer must proceed to the place where the witness is or summon the witness before him and take down his evidence. But neither the Criminal Procedure Code nor any other law leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar cause. The fact that the powers to execute the commission cannot be delegated to a Magistrate subordinate to a State does not absolve such officer from the duty of executing the commission or of procuring its execution in accordance with law. The provisions of sub-s. (3) of s. 503, Criminal Procedure Code, are mandatory in this respect. [p. 795, cols. 1 & 2.]

It is for the Magistrate to decide whether he would summon witnesses residing in a Native State in Court to record their statements or whether he would issue a commission and if the Magistrate has decided upon the latter course it is not within the discretion of the Agent to the Governor-General to whom the commission is issued to decline to execute the commission on the ground that there exist other possible means for examining the witnesses. [p. 795, col. 2.]

Criminal appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure

Code, Multan, dated the 31st January, 1927. Mr. Des Raj Sawhney, Public Prosecutor, for the Respondent.

ORDER.—Sikandar, appellant, having been convicted and sentenced to six years' rigorous imprisonment under s. 379/75 of the Indian Penal Code appealed to this Court through the Jail. His appeal was heard by Skemp, J., who by his order of the 20th May, 1927, remanded the case to the Magistrate directing him to record the statement of the witnesses named by the appellant. The Magistrate was directed "to send for the appellant and ask whether he wishes a commission to issue to the Political Agent or other officer at Bahawalpur to examine the appellants' witnesses or have them examined under sub-s (4) of s. 503 in Bahawalpur State".

It appears that originally the witnesses, who are residents of the Bahawalpur State, were summoned by the Magistrate, but in spite of the service of the summonses on them they did not appear and consequently the Magistrate proceeded to deliver judgment holding that he "could not coerce the witnesses to appear against their will and could not issue warrants against them in Bahawalpur State".

After the order of remand had been received by the Magistrate he ascertained the names and the addresses of the witnesses from the accused and issued a commission for their examination under s. 503 of the Criminal Procedure Code to the Agent to the Governor-General, Punjab States, who is the officer representing the British Indian Government in Bahawalpur State. The Agent to the Governor-General, however, has returned the commission unserved with an intimation conveyed to the District Magistrate of Multan in his letter No. 4 J 5616 dated the 18th of August, 1927, 5-9-22

regretting his inability to comply with the request with regard to the examination of the defence witnesses on the ground that there is no resident Political Officer in Bahawalpur State, who can execute the commission. In this letter reference is made to a previous letter of the 18th of September, 1922, to the District Magistrate of Multan in which, for the same reasons, a similar commission was returned unexecuted by the Agent to the Governor-General, Punjab States.

After a careful consideration of the grounds mentioned by the Agent to the

Governor-General, Punjab States, for his inability to execute the commission, I have arrived at the conclusion that such grounds cannot be supported by any provision of law.

Section 503 (1) of the Criminal Procedure Code confers the power, *inter alia*, on a District Magistrate, on being satisfied that such a course is necessary for the ends of justice, to issue a commission to a District Magistrate or a Magistrate of the First Class within the local limits of whose jurisdiction the witness resides to take evidence of such witness.

Section 503 (2) authorises the issue of a commission to the officer representing the British Indian Government in the territories of any Prince or Chief in India when the witness resides in such territory.

Then s. 502 (3) provides that such officer shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner as in the trial of warrant cases under the Criminal Procedure Code.

Sub-s. (4) of the section further authorises the officer representing the British Indian Government to delegate his powers and duties under the commissions to any officer subordinate to him whose powers are no less than those of a Magistrate of the First Class in British India.

It will thus be observed that the Criminal Procedure Code nowhere speaks of a Resident Political Officer in the territories of any Prince or Chief in India but of Political Officer representing the British Indian Government in such territories irrespective of the actual place of residence of the officer concerned and also that once a commission has been issued by the District Magistrates or the other Courts mentioned in s. 503 to an officer representing the British Indian Government in such territory it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence, or to delegate his functions under the commission to any officer subordinate to him and competent to execute the commission and in that case such officer must proceed to the place where the witness is or summon the witness before him and take down his evidence. But neither the Criminal Procedure Code nor any other

law, that I am aware of, leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar reason. The provisions of sub-s. (3) of s. 503 of the Criminal Procedure Code are mandatory in this respect.

It is, no doubt, proved as remarked by the Secretary to the Agent to the Governor-General in his letter of the 18th of August, 1927, that the powers to execute the commission cannot be delegated to a Magistrate subordinate to a Darbar, but that does not absolve the Agent from the duty of executing the commission or of procuring its execution in accordance with law.

In the previous letter to which reference has already been made the attention of the District Magistrate was invited to certain rules of this Court under which a letter or a precept of the nature of a summons may be sent to witnesses residing in the territories of the Princes or Chiefs in India through the Officers representing the British Indian Government. Presumably it is on account of this last suggestion that attention was invited to this previous letter. But, in this case, as I have already stated above, the Magistrate did send summons to the witnesses, all of whom were served but did not appear and, therefore, the issue of a letter or a precept of the nature of a summons through the Agent to the Governor-General, Punjab States, would have been of no use. In any case it is for the Magistrate to decide whether he would summon the witnesses in his Court to record their statements or whether he would issue a commission and if the Magistrate has decided upon the latter course it is not within the discretion of the Agent to the Governor-General to decline to execute the commission on the ground that there exist other possible means for examining the witnesses. It is, of course, assumed that Magistrates do not and will not issue such commission unnecessarily. In the present case the Magistrate in pursuance of the order of this Court decided to issue a commission to the Agent to the Governor-General, Punjab States, and I hold that officer was not entitled to refuse to execute the commission on the grounds stated by him.

I am under these circumstances constrained to send the case back to the

District Magistrate with direction to return the commission to the Agent to the Governor-General, Punjab States, inviting his attention to the law on the subject as explained in his order and requesting him to execute the commission. When the witnesses have been examined, the Magistrate will comply with the order of remand dated the 20th of May, 1927.

Case remanded.

R. L.

LAHORE HIGH COURT.
CRIMINAL APPEAL No. 755 of 1927.

December 1, 1927.

Present:—Mr Justice Fforde and
Mr Justice Agha Haidar.

EMPEROR—APPELLANT

versus

BAHADUR SON OF MUHAMMAD—

ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Insanity—Burden of proof—Evidence of insanity—Motive, mere absence of, effect of—Benefit of doubt—Criminal Procedure Code (Act V of 1898), ss. 464, 465, 469—Defence of insanity—Magistrate, when bound to order medical enquiry.

Where an accused person relies upon s. 84 of the Penal Code to escape the legal consequences of his act, the onus is upon him to prove that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing its nature or that what he was doing was either wrong or contrary to law. That onus may be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards; also by evidence of his mental conditions, his family history and so forth. If contemporaneous acts of his are proved to have been of such a nature as to indicate that he was quite incapable of forming rational views, that would be a strong element to show that at the time of the crime in question he was not capable of knowing that it was a wrongful act. [p. 797, col. 1.]

Although the fact that a murder has been committed in a particularly brutal and purposeless way for no motive whatsoever, is a circumstance which may be taken into consideration together with other material to enable a Court to decide whether or not the crime in question was committed at a time when the accused person was in such a state of mind that he was incapable of knowing the nature of his act, yet in the absence of other evidence mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind for the purposes of defence under s. 84, Penal Code. [p. 798, col. 2.]

To attract the application of s. 84, Penal Code, it is not enough to establish a doubt as to the soundness of the mind of the accused at the time of the commission of the crime. This is not a kind of doubt of which the accused may be given the benefit. To entitle the accused to the benefit of the section the accused must satisfy the Court that his condi-

tion of mind was such that he was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. [p. 799, cols. 1 & 2.]

There is no provision of law in India making it incumbent upon a Committing Magistrate to order a medical enquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable by reason of mental infirmity of taking his trial that this issue of insanity must be tried before the trial for the offence is proceeded with. Where the Magistrate is of opinion that the accused is sane at the time he has no alternative but to proceed in accordance with the provisions of s. 469, Criminal Procedure Code. [p. 799, col. 1.]

Criminal appeal from an order of the Sessions Judge, Rawalpindi, dated the 23rd April, 1927.

Mr. Abdul Rashid, Assistant Legal Remembrancer, for the Appellant.

Mr. Nihal Singh, for the Respondent.

JUDGMENT.

Fforde, J.—Bahadur has been tried by the learned Sessions Judge of Rawalpindi for the murder of *Musammam* Amrit Kaur and Teja Singh, two children aged seven and four years respectively. The defence was that at the time the murders were committed Bahadur was insane. The learned Sessions Judge has accepted this defence and acquitted the accused.

The Crown now appeals against this acquittal, contending that Bahadur should have been convicted of murder and sentenced to death. The sole question which arises for determination in this appeal is whether or not Bahadur at the time when he killed *Musammam* Amrit Kaur and Teja Singh knew that what he was doing was either wrong or contrary to law. The circumstances of the crime are not disputed and may be stated very shortly.

Musammam Maya Devi was living alone with her two children at Turkwal while her husband was carrying on a shop keeping business at Kohala. On the morning of the 6th of February, 1927, while *Musammam* Maya Devi was absent from the house to answer a call of nature, Bahadur entered the room where the two children were, armed with a heavy stick, closed the door by a chain, and then proceeded to batter the small boy to death. The crying of the children brought neighbours upon the scene. The daughter in the meantime had managed to unhitch the chain and was attempting to open the door when Bahadur struck her. A man called Shahana, who had come on the scene on hearing a clamour, finding that

Bahadur was inside the room and was refusing to allow anyone to enter, procured a thorn bush, forced the door open, and with the thorn bush in front of him proceeded to drive the accused back. The accused in the meantime struck blows with his stick at the thorn bush and, while being forced gradually back, tripped over a *charpoy* and fell to the ground. Shahana then snatched the stick from his hand and grappled with him. Other persons came into the room and helped in securing the culprit. By this time the boy was dead, but the little girl was still alive and died shortly afterwards of her injuries. The facts, as I have briefly narrated them, are not disputed.

Counsel for the accused urges that the circumstances of the murder, the fact that no motive for the crime has been proved, and the evidence of two witnesses of certain eccentric conduct on the part of the accused some months prior to the crime, and the further fact that the accused had at one time, not very remote, received some injuries to his head, all go to prove that the accused at the time he committed the act in question was incapable of knowing that he was doing wrong. This is the view which the learned Sessions Judge has adopted, but in my judgment it is a view which cannot reasonably be held on the facts of this case.

Where an accused person relies upon s. 84 of the Indian Penal Code to escape the legal consequences of his act, the onus is upon him to prove that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing its nature or that what he was doing was either wrong or contrary to law. That onus may be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental conditions, his family history, and so forth. If contemporaneous acts of his are proved to have been of such a nature as to indicate that he was quite incapable of forming rational views, that would be a strong element to show that at the time of the crime in question he was not capable of knowing that it was a wrongful act. In the present case, however, no evidence has been produced or any contemporaneous acts of the accused. Nothing has been told us of his behaviour during the days

immediately preceding the crime, but some evidence has been produced by which it is sought to prove that he behaved with remarkable eccentricity some time prior to the event in question.

The two witnesses, who have been called to prove this matter, are Nazra and Jahana. Nazra states that the accused had received serious injuries in his head in a fight and had been laid up for several months as a result of these injuries, that, after he had risen from his sickness, he had a drum beaten in the courtyard of his house, a large number of people had collected and he went about carrying a tray with Rs. 100 in it stating that anyone who had beaten him could help himself to the money. According to this witness, he also got a *mirasi* to stand on the roof of his house, beat a drum and give a challenge to all people who owned bullocks to bring their animals and have a fight with his cattle. This witness says that nobody accepted this challenge, because everyone knew that the accused was insane. This witness also says that a day prior to the present crime the accused went into mosque wearing cattle bells round his neck and that people kept him under control as he was mad. This witness gives the date of the first two incidents as five or six days before the murder and he states that the fight resulting in the injuries to his head occurred a year ago.

The next witness, Jahana, says that the fight took place in April of last year, (i. e. 1926) that the accused was ill for some months as a result of the injuries to his head and did not return to his work when he recovered. He says that a few days before the crime two *Maulvis* had visited the village, which attracted a large crowd of people from the Jhelum, Rawalpindi and Attock Districts and that Bahadur went to the mosque wearing bullock-bells round his neck and created a disturbance. This witness also refers to the incident of the drum beating and the challenge to the owners of cattle, and says it took place five or six days before the murder.

In regard to this evidence I may say, first of all, that the first witness admits that he is a collateral of the accused and the second witness admits that the accused is his son-in-law. Although the circumstances, which these witnesses depose to as showing the insanity of the accused,

are alleged to have been of widespread notoriety, not a single independent witness has been produced to corroborate these two persons in respect of the matters which they have alleged. It seems incredible that, if on the day prior to the crime, the accused had entered a public place of worship in a fantastic manner, as he is alleged to have done, causing a public disturbance not a single person should have been available to give evidence of this fact. According to Jahana also, the incident of the drum beating took place five or six days before the occurrence. In respect to this no person from the neighbourhood has been called to give evidence on this matter. In my judgment the evidence of these two witnesses is not worthy of any credit whatsoever, and I cannot help expressing some surprise that it should have been treated seriously by the learned Sessions Judge.

Another matter which the learned Sessions Judge has relied upon as evidence of insanity is that "the accused behaved like a mad man when he was caught in the house of his victims as he rained a shower of blows on the thorn bush with which he was being pushed back." It seems to me that the accused in striking at this thorn bush did what a normal person would do who was trying to resist capture and who was being assaulted in such a manner.

The learned Sessions Judge has also considered the evidence upon the head injuries to the accused. There is no doubt that there is a scar on the accused's head showing that some time back he had received a fracture of the skull. But, apart from the evidence of his two relatives, there is nothing to show that these injuries to the head had resulted in any untoward act on the part of the accused or had incapacitated him in any way whatsoever.

The fourth matter relied upon by the learned Sessions Judge as evidence of insanity is the absence of motive for this crime. I may say that the motive alleged by the prosecution, sought to be proved by the mother of the children and by one Gurdial Singh, is not very satisfactory, inasmuch as Gurdial Singh's account of a complaint made to him by *Musammat Maya Devi* does not tally with the story which she herself has given. It may be that the accused had been importuning *Musammat Maya Devi* to become his paramour, as

she alleged, but I am not satisfied that she did complain of this matter to Gurdial Singh before the crime in question. It must be borne in mind that this kind of conduct towards a married woman, who was living apart from her husband, is not a circumstance which a woman is likely to talk about, and, although it is quite possible that she is speaking the truth that the accused did molest and importune her, I am not satisfied that she complained of these acts to Gurdial Singh. However, even accepting the learned Sessions Judge's view that no motive for the crime has been proved, that in itself—the mere absence of motive—is not a sufficient ground upon which mania may be inferred. There is no doubt that the fact that a murder has been committed in a particularly brutal and purposeless way for no motive whatsoever, is a circumstance which may be taken into consideration, together with other material, to enable a Court to decide whether or not the crime in question was committed at a time when the accused person was in such a state of mind that he was incapable of knowing the nature of his act. As I have said in the absence of other evidence mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind for the purposes of a defence under s. 84, Indian Penal Code.

Mr. Nihal Singh has argued that the learned Committing Magistrate should have ordered an investigation into the state of the accused's mind as soon as the defence of insanity was raised. For this contention I can find no authority. Section 469 of the Criminal Procedure Code provides that when an accused person appears to be of unsound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that he committed an act which, if he had been of sound mind, would have been an offence, and that at the time of the commission he was, by reason of unconsciousness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate must proceed with the case and commit the accused for trial to the Court of Session or High Court, as the case may be. There is no provision of law in India making it incumbent upon a Committing Magistrate to order a

Medical inquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable by reason of mental infirmity, of taking his trial, that this issue of insanity must be tried before the trial for the offence is proceeded with. That is provided by ss. 414 and 465 of the Criminal Procedure Code. In the present case it was not suggested that the accused was insane either at the time he came before the Committing Magistrate, or before he took his trial before the Sessions Judge, or at any period in the interval. His whole case is that he was suffering from such a condition of mind at the time of the crime that he was not capable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. The learned Committing Magistrate refused an application by Counsel for the defence to hold an inquiry as to the state of the mind of the accused person. The Committing Magistrate in rejecting this application expressed his view that the accused was sane at that time, and upon that view the Committing Magistrate had no alternative but to proceed in accordance with the provisions of s. 469 of the Criminal Procedure Code. The learned Sessions Judge seems to think that there has been some dereliction of duty on the part of the Committing Magistrate in not ordering a Medical inquiry. This view of the learned Sessions Judge is, in my opinion, entirely contrary to the statutory provisions. The learned Sessions Judge also seems to have been of opinion that it was for the Crown to establish the sanity of the accused; but he does not seem to have realised that the onus was upon the accused to prove that he was suffering from such disability as is indicated in s. 84 of the Indian Penal Code. The learned Sessions Judge says that it may be argued that the fact that he was insane when he committed the murders has not been proved conclusively but still there remains the doubt that he may have been mad at the time. This is not a kind of doubt of which the accused may be given the benefit. In order to come within the provisions of s. 84 of the Indian Penal Code the accused must not leave the condition of his mind at the time of the commission of the offence in doubt, but must satisfy the Court that it was such that he was incapable of knowing the nature of

his act or that what he was doing was either wrong or contrary to law. This, in my judgment, he has wholly failed to establish.

I am satisfied from the admitted facts of this case from the fact that the accused selected a time when the mother was absent from the house to batter to death these two unfortunate children; the fact that before starting upon his crime he chained the door from inside to prevent anyone entering; the fact that he went to the scene having armed himself with a *dang*; and the fact that when he was interrupted in the course of its perpetration he resisted capture—that he knew perfectly well that he was doing a wrongful act. Under these circumstances I am satisfied that the decision of the learned Sessions Judge is clearly erroneous, and I would accordingly accept the appeal for the Crown, set aside the verdict of acquittal, convict the respondent under the provisions of s. 302 of the Indian Penal Code of the murders of *Musammam Amrit Kaur* and *Teja Singh* and sentence him to death.

If it may now be the case that before the sentence is executed it appears to the Jail Authorities that the accused is insane, I have no doubt that proper steps will be taken to inquire into his mental condition. This is a matter, however, for the Local Government and not for this Court.

Agha Haidar, J.—I agree.

R. L.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 849 of 1926.

February 3, 1927.

Present:—Mr. Justice Wallace.

BODDIPATI LALAMMA AND OTHERS

—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367—Bench of Honorary Magistrates—President in minority—Bench judgment written by President—Judgment, whether in accordance with law.

In a case where the President of a Bench of Honorary Magistrates is in a minority as to conviction or acquittal, the judgment should be written by some member of the majority since, otherwise, there will be a conviction based on an acquitting judgment, without any reasons for conviction which, under the provisions of the Criminal Procedure Code the Bench is bound to set out.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Bench of Magistrates, Narasaraopet, in B. C. No. 223 of 1926.

Mr. Ch. Raghava Rao, for the Petitioners.
The Public Prosecutor, for the Crown.

ORDER.—In a case where the President of the Bench is in a minority as to conviction or acquittal, the judgment should be written by some member of the majority. Otherwise, as in the present case, we have a conviction based on an acquitting judgment, and we are left without any reasons for conviction which, under the provisions of the Criminal Procedure Code the Bench is bound to set out. The judgment does not conform to the law and the conviction cannot be upheld. It is hereby set aside. The fines, if paid, should be refunded.

It is not a case for ordering re-trial.

V. N. V.

Conviction set aside.

A. N. A.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1111 OF 1927.

November 18, 1927.

Present:—Mr. Justice Agha Haidar.

KALU AND ANOTHER—CONVICTS—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Prosecution and defence evidence divergent—Benefit of doubt.

Where the prosecution and the defence witnesses between whom there is not much to choose make two divergent statements about one and the same incident, the matter becomes doubtful and the accused is entitled to the benefit of doubt.

Criminal appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Gujranwala, dated the 17th August, 1927.

Mr. Khurshid Zaman, for the Appellants.

Pandit Bishen Narain, for the Government Advocate, for the Respondent.

JUDGMENT.—The facts of the case are fully set out in the judgment of the learned Magistrate. So far as Kalu is concerned, Mr. Khurshid Zaman has accepted the finding of the learned Magistrate and has only asked me to consider the question of sentence. I do not think that this is a

case in which I should like to interfere. A man has been killed and Kalu is clearly responsible for it. He has not been treated with any severity by the Magistrate and I do not think that a sentence of seven years' rigorous imprisonment in his case requires interference.

The case of Madu his brother presents some little difficulty. It is true that his name was mentioned in the First Information Report which was lodged with fair promptitude by Amir, the son of Shahu deceased. But the fact remains that there is an unfortunate tendency among people of the class to which both the accused and the complainant belong to throw their net too wide so as to implicate in an offence as many friends or relations of the really guilty person as possible. So the mere fact that the name of Madu is mentioned in the First Information Report is not very material. The names of the witnesses are also given in the First Information Report and they have given evidence in the present case but the difficulty is that four witnesses have come forward in support of the defence and they unanimously state that Madu was not there. So far as the reliability of the two sets of witnesses is concerned, it cannot be said that the witnesses for the prosecution are decidedly superior to those for the defence. It is true that the learned Magistrate had all these witnesses before him and was in a more advantageous position than a Court of Appeal can be, in forming his opinion as to the credibility of the witnesses adjudged from their demeanour but after all it is not always an infallible test. When two sets of witnesses between whom there is not much to choose make two divergent statements about one and the same incident, the matter becomes, to say the least of it, doubtful. This is the case here.

I, therefore, give the benefit of doubt to Madu. I allow his appeal, set aside his conviction and sentence and order that he may be released forthwith. So far as Kalu is concerned, the appeal, as already stated, stands dismissed.

K. L.

Conviction set aside.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 218 OF 1927.

November 5, 1927.

Present:—Mr. Justice Dalip Singh.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—DEFENDANT

—PETITIONER

versus

MESSRS. TULSI DAS-KISHEN DAYAL

—PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), s. 75—Risk Note Form B—Interpretation of note—Onus of proving dealings with consignment—Evidence of Railway servants, value of—Duty of Railway Company.

Under the new Risk Note Form B it is always safe for the plaintiff to give due notice to the Railway to disclose and, if not satisfied with the disclosure, to call upon the Railway to give evidence making this a portion of his pleas. On the other hand, it is desirable for the Railway, whether called upon or not to take the precaution of disclosing the dealings in pleadings and to inquire from the Court whether it would require further evidence thereon other than pleadings quoted by such relevant copies of entries from books as the Railway might think fit to put in with its pleadings or at the time of production of documents. [p. 802, col. 2.]

A Court should not disbelieve a Railway servant merely on the ground that he is a Railway servant and that, therefore, he is bound to state that he had done his duty. At the same time where possible the Railway should support the oral evidence of its servants by books which should be proved to have been duly kept. But before the Court can disbelieve the Railway servants the plaintiff must cross-examine those servants or otherwise prove that relevant books could have been forthcoming and that there was no reason for their non-production. If this is done it is, of course, open to the Court to disbelieve the oral evidence on the ground that the corroborative evidence of the books had not been produced in the case. [p. 802, col. 1.]

Petition, under s. 25 of Act IX 1887, for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 10th January, 1927.

Mr. H. Carden Nood, Government Advocate, for the Petitioner.

Mr. Jai Gopal Sethi, for the Respondents.

JUDGMENT.—In this case the plaintiff sued the Secretary of State for India on the ground that he had delivered certain bales to the defendant Railway and two of these bales had not been delivered by the Railway. Various pleas were taken but they were evidently based on an entire misconception of the facts of the new form of Risk Note 'B'. As the form is new I propose in this case to point out possible constructions of the meaning of the form in order that the public and the Railway may be warned what sort of evidence should be led or expected of them in future cases. The Court below held that the Railway

Administration had failed to explain how the consignment was dealt with when it was in its possession or control and it, therefore, held that the plaintiff was entitled to recover Rs. 258 and decreed accordingly.

The relevant words in the new Risk Note are as follows:—

"The Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct on the part of the Railway Administration or its servants cannot be fully inferred from such evidence the burden of proving such misconduct lies upon the consignor."

It has been contended by the learned Government Advocate in revision that these words mean that the plaintiff in every such case should call upon the Railway to make the necessary disclosure and thereupon the Railway shall be bound to make the said disclosure and that if the plaintiff is dissatisfied with the disclosure or does not accept the truth of the disclosure made he can call upon the Railway to give evidence of its dealing with the consignment. If this evidence itself is sufficient to lead an inference of misconduct then the case can be decided against the Railway. If it is not so sufficient then it is open to the plaintiff to give evidence tending to prove such misconduct but if the Railway has not been asked to make the disclosure it is not necessary for it to give any evidence, or if it is not called upon to give any evidence it is not necessary for it to give evidence, and, therefore, the Court below was wrong in decreeing the plaintiff's suit without any proof of misconduct on the part of the Railway Administration or its servants. It is clear to me from the pleas of the Railway that the parties seem to have been under the impression that the old Risk Note Form was still being used and, therefore, the position of neither side was clearly grasped in the trial in the Court below. Counsel for the respondent has contended that the fact that the Railway tendered such evidence purporting to show how it dealt with the consignment proved that the Railway did realize its position. This, however, is not necessarily so. The Railway did not give evidence disclosing their dealings throughout the time that the consignment was in their possession or con-

trol. It seems to me that they were endeavouring to prove that there had been a loss of the consignment. This conduct could be explained by reference to the conflict of rulings under the old Risk Note Form as to whether it was sufficient for the Railway merely to plead loss or whether the Railway had to go further and prove loss before they could claim exemption under Risk Note Form 'B'. I, therefore, think that the best course in the circumstances is to remand the case for re-trial to the Court below and give both parties a chance of producing that evidence they may wish to. The plaintiff will be presumed to have called upon the Railway to give evidence as to how they dealt with the consignment throughout the time it was in their possession or control, and the Railway shall give such evidence as they may consider fit as regards this. In this connection I will point out that the Court should not have disbelieved a Railway servant merely on the ground that he was a Railway servant and that, therefore, he was bound to state that he had done his duty. It is obvious that in the majority of cases the Railway can produce no other evidence of how it dealt with the goods except by producing those of its servants who had dealt with the goods and to disbelieve the evidence of these servants on the ground that they naturally would not admit any dereliction of duty would be to cast an impossible onus on the Railway Administration. At the same time I would point out that where possible the Railway should support the oral evidence of its servants by books which should be proved to have been duly kept in the course of business. But before the Court can disbelieve the Railway servants the plaintiff must cross-examine those servants or otherwise prove that relevant books should have been forthcoming and that there was no reason for their non-production. If this is done it is, of course, open to the Court to disbelieve the oral evidence on the ground that the corroborative evidence of the books had not been produced in the case.

I now proceed to point out the possible construction of the new form of Risk Note in order that the parties may be warned, as I have said before, as to what their respective rights and duties are. It is possible to hold that it is initially the plaintiff's duty to call upon the Railway Administration to disclose the dealings with the con-

signment. It is also possible to hold that what the Risk Note clearly means is that the Railway should in its pleadings disclose how the consignment was dealt with. As regards the construction of the words "if necessary" it may be that it means that the plaintiff may call upon the Railway to prove either in its pleadings or its previous disclosure or it may mean that on the pleadings and facts stated it is for the Court to decide if it is necessary for the Railway to give evidence. In the circumstances I would, therefore, if I were plaintiff, give due notice to Railway to disclose and if not satisfied with the disclosure I would call upon the Railway to give evidence making this a portion of my pleas. On the other hand, if I were the Railway, then, whether called upon or not by the plaintiff, I would take the precaution of disclosing the dealings in pleadings and would enquire from the Court whether it would require further evidence thereon other than pleadings quoted by such relevant copies of entries from books as the Railway might think fit to put in along with its pleadings or at the time of production of documents. Both parties will then be in a position, whatever interpretation was given by the Courts to this Risk Note, to avoid the expense of re-trial and appeals or revisions. In the present case I as stated above, hold that the plaintiff may be presumed to have called upon the Railway to give evidence of its dealings and the Railway shall give evidence of such dealings and produce such evidence, oral or documentary, as it may think fit and the plaintiff shall then be at liberty to give evidence tending to prove misconduct if so advised. In my opinion, as at present advised if the Court is not satisfied that the Railway has given good evidence to prove its dealings with the consignment it is open to the Court to decree the plaintiff's suit on the ground that the Railway has failed to discharge statutory obligation. It must not, however, be taken to decide this point finally and it is open to the Court to hold that even if the evidence given by the Railway is not satisfactory it is still for the plaintiff to prove misconduct before the Railway can be saddled with responsibility. No order as to costs in this revision.

R. L.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 345 of 1926.

September 29, 1927.

Present:—Mr. Findlay, J. C.

GANPAT—DEFENDANT—APPLICANT
versus

LAHANA—PLAINTIFF—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (g)—Contract of marriage—Breach—Suit for refund of money advanced, whether triable by Small Cause Court—Contract Act. (IX of 1872), s. 25—Money paid in consideration of contract of marriage—Refund, suit for, whether barred.

A suit for refund of money advanced as consideration for a marriage, on breach of the contract of marriage is, in reality, a suit for damages in respect of the breach of contract of marriage falling within the scope of Art. 35 (g) of Sch. II of the Provincial Small Cause Courts Act and is not triable by a Small Cause Court. [p. 803, col. 2.]

Kali Sunker Dass v. Koylash Chunder Dass (3), relied on.

Jagornath Dutt v. Radha Sunder Ghose (1) and *Giris Chandra Mahender v. Purna Chandra Dutt* (2), distinguished.

A suit for refund of money paid in consideration of a contract of marriage is maintainable where the contract has been broken. Section 23 of the Contract Act does not bar such a suit. [p. 804, col. 1.]

Srinivasa Aiyar v. Sesha Iyer (7) and *Gulabchand Parachand v. Fulbai Harichand* (8), relied on.

Revision against the order of the Small Cause Court Judge, Ramtek, dated the 5th August, 1926, in Small Cause Suit No. 285 of 1926.

Mr. K. P. Vaidya, for the Applicant.

Mr. M. R. Indurkar, for the Non-Applicant.

ORDER.—The first point raised in this application is that the present suit was not triable by the Court of Small Causes having regard to Art. 35 (g) of the Small Cause Courts Act. In the plaint it was alleged that Rs. 100 was advanced, so to speak, as consideration for marriage contract, as well as Rs 15 for expenses and Re. 1 as a pledge. On behalf of the plaintiff it was further pleaded that the Rs. 100 were paid, as per custom, with the object of defraying generally the expenses of the pat marriage.

I have been referred by the Pleader for non-applicant to the decisions in *Jagornath Dutt v. Radha Sunder Ghose* (1) and *Giris Chandra Mahender v. Purna Chandra Dutt* (2) to support the position that a claim like the present one for money advanced in respect of a marriage contract is recoverable in the Small Cause Courts. The *ratio*

decidendi of these decisions seems to me to be that the suit is, in essence, one for a mere refund of money advanced, and not for compensation, having reference to s. 73 of the Indian Contract Act. In *Kali Sunker Dass v. Koylash Chunder Dass* (3), Pigot and Gordon, JJ., held that a suit to recover money spent in feeding relatives, in paying carriage hire and musicians in connection with a marriage, which fell through, was not cognizable by a Small Cause Court. I concur in this opinion.

For my own part and with all deference to the Judges who decided the Calcutta High Court cases quoted above, I am of opinion that, in essence, the present suit is, in reality, one for damages in respect of the breach of contract of marriage. It would be a reasonable construction to put on the contract in question that Rs. 100 was paid thereunder and that this sum, in reality, represented the amount of compensation which could be claimed if there was a breach of the contract. I do not think that, in the circumstances, the suit can properly be regarded as one for the mere recovery of a loan or refund of money advanced. The payment was inextricably connected with the marriage contract and it seems to me to follow that the suit for its recovery comes within the letter and the spirit of Art. 35 (g) of the Small Cause Courts Act. I am of opinion, therefore, that the suit was not cognizable in the Court of Small Causes.

It has, however, been urged on the strength of the decisions in *Dholidas Ishvar v. Fulchand Chhagan* (4), *Venkata Kristnaya v. Lakshmi Narayana* (5) and *Devarayan Chetty v. Muthyraman Chetty* (6) that the suit did not lie as the payment was contrary to public policy and void under s. 23 of the Indian Contract Act. These decisions so far support the proposition that a contract by which their father or their guardian is paid money in consideration of his giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of Law. It was, however, pleaded in the present case on behalf of the applicant that there was a caste custom to make such

(3) 15 C. 833; 7 Ind. Dec. (N. S.) 1138.

(4) 22 B. 658; 11 Ind. Dec. (N. S.) 1021.

(5) 3 Ind. Cas. 554; 32 M. 185; 18 M. L. J. 403; 4 M. L. T. 1.

(6) 18 Ind. Cas. 515; 37 M. 393; 24 M. L. J. 310; (1913) M. W. N. 200.

1) 13 C. W. N. xxxvi (36).

(2) 19 C. W. N. xxviii (38).

a payment as we are concerned with, the underlying idea being that the money so paid would be used in meeting the expenses of marriage. I am not, however, prepared to accept the contention offered on behalf of the defendant-applicant in this connection. It may be that the guardian or parent, to whom such a sum of money had been promised in consideration of his giving his son or daughter in marriage, might not be able to recover the sum so promised on the ground that the agreement is void as opposed to public policy. Here, the position is entirely different. The plaintiff accepted the money in advance, and a suit can, in my opinion, lie to recover that money, there having been a breach of the marriage contract: cf. *Srinivasa Aiyar v. Sesha Iyer* (7) and *Gulabchand Parachand v. Fulbai Harichand* (8). I am of opinion, therefore, that the suit in the present case was not barred on the ground just considered.

A further question would, in any event, have arisen as to whether or not there was a caste custom to make such a payment in advance and also as to whether such a payment was intended to be used in defraying the expenses of the marriage. The suit, however, not being, in my opinion, cognizable by the Small Cause Court must fail. The judgment and decree, revision of which is sought, are reversed and the plaintiff's suit is dismissed. The plaintiff-non-applicant must bear the defendant-applicant's costs in both Courts.

G. R. D.

A. N. A.

Petition allowed.

(7) 41 Ind. Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282.

(8) 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1469 OF 1923.

June 23, 1927.

Present:—Mr. Broadway, Acting Chief Justice, and Mr. Justice Bhide.

Musammat GOPAL DAI—DEFENDANT—
APPELLANT
versus

DHANNA MAL AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 97—Vendor and purchaser—Sale by alienee from widow to third person with covenant for quiet enjoyment—Declaratory suit by reversioner—Subsequent dispossession by reversioner—Suit for damages for breach of covenant for quiet enjoyment—Cause of action, when

arises on decision of reversioner's suit or actual dispossession—Silence after decree in reversioner's suit, whether amounts to acquiescence—Contract to indemnify, effect of.

Two widows sold certain property to S. Some of the reversioners instituted a suit for a declaration that the alienation was not binding upon them. In February, 1898, during the pendency of this suit, S sold the property to the plaintiffs. The sale-deed contained a stipulation that if any other claimant came forward or the property went out of the possession of the vendees, the vendor would be liable to refund the purchase-money with damages. On the same date a separate agreement was executed by S in favour of the vendees in which the suit by the reversioners was referred to and to safeguard the vendees against the consequences of the suit, certain other properties were hypothecated to them. The suit by the reversioners was decreed in their favour by the Privy Council on the 11th May, 1909. The last surviving widow died in January, 1919. In May, 1919, the reversioners sued the plaintiffs for possession and obtained delivery of possession on the 13th August, 1921. The plaintiffs instituted a suit for recovery of the purchase-money and damages against the representatives of S, on the 30th November, 1921:

Held, (1) that the indemnity bond only furnished an additional security to the vendees, but in no way abrogated or modified the terms of the sale-deed which were quite general and independent of the security bond; [p. 806, col. 1.]

(2) that the period of limitation for the suit did not commence to run notwithstanding the decision of the Privy Council in 1909, till the plaintiffs were actually dispossessed in the year 1921 and that the suit was not, consequently, barred by limitation; [p. 807, col. 2.]

Bassu Kuar v. Dhum Singh (3), *Amma Bibi v. Udit Narain Misra* (4) and *Hukum Chand Boid v. Pirkichand Lal Chowdhury* (5), distinguished.

Tapasi Mal v. Jhandoo (6), commented upon.

(3) that the silence of the plaintiffs after the Privy Council decision in 1909 did not amount to acquiescence inasmuch as they were not only not bound to take any action immediately after that decision, but could not have used for any relief until they were actually dispossessed. [*ibid.*]

First appeal against the decision of the Senior Sub-Judge, Delhi, dated the 19th March, 1923.

Messrs. Kishan Dayal and Jagan Nath Aggarwal, for the Appellant.

Lala Sardha Ram, R. S., and Mr. Maya Das, for the Respondents.

JUDGMENT.

Bhide, J.—The material facts of this case may be briefly stated as follows for the purposes of this appeal:—Musammat Sarsuti and Musammat Puran Devi, two widows, sold some property known as Katra Chohan in Delhi City to Shambhu Nath and two other persons on the 1st July, 1888. Shambhu Nath subsequently purchased the shares of the latter and became sole owner. On the 14th June, 1897, two reversioners, named Jai Narain and Rup Narain, instituted a suit for a declaration to the effect that

the sale by the widows should not affect their reversionary rights. The case went up to the Privy Council and was eventually decreed on the 11th May, 1909*. During the pendency of the suit by Jai Narain and Rup Narain, Shambhu Nath sold a portion of the property to Dhanna Mal and Sanwal Das, the present plaintiffs, for Rs. 18,560 on the 14th February, 1898*. In the sale-deed it was stipulated that if any other claimant came forward or the property went out of possession of the vendees, the vendor would be liable to refund the purchase-money with damages. On the same date a separate agreement was executed by Shambhu Nath in favour of the vendees, in which the suit by Jai Narain and Rup Narain was specifically mentioned, and to safeguard the vendees against the consequences of that or any other suit certain other property was hypothecated. *Musammât Sarsuti*, the last surviving widow, died on the 9th January, 1919. On the 3rd May, 1919, Rup Narain instituted a suit for possession of the property sold by Shambhu Nath to the plaintiffs. On the 30th July, 1921, this suit was decreed on payment of Rs. 38,144 as compensation. Rup Narain deposited the amount and obtained possession of the property on the 13th August, 1921. The present suit was then instituted by the plaintiffs against *Musammât Gopal Devi*, widow of Shambhu Nath, on the 30th November, 1921, on the basis of the stipulation as regards quiet possession and enjoyment in the sale-deed and the agreement referred to above, for recovery of the purchase-money, arrears of rent and damages, amounting in all to Rs. 20,119-14-0. The defendant put forward various pleas including limitation and acquiescence. The learned Senior Subordinate Judge who tried the case held the suit to be within time and granted the plaintiffs a decree for Rs. 18,891. Further interest at 6 per cent. per annum from the date of suit till realization was also allowed on the purchase-money, i. e., Rs. 18,560. From this decision the defendant has appealed.

The main point argued in the case was that of limitation. It was urged for the appellant that the suit was governed by Art. 97, Sch. I, Indian Limitation Act, and that the starting point for limitation was the date of the Privy Council judgment of 1909 in the suit by the reversioners Jai Narain and Rup Narain, inasmuch as that judgment negatived the vendee's title and thus re-

sulted in failure of consideration. It was further contended that, even if loss of possession furnished a fresh cause of action subsequently, the earlier cause of action must prevail, inasmuch as limitation, once it has begun to run, cannot be subsequently interrupted. *Gaya Din v. Jhuma Lal* (1) and *Shib Dayal v. Meharban* (2) were relied upon in support of the latter contention.

The present suit, as already stated, is based on the covenant as regards quiet possession and enjoyment embodied in the sale-deed and also on the terms of the agreement which was executed along with the sale-deed with special reference to the suit by Jai Narain and Rup Narain. This agreement was really in the nature of an indemnity bond and provided that if the whole or part of the property went out of the possession of the vendees on a suit being brought by anybody or if the vendees were impleaded in any suit as defendants and had to pay the value of the property, the vendor was to be liable to them for re-payment of the value of the property together with costs of the suit. There can be no doubt, that according to the terms of both the documents, the vendees were entitled to a refund of the purchase-money in the event of loss of possession. This fact was not disputed on behalf of the appellant, but it was contended as regards the indemnity bond that it was to enure only for a limited period, namely, up to the date of the decision of the Privy Council judgment of 1909, and that it was null and void after that date. This interpretation of the document, however, leads to an obviously absurd position. The material portion of the indemnity bond bearing on this point is as follows : *aur ba'd faisla muqaddama mazkura balz badalat akhiri yih zamanat nama babut zar zamanat kaladam wabe asarsamjha jawega aur man muzhir wapas lunga* (and after the decision of the above-mentioned suit by the final Court, this security bond with regard to the security money shall be considered null and void and ineffectual, and I will take it back). The words "above-mentioned suit" occurring in the above passage are ambiguous; for there are, at least, three different suits mentioned in the preceding portion of the document, namely, first, the suit of Jai Narain and Rup Narain which was pending; secondly, a suit resulting in dispossession of the vendees from the property; and

(1) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

(2) 69 Ind. Cas. 931; 45 A. 27; 20 A. L. J. 819; A. I. R. 1923 All. 1 (F. E.).

*See 3 Ind. Cas. 382—[Ed.]

thirdly, a suit requiring them to re-pay the purchase-money a second time to another person. The intention of the parties evidently was to safeguard the vendees against the consequence of an adverse decision in these suits. Whichever suit may be taken to be referred to by the words "above-mentioned suit," it seems obvious that the object of the indemnity bond would have been frustrated altogether if the bond ceased to be in force as soon as the suit was finally decided; for dispossession or double payment, for which the vendees were to be indemnified according to the terms of the bond, would in the ordinary course take place after and not before the final decision of the suit. It seems to me that the intention of the parties probably was that the indemnity bond should become null and void if the suits referred to above were finally decided in favour of the vendor, but the intention has not been properly expressed owing to bad drafting. The interpretation sought by the appellant to be placed upon the terms of the document would defeat its object altogether, and I think it must be rejected on that account.

However, even if the interpretation of the appellant is accepted for the sake of argument and it is held that the indemnity bond ceased to have any effect after the Privy Council decision of the year 1909, the plaintiffs can still fall back upon the covenant of quiet possession included in the sale-deed itself. The indemnity bond only furnished an additional security to the vendees, but in no way abrogated or modified the terms of the sale-deed which were quite general and independent of the security bond. According to the terms of the sale-deed, the vendor undertook to refund the purchase-money "if by chance anyone comes forward as a claimant or objector in respect of the property sold, or if the whole or a part thereof goes out of the possession of the vendees on action being brought by anybody."

Now, the first part is obviously inapplicable to the suit of the reversioners, Jai Narain and Rup Narain, which was actually pending at the time. The second part is, however, quite general and would apply to dispossession resulting from that suit or any other suit. The vendees were not dispossessed till 1921, and if limitation is reckoned from the date of dispossession, the suit would admittedly be within time.

It was, however contended on behalf of the appellant that the Privy Council judgment of 1909 in any case resulted in negation of the plaintiffs' title and, in consequence, failure of consideration, and that there arose thus a cause of action for which the limitation period is prescribed by Art. 97, Sch. I, Indian Limitation Act. The following rulings were cited in support of this contention: *Bassu Kuar v. Dhum Singh* (3), *Amma Bibi v. Udit Narain Misra* (4), *Hukam Chand Boid v. Pirthichand Lal Chowdhury* (5) and *Tapasi Mal v. Jhandoo* (6). Now, in the first place, it cannot be properly said that the vendees' title was negated or that the consideration failed entirely on the date of the Privy Council decision. The suit decided by the Privy Council was merely for a declaration. The alienation was declared to be voidable at the option of the reversioners on the death of the widows. The last surviving widow did not die till the year 1919 and the vendees were certainly entitled to retain possession of the property till then. The property had, moreover, been improved and the reversioners could not have recovered possession without paying heavy compensation. There was thus a possibility of the reversioners not being able to take advantage at all of the declaratory decree. It was also likely that the vendor who had guaranteed quiet possession and enjoyment to the vendees might have come to terms with the reversioners. It is thus clear that the chances of the vendees losing possession of the property were remote and uncertain when the declaratory suit was decided by the Privy Council in the year 1909. Possession was certainly an important element of the consideration for the sale and this portion of the consideration did not fail till the year 1921. The learned Counsel for the appellant has relied upon *Bassu Kaur v. Dhum Singh* (3) and *Amma Bibi v. Udit Narain Misra* (4), but the facts of these cases were quite different because no question of possession was involved therein. In both these cases there was only an agree-

(3) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec (N. S.) 458 (P. C.).

(4) 1 Ind. Cas. 890; 31 A. 68; 36 I. A. 44; 9 O. L. J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89 (P. C.).

(5) 50 Ind. Cas. 444; 46 O. 670; 46 I. A. 52; 17 A. L. J. 514; 36 M. L. J. 557; 23 O. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 253; 30 O. L. J. 71; 26 M. L. T. 131; 10 L. W. 416 (P. C.).

(6) 62 Ind. Cas. 953.

ment to sell, and when specific performance on the basis of the agreement was refused by Courts, failure of consideration was held to have taken place. In *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (5), which has also been relied upon, the decision proceeded on the special facts of the case which were somewhat peculiar. The suit was one for recovery of purchase-money on the sale of a Patni Taluq being set aside under the Bengal Patni Taluq Regulation of 1819. Owing to the particular course which litigation had taken in that case, the applicability of Art. 97, Sch. I, Limitation Act, was assumed for the purposes of the appeal but without affirming its correctness. The argument that the starting point of limitation should be taken as loss of possession was advanced, but the plea was treated as belated. Their Lordships, however, distinctly recognized that "there may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run" (*ibid.* at page 679*). Their Lordships thus do not appear to have laid down any general rule governing cases of this description, and the ruling in *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (5) has been distinguished on this ground by the Madras High Court and held to be inapplicable where a vendee has been put in physical possession and subsequently dispossessed: *vide Hariharamangalath Kizhoor Variyath Sankara Variyar v. Thaiparambil Kalathil Ummar* (1) and *Vangali Venkatanna v. Polamansethi China Appalaswami* (8).

Some stress has also been laid on *Tapasi Mal v. Jhandoo* (6), a Single Bench ruling of this Court, which *prima facie* seems to be in the appellants' favour. The facts are, however, to some extent distinguishable as the vendees themselves had in that case sued for a declaration that they were owners of certain land belonging to a minor which had been sold to them and the suit had been dismissed on the ground that the sale was void. In the present case the vendees were not even parties to the suit decided by the Privy Council and the sale was not void but only voidable at the option of the rever-

sioners on the death of the two widows who had effected the sale. The Single Bench decision purports to follow *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (5), but does not discuss it in detail, and the reservation that their Lordships make in respect of the circumstances in which limitation may run from loss of possession has not been noticed. The case, moreover, has not been published in any authorized report, and with all respect for the view of the learned Judge who decided the case, I do not think it can be accepted as an authority in the circumstances of the present case. I would accordingly hold that limitation did not commence to run till the vendees were actually dispossessed in the year 1921, and from the date of dispossession the suit is admittedly within time, as already noted.

The other grounds of appeal were not much pressed. It was urged that the plaintiffs had already realized large profits from the property during the period they have been in possession and that their silence after the Privy Council decision should be held to amount to acquiescence disentitling them to any relief. This contention has obviously no force. The vendees had paid a substantial sum for the property and were clearly entitled to its profits so long, at any rate, as they were entitled to retain possession. But for the suit of the reversioners they might have enjoyed the profits of the property in perpetuity. Their silence after the Privy Council decision also cannot be construed as tantamount to acquiescence. They were not only not bound to take any action immediately after that decision, but could not have, in fact, even sued for any relief until they were actually dispossessed.

Lastly, it was urged that the plaintiffs should not have been, at any rate, allowed any interest; but the lower Court has allowed interest at the moderate rate of 6 per cent. per annum on the purchase-money only from the date of the suit up to realization, and this seems reasonable enough in the circumstances. On the above findings I would reject the appeal with costs.

Broadway, Ag. C. J.—I concur.

A. N. A.

Appeal dismissed.

(7) 70 Ind. Cas. 787; 46 M. 40; (1922) M. W. N. 634; 16 L. W. 684; 43 M. L. J. 721; A. I. R. 1923 Mad. 46; 32 M. L. T. 3.

(8) 86 Ind. Cas. 755; (1925) M. W. N. 101; 48 M. L. J. 217; 22 L. W. 126; A. I. R. 1925 Mad. 749.

*Page of 46 O.—[Ed.]

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL.

No. 1580 of 1927.

November 7, 1927.

Present :—Mr. Justice Tek Chand.

KANSHI RAM—DEFENDANT—APPELLANT
*versus***HINDUSTAN NATIONAL BANK, LTD.,****THROUGH MADAN GOPAL, OFFICIAL****LIQUIDATOR—PLAINTIFF—RESPONDENT.**

Civil Procedure Code (Act V. of 1908), s. 141, O. XXXVIII, rr. 5, 6—Winding up of Company—Attachment before judgment by Liquidation Court, validity of—Attachment before judgment of property in another District—Procedure for attachment before judgment—Defendant likely to dispose of property, whether ground for attachment—Companies Act (VII of 1913), s. 164—"Court", meaning of—District Judge's powers, extent of.

Proceedings under the Companies Act are proceedings in a Court of civil jurisdiction within the meaning of s. 141, Civil Procedure Code, and a Liquidation Court has, therefore, in a proper case power to make an order of attachment before judgment in accordance with the provisions of O. XXXVIII, r. 5, Civil Procedure Code. [p. 809, col. 1.]

Under the Civil Procedure Code as amended in 1908 the jurisdiction of Courts to act under O. XXXVIII, rr. 5 and 6 has been very much extended and a Court can now attach before judgment property situate beyond its local limits. [p. 809, col. 2.]

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary that in exercising these powers Courts should strictly adhere to the procedure laid down in the Code. Before an order of attachment of property before judgment is passed the Court should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he has appeared and failed to furnish security or show cause, that the Court can pass an order under O. XXXVIII, r. 6 of the Code attaching his property. [p. 809, col. 2; p. 810, col. 1.]

The provisions of O. XXXVIII, r. 5 of the Code can only be invoked if the Court is satisfied that the respondent is *about* to dispose of the whole or any part of his property. A vague and an indefinite allegation that he is *likely* to dispose of his property is wholly insufficient to justify an order for attachment of property before judgment. [p. 810, col. 1.]

Under s. 164, Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of the Act and has for the purposes of such winding up all the jurisdiction and powers of the High Court. [p. 809, col. 2.]

Miscellaneous first appeal from the order of the District Judge, in charge of liquidation work, at Lahore, dated the 12th March, 1927.

Lala Mool Chand, R. S., for the Appellant.

Mr. Madan Gopal, for the Respondent.

JUDGMENT.—By an order of this Court the Hindustan National Bank, Ltd., was ordered to be wound up and Mr. Madan Gopal, Advocate, was appointed as the Official Liquidator. It was also directed that all subsequent proceedings in winding up be had in the Court of the District Judge, Lahore.

On the 6th January, 1927, the Official Liquidator presented to the District Judge an application under s. 235 of the Indian Companies Act praying that an enquiry be made into the conduct of 16 persons who were named in the petition and who were alleged to have committed acts of malfeasance and misfeasance with respect to the property of the Company and that all, or such, of these persons as may be found guilty of having committed such acts, may be directed to compensate the Company for the loss so caused. One of these 16 persons was Kanshi Ram, Assistant Engineer, Sukkur, (No. 8). In the application nothing was stated to indicate the position that he held in the Company, nor were any acts of misfeasance or malfeasance specified which he was supposed to have done. Mr. Madan Gopal points out that this was a mere slip of the pen and that really it was intended to proceed against him as one of the promoters of the Company, his son Kanwar Sain being the Managing Director of the Company. He also says that subsequently on the 21st of May, 1927, he applied for leave to amend the application to make this point clear and this amendment was allowed. It may, therefore, be assumed that the liquidator intended to proceed against Kanshi Ram as one of the promoters of the Company.

On the same day, i.e., the 6th of January, 1927, an application under O. XXXVIII, r. 5, Civil Procedure Code, was presented by the liquidator supported by an affidavit praying for the attachment before judgment of a garden situate at Kunjah, District Gujrat, it being alleged that the liquidator had been informed and verily believed it to be true, that the aforesaid Kanshi Ram "was likely to dispose of the property with a view to defraud his creditors". The learned District Judge without issuing any notice to Kanshi Ram or following the procedure prescribed in r. 5, directed that the "attachment order as prayed may issue". On the 11th February, 1927, Kanshi Ram appeared and raised various objections to

the attachment of the garden. These objections were rejected by the District Judge on the 12th March, 1927. Against this order a miscellaneous appeal under O. XLIII, r. 1 (a), Civil Procedure Code, and s. 202 of the Indian Companies Act has been preferred to this Court by Kanshi Ram and I have heard Mr. Mool Chand on his behalf and Mr. Madan Gopal Liquidator who has appeared to support the order.

Mr. Mool Chand has argued that the order of the learned District Judge is wrong for the following reasons:

(1) That O. XXXVIII, r. 5, Civil Procedure Code, is inapplicable to proceedings under s. 235 of the Indian Companies Act.

(2) That the District Judge of Lahore had no jurisdiction to attach immoveable property situate in the Gujrat District.

(3) That the proper procedure as laid down in O. VIII, r. 5, Civil Procedure Code, was not followed by the District Judge, and

(4) That on the affidavit of the liquidator and other materials on the record no case had been made out for attaching the property before judgment.

In addition to this Mr. Mool Chand also urged that his client was not one of the officers or promoters of the Company and, therefore, no proceedings under s. 235 could be legally taken against him. As to this last point, however, no decision has yet been given by the lower Court and the matter is still under enquiry. I, therefore, did not allow Mr. Mool Chand to argue this point.

In my opinion there is no force in points Nos. 1 and 2 taken by Mr. Mool Chand under s. 141, Civil Procedure Code, the procedure provided in the Civil Procedure Code in regard to suits is to be followed, as far as it can be made applicable, to all proceedings in all Courts of civil jurisdiction. Now it cannot be denied that proceedings under the Indian Companies Act are proceedings in a Court of civil jurisdiction. A Liquidation Court has, therefore, in a proper case, power to make an order of attachment before judgment in accordance with the provisions of O. XXXVIII, r. 5, Civil Procedure Code.

Nor do I see any force in the second objection, viz., that the learned District Judge had no jurisdiction to attach immoveable property situate in the Gujrat District.

Apart from the fact that under the Code as amended in 1908 the jurisdiction of Courts to act under O. XXXVIII, rr. 5 and 6 has been very much extended and a Court can now attach before judgment property situate beyond its local limits, there is in the present case the further circumstances, that under s. 164 of the Indian Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of Act and had for purposes of such winding up all the jurisdiction and powers of the High Court. It cannot be denied that the High Court would have the power to attach immoveable property in Gujrat. Therefore, the order of the District Judge in attaching the property at Gujrat is not without jurisdiction. Accordingly I overrule this objection also.

I am, however, of opinion, that the appeal must succeed on objection Nos. 3 and 4. The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary, that in exercising these powers, Courts should strictly adhere to the procedure prescribed by the Code. Rule 5, of O. XXXVIII, Civil Procedure Code, lays down that if the "Court is satisfied by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree, that may be passed against him, is about to dispose of the whole or any part of his property the Court may direct the defendant, within a time to be fixed by it, either to furnish security in such sum as may be specified in the order and to produce and place at the disposal of the Court when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear to show cause why he should not furnish security".

It is clear that before an order of attachment of property before judgment is passed, the Court should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he had appeared and failed to furnish the security or, show cause that the Court

can under r. 6 pass an order attaching his property. It is conceded that in this case this procedure was not followed. No doubt, in cases of emergency, the Code empowers the Court under cl. 3 of r. 5 to pass an *interim* order directing the conditional attachment of the property, but in this case the Court did not act under that section, nor did it subsequently say in its order of the 12th of March that it intended to act under that clause. Further the provisions of r. 5 can only be invoked if the Court is satisfied that the respondent is about to dispose of the whole or any part of the property. The affidavit filed by the liquidation on which the Court acted in this case did not make any such allegation. All that was stated was that the appellant was *likely* to dispose of the garden. Now it is quite clear that a vague and indefinite allegation of this kind is wholly insufficient to justify proceedings being taken under rr. 5 and 6. It is conceded that beyond this allegation in the affidavit there were no materials before the Court either on the 6th of January, 1927, when the attachment order was issued, or on the 12th of March, 1927, when the Court overruled the appellant's objections against this attachment, to justify a reasonable apprehension that the appellant was about to dispose of the whole or any part of his property with intent to obstruct or delay the execution of an order or decree that might be passed against him. I, therefore, hold that the learned Judge acted illegally in passing the order for attachment before judgment of the garden in question.

Accordingly I accept the appeal and set aside the orders of the lower Court dated the 6th of January and 12th of March, 1927, and direct that the property be released from attachment. I direct that the costs of the appeal be borne by the parties.

R. L.

Appeal accepted

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 49 AND 50
OF 1926.

July 19, 1927.

Present:—Mr. Justice Ramesam and
Mr. Justice Cornish.

A. V. S. SATHAPPA CHETTY AND
OTHERS—DEFENDANTS—APPELLANTS
versus

S. N. SUBRAMANIAN CHETTY—
COUNTER-PETITIONER—RESPONDENT.

Decree—Construction—Partnership suit—Prelimi-

nary judgment dealing with certain matters and adjourning suit to later date, whether determination of entire suit.

Where in a suit for dissolution of partnership, the preliminary judgment directed dissolution, the appointment of a Commissioner and taking accounts and "the further consideration of the suit was adjourned" to a later date:

Held, that the suit could be considered to have been only partially and not entirely disposed of and it was competent to the Court later to take into consideration other matters covered by other issues and not disposed of in the original judgment. [p. 811, col. 2.]

Appeal against the orders of the Court of the Subordinate Judge, Sivaganga, dated the 22nd September, 1925, and respectively passed in C. M. P. No. 223 of 1925 and C. M. P. No. 222 of 1925, in O. S. No. 19 of 1917.

Mr. B. Sitarama Rao, for the Appellants.

Mr. E. Vinayaka Rao, for the Respondent.

JUDGMENT.—These miscellaneous appeals arise out of a preliminary judgment and decree passed by the Subordinate Judge of Sivaganga in O. S. No. 19 of 1917. That suit was for dissolution of a partnership, for taking accounts and for the appointment of a Receiver. The suit was originally disposed of by the Subordinate Judge on the 31st March, 1919, on the ground that it was barred by limitation. The plaintiff appealed to the High Court and the High Court reversing the judgment of the Subordinate Judge held that the suit was not barred by limitation and remanded the suit for the passing of a proper preliminary decree. This was on the 7th of October, 1921. Leave was granted to the defendants to appeal to His Majesty in Council and that appeal terminated only very recently on the 14th February, 1927, in which the judgment of the High Court was confirmed. But long before the decision by the Privy Council the Subordinate Judge passed a preliminary judgment and a preliminary decree on the 13th December, 1921. On that occasion, only the plaintiff's Vakil was present. Neither the defendants nor their Vakil was present in Court. The defendants then presented an application on the 21st June, 1925, for setting aside the *ex parte* preliminary judgment and decree on the ground that they were not aware of the decree and that they thought that as the subject matter was under appeal to His Majesty in Council the Subordinate Judge would not deal with it. The Subordinate Judge now finds that it is true

they were not aware of the preliminary decree passed on the 13th December, 1921. He further finds that there is no excuse for the defendants' non-appearance on that day and refused to set aside the *ex parte* order and dismissed the petition. C. M. A. No. 49 of 1926 was filed by the 1st defendant and C. M. A. No. 50 of 1926 by the 3rd and 6th defendants the points arising in both being the same.

The only object in filing these appeals seems to be that the defendants have an apprehension that on account of the form of the preliminary decree certain points originally arising in the case and which were the subject-matter of issues Nos. 13-16 would be excluded from future consideration. These issues raise the question on plaintiff's liability in respect of some matters connected with the partnership and they were not considered by the original Subordinate Judge who disposed of the case as being barred by limitation. For a proper disposal of the case they have to be considered. In the revised preliminary judgment the Subordinate Judge says:—"following the direction of the High Court I pass a preliminary decree to the following effect." He declares that a partnership existed, that accounts were regularly kept and that the plaintiffs were entitled to have the said partnership dissolved and that the partnership do stand dissolved as from the said date 20th December, 1926. Then comes the decretal portion consisting of six clauses, to the effect that the partnership should stand dissolved from the 20th December, 1926, that accounts should be taken of the amount due to the suit partnership from defendants Nos. 3 and 4 by reason of mistakes, etc., alleged to have been committed by 3rd defendant during his agency in the same partnership firm, and the amount due to the plaintiff's firm. Paragraph 3 directs the plaintiff to file a statement of charges against the 3rd defendant. Paragraph 4 states that defendants Nos. 3 and 4 do within one month from the date on which the plaintiff files into Court his statement of charges, file their answer and explanations thereto. Paragraph 5 refers to the appointment of a Commissioner for the above purpose with power to record evidence and do all lawful acts in the matter and para. 6 refers to his remuneration. Then "we have got this sentence, "the further consideration of the suit be adjourned to

20th January, 1922." It is apprehended that his decree may be construed as dealing with all the matters which form the subject-matter of the suit and that they will be precluded from raising the subject-matter of issues Nos. 13-16 hereafter. The last sentence of the decree, that the suit is adjourned to the 20th January, 1922, shows that the Subordinate Judge himself considered the suit as having been partially disposed of and that something more remained to be considered.

There is no express statement in the preliminary judgment or decree that no other matter remains to be considered. The direction was that the plaintiff should file his statement of charges within one month from the date of the order and from that date the defendant is given another month to file his answers. Thus these two matters take up nearly two months (*i. e.*), upto February, and the fixing of the 20th January, 1922 would not have been for the purpose of considering these charges and answers. Obviously it could not have been for a consideration of the Commissioner's accounts. The only possible inference that can be drawn from the Subordinate Judge's order is that he adjourned the case to the 20th January, 1922, for a consideration of other matters, arising in the suit not covered by the direction in cl. 2 about accounts being taken of two items. These and other matters apparently require evidence. He took this course probably because he thought that the defendants were misled by the fact that the proceedings were still pending in the Privy Council and if their Vakil was present the matter could surely be fully dealt with. It is admitted by both the parties that after this preliminary decree of the 13th December, 1921, nothing further has happened. No fee was paid into Court by the plaintiff for the purpose of paying the Commissioner and no Commissioner took the accounts, and on or within the 31st January, 1922, no statement was filed. Apparently the parties thought that they should await the Privy Council decision for further attention to be paid to the case.

This seems to be the proper interpretation of the order of the Subordinate Judge. In these circumstances it is unnecessary for us to interfere with the order of the lower Court or to consider the further question whether any excuse was made out for the

non-appearance of the defendants on the 13th December.

In these circumstances we make no order as to costs.

V: N. V.

A: N. A.

Petition dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1451 OF 1927.

October 31, 1927.

Present:—Mr. Justice Jai Lal.

MAULA BAKHSH—DEFENDANT—

APPELLANT

versus

UDHAM SINGH—PLAINTIFF AND

BUTA KHAN AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Bona fide mistake as to nature of suit—Appeal filed in wrong Court—Exclusion of time spent in wrong Court—Land, change in character—Unclassed suit.

Where a party under a bona fide, though mistaken, belief as to the nature of the suit files an appeal in a wrong Court, but on its being returned for presentation to the proper Court, presents it in the proper Court without any delay he is entitled to the benefit of s. 14, Limitation Act. [p. 813, col. 1.]

The plaintiff brought a suit for redemption of an area of 2 kanals 14 marlas of agricultural land. In 1924 the defendants had built a *kotha* on 2 marlas of the land and in *kharif* 1924 the land was not cultivated and the suit was instituted on 1st July, 1924:

Held, that the character of the land had not been so changed as to make a suit relating thereto an unclassified suit. [p. 812, col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 10th March, 1927, affirming that of the Additional Subordinate Judge, Fourth Class, Gujar Khan, District, Rawalpindi, dated the 25th May, 1926.

Mr. Hargopal, for the Appellant.

Mr. Ghulam Rasul Khan for Mr. Aziz Ahmed, for the Respondents.

JUDGMENT.—This judgment will dispose of Appeal No. 1451 of 1927 and Civil Revision No. 252 of 1927. They both arise out of the same case.

A suit for redemption was filed by the contesting respondents against Maula Bakhsh appellant in one case and the petitioner in the other and was decreed. The value for the purposes of jurisdiction was Rs. 99. The defendants being dissatisfied with the decree of the Subordinate Judge presented an appeal in the Court of the Senior Subordinate Judge. On the hearing

of the appeal an objection was taken by the respondent that the suit being in respect of the land as defined in the Punjab Tenancy Act and the Land Revenue Act was a land suit and consequently that no appeal lay to the Senior Subordinate Judge who is competent to hear appeals in Small Cause and unclassified suits. The Senior Subordinate Judge after enquiry held that the suit was for possession by redemption of land as the property in suit was initially land and its character had not been changed by anything alleged to have been done thereon by the defendant. He, therefore, returned the memorandum of appeal, on the 23rd of February, 1927, for presentation to the proper Court. On the 24th February, 1927, i. e. the next day, the appellant filed the appeal in the Court of the District Judge at Rawalpindi. Admittedly on that date the ordinary period for appeal to the Court of the District Judge had expired. The appellant, however, claimed reduction of the time spent by him in prosecuting his appeal in the Court of the Senior Subordinate Judge, under s. 14 of the Indian Limitation Act, but the learned District Judge declined to give the appellant advantage of that provision of law holding that there was no scope for doubt about the Court which was competent to hear the appeal from the decree of the Subordinate Judge and that it could not be held that the appellant filed the appeal in the Senior Subordinate Judge's Court in good faith.

Maula Bakhsh has, therefore, presented a petition for revision against the order of the Subordinate Judge, returning his memorandum of appeal for presentation to the proper Court and an appeal against the order of the District Judge dismissing his appeal as barred by time. On the finding of the Senior Subordinate Judge there is no doubt that the suit is a land suit. It related to an area of 2 kanals and 14 marlas. In 1924 the defendant built a *kotha* on two marlas of this land. It is true that in the *kharif* of 1924 the land was not cultivated and the suit was instituted on the 1st of July, 1924. It is not, however, possible on that account alone to hold that at the time of the institution of the suit the character of the land had been changed in such a way as to make a suit relating thereto an unclassified suit. The petition for revision, therefore, is dismissed with costs.

With regard to the appeal, I hold that it must be succeeded. The reasons given

by the appellant in support of his contention that the property in suit had changed its character were not such as could summarily be rejected. They needed consideration. It has not been shown that the appellant had any motive for filing the appeal in the Court of the Senior Subordinate Judge. On the other hand, it appears that he honestly believed that the appeal lay to that Court. Under these circumstances I hold that this was a fit case in which the provisions of s. 14 of the Indian Limitation Act should have been applied specially because the appellant filed his appeal in the Court of the District Judge the day after the Senior Subordinate Judge decided against him. Accepting the appeal I set aside the order of the District Judge and holding the appeal to be within time, I remand it to him for decision on the merits. There will be no order as to the costs of this appeal.

R. L.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 35 B OF 1926.

October 17, 1927.

Present:—Mr. Findlay, J. C.

DEWAJI KUNBI—DEFENDANT—

APPELLANT

versus

Syed AMRULLASHA—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS.

Benar. Land Revenue Code of 1896, ss. 78 (8), 79 (2)—Annual tenant—Notice of enhancement of rent by certificated holder only, validity of—Issue of such notice, whether bars action for ejectment.

A notice of enhancement given to an annual tenant by a certificated holder and manager of a Jagir village is not invalid simply because some of his co-sharers do not agree that such a notice should be given. [p. 814, col. 1.]

The mere issue of a notice of enhancement does not bar an action for ejectment if that remedy is otherwise legally open to the landlord especially when the tenant after receiving the notice of enhancement not only refuses to pay the enhanced rent but contests the landlord's title. [*ibid.*]

Appeal from the decree of the Additional District Judge, Yeotmal, dated the 20th October, 1925, in Civil Appeal No. 11 of 1925.

Mr. C. B. Parakh, for the Appellant.

Mr. M. R. Bobde, for the Respondent.

JUDGMENT.—The judgment in this appeal will also govern the connected

Second Appeals Nos. 36, 37, 38 and 39-B of 1926, the facts of which are, to all intents and purposes, similar.

The facts of the case are sufficiently clear from the detailed judgments of the Additional District Judge in Civil Appeals Nos. 13 and 14 of 1925 in his Court and I find it unnecessary to repeat them here. Each of the defendants has now come up on second appeal against the judgment and decree of the lower Appellate Court ordering him to give up possession of the survey number, or part of the survey number, concerned as the case may be.

It has not been disputed in this Court that the defendants are annual tenants, and only two points have been pressed out of the various grounds of appeal. The notice for enhancement of rent in the present case was given on the 28th of August, 1922, and the notice of ejectment was given on the 5th of December of the same year. The first point for decision is whether the plaintiff-respondent No. 1, Amrullasha, could himself validly give such notice. It is urged in this connection that he cannot, by himself, represent the landlord and that, as a matter of fact, the other co-sharers are opposed to his claim. The lower Appellate Court has not dealt in detail with the finding of the first Court, which is to be found in para. 7 of its judgment in Suit No. 182 of 1923 and in para. 12 of its judgment in Suit No. 197 of 1923, in which reasons are given for holding that the plaintiff and his predecessors have been solely managing the village. The *krarnama* to this effect has also been proved and it is impossible to find any reason for disturbing this finding of fact which has been arrived at by the first Court, nor has, indeed, any such reason been alleged. On this ground alone, therefore, the first contention urged in appeal was bound to fail.

Apart from the two cases quoted by the lower Appellate Court, on which it relies for its finding that a notice from the certificated holder Syed Amrullasha alone was a valid one, I find myself in full agreement with the remarks of Mittra, A. J. C., in *Narayan v. Syed Bahadur* (1), decided on March 17, 1917, on this point. It is important, moreover, to remember that an estate like the present one is, in reality, impartible and the persons beneficially

interested in it cannot ordinarily demand more than the share of income they are entitled to. Whether or not they are entitled to revise or cancel any agreement for management, which was come to amongst themselves, is a matter I am not called upon to decide, but it is certainly not open to the present appellant, merely because some of such persons may desire that he should be retained in the land, to claim that this difference of opinion amongst the co sharers would render invalid an ordinary act of management done by the certificated holder who has, moreover, by agreement and by long practice, been recognised as the manager of the estate. I find, myself, therefore, in full agreement with the Additional District Judge in his finding that the notices in question were valid, although signed by Syed Amrullasha alone.

The second point urged on behalf of the appellant seems to me to have even less substance. This is that having issued notice for enhancement of rent under s. 78 of the Berar Land Revenue Code, 1896, it was not open to Syed Amrullasha to issue notice of ejectment under s. 79 *idem*. These tenants are annual tenants only and, in the absence of an express provision contained in s. 79 (2) that it was to be subject to the provision contained in s. 78, it is preposterous to suggest that the more drastic remedy afforded by s. 79 is, or could be abrogated by action under s. 78. Moreover, at any time, the landlord has a right to ask for the rent of the holding to be enhanced under s. 78 entirely irrespective of the tenant who may hold it during the following year for which enhancement is asked. In view of the absolute provision contained in s. 79 (2), it is impossible to my mind to suggest that the mere issue of a notice of enhancement bars the landlord's resort to action for ejectment if that is otherwise legally open to him. Moreover, in the present instance, the notice in question was apparently not sent through a Revenue Officer as is required by sub-s. (8) of s. 78. It has been proved also that each of the appellants declined to pay the enhanced rate, evidence on which point was properly admitted in the lower Appellate Court and whose finding thereon I agree with. The replies of the appellants, in which they not only declined to pay the enhanced rent but also, in effect, contested their landlord's title, speak for themselves.

These replies were received before notice of ejectment was given and, in those circumstances, it seems to me futile to suggest that the landlord was debarred from having recourse to his remedy under s. 79 (2). The second contention in the appeal, therefore, fails and I am unable to see any reason for interference with the judgment and decree of the lower Appellate Court.

The appeal is accordingly dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

G. R. D.
A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1742 OF 1923.

October 19, 1927.

Present:—Mr. Justice Harrison and
Mr. Justice Tek Chand.

MUHAMMAD BAKHSH AND ANOTHER

—DEFENDANTS —APPELLANTS

versus

NATHU AND ANOTHER—PLAINTIFFS

—RESPONDENTS.

Adverse possession—Admission of title by party in possession, effect of.

An admission by a party in possession, of the title of the true owner cancels the effect of any previous overt act of adverse possession.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 14th May, 1923, reversing that of the Subordinate Judge, Second Class, Gurdaspur, dated the 31st October, 1922.

Mr. Niaz Muhammad, for the Appellants.

Mr. J. L. Kapur, for Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—Plaintiffs brought this suit for possession of 10 *kanals* 18 *marlas* of land now situate within the *abadi* of their village and formerly agricultural land. The only issue in the case was whether the plot belonged to the plaintiffs and had been in their possession within the last twelve years. Both these points were decided in their favour by the District Judge and a decree was given.

On second appeal Counsel does not contest the title of the plaintiffs beyond saying that his clients have acquired an adverse title, which is indefeasible that the plaintiffs had not been in possession within twelve

years. He relies upon an overt act committed by his clients in the year 1909, when they attempted to build a wall on this land, and in a criminal case, which followed thereon, admitted the title of the plaintiffs. Such an admission cancels the effect of any previous act that they had committed and it cannot be inferred or presumed that that admission carried with it an assertion of adverse title. No overt act since 1909 is alleged and the appeal must, therefore, fail and is dismissed with costs.

B. L.

*Appeal dismissed.***MADRAS HIGH COURT.**

CIVIL REVISION PETITION No. 492 OF 1926.

October 20, 1927.

Present :—Mr. Justice Devadoss.

M. S. KAILASANADA SARMA—

PLAINTIFF—PETITIONER

*versus*THE PRESIDENT DISTRICT BOARD,
TANJORE—DEFENDANT—RESPONDENT.*Contract—Breach by one party entitling other to cancel contract—Notice of cancellation, absence of—Breach, whether condoned.*

When a party to a contract is entitled to cancel it by reason of the breach by the other, notice of cancellation should be given to the other party. If no notice is given, it must be deemed that the breach has been condoned and that the contract is allowed to continue.

Petition, under s. 25 of Act IX of 1887, to revise the decree of the Court of the Subordinate Judge, Tanjore, in S. O. S. No. 196 of 1925.

Mr. K. B. Ranganatha Iyer, for the Petitioner.

Sir K. V. Reddi, for the Respondent.

JUDGMENT.—This is an application, to revise the decree of the Subordinate Judge of Tanjore. The decree was for a small portion of the plaintiff's claim. The plaintiff is the petitioner herein. He sued for damages for breach of contract by the defendant, the District Board of Tanjore. The agreement between the parties is embodied in Ex. III. Under the agreement the *chatram* manager had to supply paddy for being husked. The plaintiff was to husk the paddy and deliver it. There is no dispute as to quantities. The Subordinate Judge found that both the parties broke the contract and the plaintiff

was not entitled to damages. The contention of Mr. Ranganadha Iyer for the petitioner is that his act did not amount to a breach of contract. Sir K. V. Reddi for the respondent contends that inasmuch as the plaintiff did not deliver 286 measures of husked rice, he must be deemed to have broken the contract and under cl. 5 of the contract, if the plaintiff failed to take paddy to be husked or failed to measure the entire rice due for the paddy taken by him within a week thereof or withheld some quantity of paddy then the defendant was entitled to cancel the contract and that this clause applied to this case and that the District Board was entitled to cancel the contract inasmuch as the plaintiff failed to deliver 286 measures of rice. Strange enough Ex. III was executed some four months after the contract was actually entered into. The breach, if any, was before the date of Ex. III. There is nothing to show that on the date of Ex. III the plaintiff was called upon to deliver the paddy yet to be delivered. If there was a breach the defendant did not avail himself of it and if he wanted to avail himself of it he should have given notice of cancellation of the contract to the plaintiff on the ground that he did not deliver the full measure of paddy. That he did not choose to do. It is contended that the *chatram* manager gave paddy to others for husking. That is no ground for holding that District Board gave notice of cancellation of the contract to plaintiff. When a party to a contract is entitled to cancel the contract by reason of the breach by the other, notice of cancellation should be given to the other party. If no notice is given then it must be deemed that the breach was condoned and that the contract was allowed to continue. In this case the District Board not having given notice of breach of contract the contract must be held to be subsisting. In this view of the law, I set aside the decree of the Subordinate Judge only so far as the question of damages to plaintiff is concerned. As regards the value of the paddy to be delivered, the defendant must be given credit for Rs. 114-6-5. This amount will be deducted from any amount that may be due to the plaintiff. I set aside the decree of the Subordinate Judge and direct him to hold an enquiry into the amount of damages suffered by the

plaintiff by reason of the breach of contract by the defendant and after ascertaining the amount, he will give a decree to the plaintiff for the damages and the deposit amount, namely, Rs. 200 minus the amount of Rs. 114-6-5. The plaintiff will be entitled to interest from the date of suit notice, Ex. XXI. The petitioner is entitled to costs of this application.

V. N. V.

A. N. A.

Order set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1563 OF 1927.

November 4, 1927.

Present.—Mr. Justice Dalip Singh.

BEHARI LAL—DEFENDANT—APPELLANT
versusHARI SINGH AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Alienation—Father's alienation, whether void—Mortgage by father containing indemnity clause—Suit on mortgage—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 97, 116.

An alienation by a Hindu father not supported by legal necessity is not void *ab initio* but is voidable at the instance of his sons or reversioners.

A mortgage executed by a Hindu father in 1914 contained an indemnity clause that if any objection or claim arose the mortgagor would be personally liable. The mortgagee instituted a suit against the mortgagor's sons on the mortgage in 1922. The guardian of the sons contended that the land was ancestral and that the alienation was not supported by necessity. A decree was passed against the mortgagor's properties and the mortgaged property was held not liable. In a suit by the sons to set aside this decree on the ground that the suit was barred by limitation and the guardian had negligently failed to take this plea.

Held, that as soon as the decree was passed in favour of his sons that the property was not liable under the mortgage, the indemnity clause came into action and the mortgagor became personally liable to recoup the mortgagee and, therefore, whether Art. 97 or Art. 116 of the First Schedule to the Limitation Act was applicable, the suit was within limitation.

Second appeal from the decree of the Additional District Judge, Jullundur, dated the 14th April, 1927, reversing that of the Additional Subordinate Judge, Third Class, Jullundur, dated the 30th November, 1926.

Lala Badri Das, R. B., for the Appellant.

JUDGMENT.—On the 21st December, 1914, the father of the present plaintiffs executed a registered mortgage deed in favour of the defendant. The mortgagor died and the present defendant brought a suit against the present plaintiffs, as representatives of the mortgagor, on the 23rd

May, 1922, for the recovery of the principal and interest on the mortgage amount and further prayed for a decree that if the whole decretal amount could not be realized by sale of the mortgaged property, he might be given the right to apply for its recovery from the other property of the deceased mortgagor. The mother of the minors acting as guardian *ad litem* defended the suit pleading that the land mortgaged was ancestral and there was no valid necessity and, therefore, the land under mortgage was not liable for payment of the mortgage debt. She did not raise the plea of limitation. The Court held that the property was ancestral and that there was no necessity for the mortgage and gave a decree against the property of the deceased mortgagor in the possession of his sons on the 22nd May, 1923. It also held that the mortgaged property was not liable in execution for the debt of the father.

On the 15th March, 1926, the plaintiffs brought the present suit for declaration that this decree of 22nd May, 1923, was not binding on them on the ground that the plaintiff's mother, as their guardian *ad litem*, had acted with negligence in not pleading limitation. The learned District Judge held that the mortgage was void *ab initio* and that, therefore, neither Art. 97 nor Art. 116 brought the suit within limitation. He, therefore, accepted the appeal and reversing the decree of the lower Court decreed the suit with costs.

Counsel for the appellant (mortgagee) has contended that in so holding the learned District Judge was wrong. It seems to me that no authority is necessary for the proposition that an alienation by a Hindu father is not void *ab initio* but is voidable at the instance of his sons or reversioners. As the present mortgage contained an indemnity clause that if any objection or claimant arose then the mortgagor would be personally liable as soon as the decree was passed in favour of his sons that the property was not liable under the mortgage, the indemnity clause came into action and the mortgagor became personally liable to recoup the mortgagee and, therefore, whether Art. 97 or Art. 116 was applicable the suit was within limitation.

I, therefore, accept the appeal and restore the decree of the trial Court dismissing the suit with costs throughout.

R. L.

A. N. A.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1485 OF 1927.

November 7, 1927.

Present:—Mr. Justice Jai Lal.

Musammât JANTAN AND OTHERS—DEFEND-**ANTS—APPELLANTS***versus***AHMAD AND ANOTHER—PLAINTIFFS—****RESPONDENTS.**

Court Fees Act (VII of 1870), ss. 12, 23, Sch. II, Arts. 17, 22—Court-fee, question of, when appealable—Suit to set aside alienation by female.—Requisite Court-fee—Ancestral land, meaning of—Insufficiently stamped plaint, acceptance of—Further proceedings, whether void—Civil Procedure Code (Act V of 1908), O. VII, r. 11.

The term "ancestral land" in Art. 22 of Sch. II of the Court Fees Act means land in respect of which in order to enable the plaintiff to succeed, it is necessary for him to prove that the land is ancestral. A suit by the next heir to set aside an alienation by a female holder who has the customary life-interest in the estate is not within the purview of Art. 22 as it is not ordinarily necessary for the plaintiff in such a suit to aver or to prove that the land is ancestral. [p. 819, col. 1.]

In the case of a plaint insufficiently stamped the Court is bound to give the party concerned an opportunity to pay the proper stamp and it is on his failure to do so that the Court can decline to look at the document. But the fact that a Court has accepted an insufficiently stamped plaint does not render the proceedings which follow thereon void. [*ibid.*]

Section 12, Court Fees Act, bars an appeal only where the dispute is about the proper valuation of the subject-matter of the suit and not when the question is which of the several articles of the Court Fees Act applies to the facts stated in the plaint. [p. 818, col. 2.]

Where an order directing the payment of additional Court-fee is incorporated in the decree, it becomes an essential part of the decree and is appealable as such. [*ibid.*]

Second appeal against an order of the District Judge, Mianwali, dated the 8th of February, 1927, reversing that of the Senior Subordinate Judge, Mianwali, dated the 5th/20th October, 1926.

Mr. S. R. Lail, for the Appellants.

JUDGMENT.—The respondents instituted a suit in the Court of the Senior Subordinate Judge, Mianwali, for a declaration that a sale by Musammât Jantan of land inherited by her from Muhammada, her son, was without consideration and necessity and, therefore, void against the rights of the plaintiffs who alleged that they were the next heirs of Muhammada after the expiry of the life-interest of Musammât Jantan. An objection was raised by the defendants that proper Court-fee on the plaint had not been paid and it was pleaded that the sale was for consideration and necessity. On the merits the Senior

Subordinate Judge held in favour of the plaintiffs, but on the question of Court-fee he was of opinion that a Court-fee stamp of Rs. 10 paid by the plaintiffs was insufficient and that the proper Court-fee was Rs. 20 under Art. 22, Sch. II of the Indian Court Fees Act which provides that a plaint or memorandum of appeal in a suit by a reversioner under the Customary Law for a declaration in respect of an alienation of ancestral land shall bear a Court-fee stamp of Rs. 20. The plaintiffs' contention was that their suit was not for a declaration in respect of an alienation of ancestral land and, therefore, under Art. 17 (3) of the Second Schedule of the Court Fees Act, stamp payable was an in an ordinary suit for declaration. The learned Judge, decided all the issues framed in the case together and passed the following decree on 5th of October, 1927:—

"I accordingly come to the conclusion that the alienation was without necessity and I grant the plaintiffs a decree with costs against the defendants declaring that the sale in dispute shall not affect the rights of the plaintiffs after the death of Musammât Jantan. The decree shall not take effect until the Court-fee has been made good. The requisite Court-fee should be put in on or before the 20th of October, 1926."

This order was pronounced in the presence of the Counsel for both parties. The deficiency in the Court-fee as determined by the Senior Subordinate Judge not having been made good by the 20th of October the following note was made by the learned Judge below the decree:—

"Note.—Court-fee not paid as ordered. Decree shall not take effect."

Against the decree of the 5th October the plaintiffs filed an appeal in the Court of the District Judge who held that an appeal lay to this Court because the order under appeal amounted to an order rejecting the plaint and that in either case an appeal lay to him. He held that the proper stamp on the plaint was Rs. 10 which amount having been already paid the order of the trial Court directing payment of additional Court-fee was illegal. He, therefore, accepted the appeal, "set aside the order of the 20th October, and ordered that proper decree-sheet be prepared in accordance with law." It appears, however, that the respondents before him had filed cross-objections. These the learned Judge declined to consider on the ground that the

stage for filing cross-objections had not yet reached, that they (respondents) "can appeal against the order when a proper decree-sheet is prepared." The defendants have filed this second appeal, but the plaintiffs did not appear before me, nor were they represented by Counsel and consequently I had to hear the appeal *ex parte* against them.

The first contention of the learned Counsel, who appeared on behalf of the appellants, is that no appeal lay to the Court of the learned District Judge from the order dated the 5th October, 1926, and that the plaintiffs not having appealed from the order of 20th October were precluded from appealing against the previous order which had in effect been superseded by the later order. I may note that the plaintiffs' appeal was expressly against the order of the 5th October, but the learned District Judge has set aside the order of the 20th October. Still I do not see any force in the contention of the appellants. The decree of the Senior Subordinate Judge was conditional, that is the way in which the learned Judge himself interpreted it and the condition not having been performed as directed, the decree *ipso facto* became inoperative. There was really no fresh order made on the 20th of October, but merely a note was made of the fact that the condition had not been performed, and the further note that the decree shall not come into operation under the circumstances was merely a surplusage. It was not, therefore, necessary for the plaintiffs to appeal against any order of the 20th October, because the note made by the Judge on that date ceased to have any effect when the District Judge accepted the plaintiffs' appeal and set aside the order of the 5th October, 1926. Though the learned Judge has not expressly set aside that order, the whole of the judgment is to the effect that the finding of the Senior Subordinate Judge, that the Court-fee paid on the plaint was insufficient, was erroneous.

The learned Counsel then relied on s. 12 of the Court Fees Act in support of his argument that no appeal lay to the District Judge. The section provides that every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum as the case may be, is filed and such decision shall be final as between the

parties to the suit. But a proviso is added that where such question has been wrongly decided to the detriment of the revenue, a superior Court before whom such suit may come on appeal, reference or revision shall require the party concerned to pay the additional fee. In my opinion s. 12 does not apply to the present case. My view is that that section merely bars an appeal where the dispute is about the proper valuation of the subject matter of the suit and not where the question is which of the several articles of the Court Fees Act applies to the facts stated in the plaint. In the first case it is more or less a question of fact that has to be determined by the Court and the Legislature has laid it down that the decision of the Court in such matters shall be final. In the second case different considerations arise and the matter being purely one of law is capable of being examined by superior Courts at the instance of either party.

There is an other aspect of this question.

The order directing the payment of the additional Court-fee was incorporated in the decree. It was, therefore, an essential part of the decree and admittedly the decree was appealable to the District Judge. In other words, the decree being conditional on the performance of certain acts by the plaintiffs on the non-performance whereof it was to become void and the direction relating to the performance of such acts being illegal as held by the District Judge; the learned Judge had jurisdiction to adjudicate upon the legality or otherwise of the condition imposed.

At this stage it will be convenient to dispose of another argument that was put forward on behalf of the appellants. It was based on s. 28 of the Court Fees Act which provides that no document which ought to bear a stamp under that Act shall be of any validity, unless and until it is properly stamped. The contention of the learned Counsel was that the plaint being insufficiently stamped the decree passed thereon was void and consequently no appeal lay at the instance of the plaintiff. I confess I am unable to follow this argument. Order VII, r. 11, Civil Procedure Code, clearly provides that if the plaint is written on paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a fixed time, fails to do so then the Court shall reject the plaint. This provision of the law read with s. 28 of the Court Fees Act clearly implies

that opportunity has to be given to the party concerned to pay the proper stamp and it is on his failure to do so that the Court is entitled to decline to look at the document. But I am unable to see that if the Court accepts an insufficiently stamped plaint the proceedings which follow thereon are void. Clause (2) of s. 12 of the Court Fees Act also supports the view.

The real question that is to be considered in this appeal is whether the suit in this case was in respect of an alienation of ancestral land or whether it was one in which a mere declaration under Art. 17 (3) of the Court Fees Act was prayed for. The question presents some difficulty, but after careful consideration I have arrived at the conclusion that the view of the learned District Judge is correct. In a suit by the next heir to set aside an alienation by a female holder who has the customary life-interest in the estate it is not ordinarily necessary for the plaintiff to aver or to prove that the land was ancestral. All that he has to prove in order to establish his *locus standi* to maintain such a suit, is that he is the next heir to the estate, in other words, that if the female holder, the alienor, had not existed, he would have inherited the property. He would, under the circumstances, be entitled to sue to set aside an alienation even of land which is the self-acquired property of last male owner and, therefore it is not necessary for the success of the suit that such property should have been held by the common ancestor of the plaintiff and last male owner. In this sense the present suit is not to set aside the sale of ancestral land.

The trial Court, and before me the learned Counsel for the appellants, laid great stress on the fact that the plaintiffs' Counsel when examined in Court stated that the land in suit was ancestral. I have examined that statement and find that the learned Counsel was careful to add that it was immaterial whether the land was ancestral or not. The term "ancestral land," therefore, in Art. 22 of the Second Schedule of the Court-Fees Act means land in respect of which, in order to enable the plaintiff to succeed, it is necessary for him to prove that the land was ancestral; in other words, that it was held by the common ancestor of himself and the last male owner. This was not necessary in the present case and I must hold, therefore, that the present suit is not in respect of the alienation of ancestral land,

The consequence is that the learned District Judge was right in holding that the view of the Senior Subordinate Judge, that proper Court-fee on the plaint had not been paid, was erroneous. It may be mentioned that great inconvenience and confusion has been caused in this case owing to the fact that the Senior Subordinate Judge did not follow the usual practice of deciding the issue relating to the sufficiency or otherwise of the Court-fee before proceeding with the trial of the suit on its merits. I have grave doubts if he could pass a conditional decree under the circumstances.

In view of what I have stated it is not necessary for me to consider whether the plaintiffs had, as alleged by them, reasonable excuse for not paying the Court-fee within the time fixed by the trial Court. At the same time I consider that it was not necessary for the District Judge to order that a proper decree be prepared and that he could not decline to entertain the cross-objections of the respondents. Order XLI, r. 22 of the Civil Procedure Code, gives a right to a respondent to attack any decree which is passed against him by the lower Court by filing a cross-objection, and the learned District Judge could not take away such rights in the manner he has done. In his judgment the view of the trial Court with regard to the Court-fee was erroneous and, therefore, the order directing payment of the additional Court-fee became inoperative. There was under the circumstances no occasion to remand the case for the preparation of a proper decree. The plaintiffs were entitled to claim that subject to the decision of the cross-objections their suit should be decreed unconditionally and the respondents were entitled to an adjudication of their cross-objections.

I accept this appeal to this extent that I remand the case to the District Judge with a direction to hear the cross-objections and then to pass a decree in favour of the plaintiffs or the defendants as the case may be after due consideration of the grounds taken by the respondents in their cross-objections. As the appellants have failed in the main grounds of appeal and the respondents have not appeared before me there will be no order as to costs of this appeal.

R. L.

Appeal accepted in part.

OUDE CHIEF COURT.

SECOND CIVIL APPEALS Nos. 230, 231, 232 and 233 of 1927.

November 8, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

Hafiz AMIR AHMAD AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

TOWN AREA MAGISTRATE, LAHAR-

PUR—DEFENDANT—RESPONDENT.

U. P. Town Areas Act (II of 1914), ss. 22, 26—Right to sweepings and refuse—Power of District Magistrate to interfere with rights of private owners—Jurisdiction of Civil Court.

Under the provisions of s. 26 of the U. P. Town Areas Act, although the District Magistrate has power to make an order prohibiting any body from depositing or storing manure, refuse or other offensive matter in a manner prejudicial to public health, comfort or convenience, he has no power to make an order directing that collections of such matter belonging to other persons may be made by the town-area authorities, whether they do or do not return a portion of their sale-proceeds to the rightful owner. [p. 820, col. 2.]

Where a District Magistrate makes such an order he assumes an authority for which there is no justification whatever and his order can be questioned in a Civil Court. [p. 821, col. 1.]

Second appeal against the decree of the District Judge, Sitapur, dated the 11th March, 1927, in Civil Appeal No. 34 of 1926, setting aside that of the Additional Sub-Judge, Sitapur, dated the 28th July 1926.

Mr. Ali Zaheer for Mr. M. Wasim, for the Appellant.

Mr. H. K. Ghose, for the Respondent.

JUDGMENT.—These four appeals can be decided together. They have arisen in the following way. The villages of Pahladpur, Bankat, Tanda Salar and Shah Qulipur have been included under the provisions of Local Act II of 1914 (The United Provinces Town Areas Act) in the town area of Laharpur. Laharpur is a small town. The villages in question stand outside it. The plaintiffs in the suits out of which these appeals arise are persons who are admittedly entitled to the sweepings and refuse of the villages of Pahladpur, Bankat, Tanda Salar and Shah Qulipur. The *panchayet* of Laharpur town area has, however, asserted a right to collect such sweeping and refuse in those places. In the assertion of this right they have made collections. They have sold the refuse and credited the proceeds to the town fund. When the plaintiffs took exception to this action of the *panchayet* the *panchayet* admitted the plaintiff's rights in part, and

offered to settle the matter by making to them a money payment to be taken from the sale-proceeds. The plaintiffs refused to accept this offer. The *panchayet* refused to cease making collections, and the result has been the filing of these suits. The relief sought in each case was for a declaration that the plaintiffs possessed the rights in question, and for an order restraining the *panchayet* in perpetuity from making such collections and selling the refuse. The trial Courts in each instance decreed the suits. The learned District Judge on appeal has dismissed the suits. The plaintiffs come here in second appeal. We are unable to find that the town area authorities have any justification for making these collections. It is not denied that before the Act came into existence the plaintiffs possessed the rights to make these collections. There is nothing in the Act or anywhere else which has taken their rights away. The District Magistrate can, under the provisions of s. 26 of the Act, make an order in writing prohibiting the plaintiffs or anybody else from depositing or storing manure, refuse or other offensive matter in a manner prejudicial to the public health, comfort or convenience, but under that section he certainly cannot make an order directing that collections of property of other persons are to be made by the town area authorities, whether they do or do not return a portion of the sale-proceeds to the rightful owner. It is true that under the provisions of s. 22(e) of the same Act the sale-proceeds of all dust, dirt, dung, or refuse including the dead bodies of animals collected by the town servants are credited to the town fund. But even if those words stood alone this section can only mean that where the town area authorities are entitled to such things they then have the power to collect them, and to sell them, and to enjoy the sale-proceeds. But the words do not stand alone. The Legislature has been careful to explain in this section that such sale-proceeds do not include sale-proceeds of things of this nature to which a private person is entitled. So the town area authorities can found nothing on the provisions of that section. The case then stands that the action of the town area authorities is without any justification. An attempt was made to show that the Court had no jurisdiction because orders under s. 26 cannot be questioned at all if passed by the District Magistrate, and if passed by a town

Magistrate can only be questioned by appeal to the District Magistrate. But the order in question is not an order under s. 25. It is not an order under any section of the Act. It is most extraordinary assumption of authority for which there is no justification whatever. It was further argued that the plaintiffs in one case were estopped by the admission of their servant. We do not find that there was any admission of any value. As a result we set aside the decrees of the learned District Judge and restore the decrees of the trial Courts in all cases. The defendant the town area authority will pay his own costs and those of all the appellants in all Courts.

A. N. A. Decrees set aside.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1123

OF 1927.

November 16, 1927.

Present—Mr. Justice Tek Chand.

AMIR CHAND—PLAINTIFF—APPELLANT

versus

NAUNIT RAM AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V. of 1908), O. IX, r. 9—Application for restoration of suit—Court's duty to give opportunity to applicant to adduce evidence.

An application for restoration of a suit dismissed in default should not be dismissed *in limine* without giving an opportunity to the applicant to substantiate his allegations in the application by evidence, even though there is reason to suspect that the application is not made *bona fide*.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Shahpur at Sargodha, dated the 22nd January, 1927.

Lala Badri Das, R. B., for the Appellant.

Mr. Mukand Lal Puri, for the Respondents.

JUDGMENT.—One Lakhmi Chand, describing himself as the sole owner of certain property sold it by two sale-deeds to Naunit Ram and Tahla Ram for Rs. 12,000 and Rs. 20,000 respectively. His younger brother Amir Chand instituted two suits in the Court of the Senior Subordinate Judge, Shahpur, claiming (a) one-half of the property comprised in each sale as belonging to him and having been sold by Lakhmi Chand without any authority, and (b) the other half (which admittedly belonged to Lakhmi Chand) by

way of pre-emption. Both suits were set down for hearing for the 4th January, 1927, on which date the plaintiff was ordered to deposit 1-5th of the sale price in each suit on or before the 4th of January, 1927, and it was also ordered that the next hearing of case would be on the 20th January. On the 14th of January, 1927, the Pleader for the plaintiff appeared and stated that his client lived in the Ferozepore District, that he was ill there and that it was not possible to communicate with him and to get the money within 10 days. He accordingly prayed for further time. The Court ordered that the deposit might be made on the 20th which had already been fixed as the date of hearing. On the 20th, the cases were called at 11 o'clock when the plaintiff's Pleader Lala Gobind Lal was present but his client was absent. At the request of Lala Gobind Lal the Court decided to wait for an hour or so to see that the plaintiff might arrive with the money. The case was called again at 2 o'clock when neither the plaintiff nor his Pleader appeared and accordingly the Court passed an order dismissing the claim relating to pre-emption of half the property in each suit under s. 22 (4) of the Pre-emption Act for failure to make the deposit and the claim relating to the other half in default under O. IX, r. 8, Civil Procedure Code. The same day applications under O. IX, r. 9 (wrongly described as under O. IX, r. 139) were presented by Lala Gobind Lal for having the two suits restored. These applications were directed to be put up before the learned Senior Subordinate Judge on the 22nd with the usual office report and on the 22nd they were summarily dismissed without any enquiry, he being of opinion that the absence of the plaintiff was intentional.

Against this order of dismissal two miscellaneous appeals have been preferred to this Court and affidavits have been filed by Amir Chand plaintiff and Lala Gobind Lal Pleader stating that on the 14th Lala Gobind Lal sent a telegram to the plaintiff at Ferozepore informing him that the 1/5th should be deposited in Court on the 20th of January, but that by an oversight of the writer or by a mistake of the Telegraph Department the telegram which was actually handed over to the plaintiff stated that the money could be paid by the 30th instead of the 20th and that it was owing to this

mistake that the plaintiff did not go to Sargodha on the 20th or send the money to his Pleader for deposit in Court on that date. Several other points were also mentioned in these affidavits which, it is not necessary to recite here. The original telegram alleged to have been received by the plaintiff on the 14th of January, has been filed with the affidavits and the date mentioned in it is the 30th and not the 20th.

It seems to me that the learned Senior Subordinate Judge ought not to have summarily dismissed the application for restoration of the suits without enquiry. Even if his suspicions were correct that the applications had not been made *bona fide* but had been presented with a view to gain further time in order to procure money for deposit in Court, he should not have thrown out the applications *in limine*, but should have given the plaintiff proper opportunity to place his evidence before the Court. In view of the affidavits now put in it is very necessary to make full enquiry into the reasons for the plaintiff's absence on the 20th. I, therefore, accept the appeals, set aside the order of the lower Court dismissing the applications for restoration and remand both the cases to it for disposal in accordance with law. Costs will follow the event.

I wish to make it clear that I express no opinion as to the correctness or otherwise of the allegation made in the affidavits, that the date mentioned in the telegram as 30th January was the result of a *bona fide* mistake on the part of the sender or the Telegraph Department. This is one of the matters for enquiry in the trial Court.

R. L.

Appeal accepted.

OUDDH CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 54 of 1927.

December 12, 1927.

Present:—Mr. Justice Pullan.

ANSAR AHMAD—APPELLANT

versus

Musammat SAMIDAN—RESPONDENT.

Muhammadan Law—Guardianship—Mother's rights—Marriage not within prohibited degrees, effect of—Grandmother's right to guardianship—Guardians and Wards Act (VIII of 1890), s. 17—Court, whether entitled to disregard law in minor's interest.

Under the Muhammadan Law a mother is disqualified from guardianship even of her minor

daughter if she is married to a man who is not related to the minor within the prohibited degrees. [p. 822, col. 2.]

Where the law definitely lays down that an appointment cannot be made, the Court cannot disregard the law even in the interests of the minor.

Under the Muhammadan Law maternal grandmother comes next to the mother in the order of priority among females who are entitled to be appointed guardians. [p. 822, col. 2; p. 823 col. 1.]

Miscellaneous appeal against an order of the District Judge, Fyzabad, dated the 15th July, 1927.

Mr. Ghulam Hasan, for the Appellant.

Mr. Ali Zaheer, for the Respondent.

JUDGMENT.—This is an appeal from an order of the learned District Judge of Fyzabad appointing Musammat Samidan to be the guardian of her minor daughter in preference to the appellant Ansar Ahmad who is the father's brother of the minor. The learned District Judge has appointed the mother although he appears to be aware that her appointment is contrary to Muhammadan Law, because he considers that the child should not be given over to the care of her uncle who is understood by the Judge to have denied her right to her paternal inheritance. It is not altogether clear what the appellant has done in this matter, but I understand from Counsel that in an application for mutation of names in the Revenue Courts, he has supported an entry in the *wajib-ul-arz* which excludes females in this family from inheritance to landed property. There is nothing to show that he himself has any adverse interest to the minor. But it is not so much the disability of the appellant which must be considered in this case as the disability of the mother, and to that there seems to be no answer. All the authorities on Muhammadan Law are agreed that the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. In this case Musammat Samidan has married a man who is a stranger, and, under s. 17 of the Guardians and Wards Act, a Court in appointing a guardian must make an appointment "consistently with the law to which the minor is subject." Where the law definitely lays down that an appointment cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor. In this case it may be that it is not in the interests of the minor that the uncle

should be the guardian, but it is nowhere suggested that these are the only persons who under the Muhammadan Law could become the guardian of the minor. As a matter of fact I am told that in the mutation proceedings the maternal grandmother is actually acting as the guardian of the child and under the Muhammadan Law, the mother's mother comes next to the mother in the order of priority among females who are entitled to be appointed guardians (see s. 107 of Wilson's Anglo-Muhammadan Law, 5th Edition, page 182). Under the circumstances I think it would be better if the lower Court should reconsider this question in view of the fact that the guardian appointed by the lower Court is one who is disqualified under the Muhammadan Law, and I, therefore, set aside the order of the District Judge and return the case to him in order that he may re-consider the claim of the appellant along with those of any other persons who may be found willing to accept the guardianship. The appellant will get his costs in this Court.

A. N. A.

*Order set aside.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1543 OF 1927.

November 30, 1927.

Present :—Mr. Justice Zafar Ali.

MANGHU RAM AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

NUR MUHAMMAD—DEFENDANT—

RESPONDENT.

Contract Act (IX of 1872), ss. 23, 51—Reciprocal agreements—Agreement of one party void—Enforceability of the other agreement.

Where parties enter into reciprocal agreements one of them cannot be enforced if the other is void and unenforceable.

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 11th of March, 1927, affirming that of the Subordinate Judge, Fourth Class, Dera Ghazi Khan, dated the 4th of August, 1926.

Mr. Sain Das, for the Appellant.

Mr. Anant Ram Khosla, for the Respondent.

JUDGMENT.—This litigation arose out of a triangular contract among three

parties viz., (1) Manghu Ram plaintiff, (2) his debtors Imam Bakhsh and Haidar who owed him Rs. 717 and (3) Nur Muhammad, who took upon himself to pay to Manghu Ram the money owing to him by Imam Bakhsh and Haidar, and gave a bond to him in consideration for Imam Bakhsh and Haidar having mortgaged certain lands to him and Manghu Ram having executed an agreement in his favour to the effect that he (Manghu Ram) would not realise either the principal or interest payable under the bond, but would content himself with a certain share of the produce of the land. Contrary to that agreement Manghu Ram sued Nur Muhammad on the bond to recover the principal and interest. Imam Bakhsh and Haidar were not impleaded as defendants. Nur Muhammad's answer was that Manghu Ram was precluded by his own agreement from suing to recover the principal and interest. The Courts below having accepted the defendant's plea dismissed his suit. He comes up to this Court in second appeal, and his learned Counsel repeats the argument that was advanced in the Courts below that the agreement being contrary to the provisions of the Punjab Alienation of Land Act, was void and could not be enforced, and that this being so the defendant could not succeed on a plea that was based upon that void agreement. But the agreements between the parties were reciprocal and one of them could not be enforced if the other was void and unenforceable. Whether the plaintiff's agreement is void or not, he cannot avoid it if he should wish to enforce the bond.

The appeal, therefore, fails and I dismiss it with costs.

R. L.

*Appeal dismissed.***POUDH CHIEF COURT.**

FIRST CIVIL APPEAL No. 50 OF 1927.

November 29, 1927.

Present :—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Pullan.

Babu TULSHIPAT RAM AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

Babu KAMAKHIYA DAT RAM AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Discretion of trial Court—

Interference in appeal—Duty of plaintiff to include whole claim—Omission to include part of claim—Amendment at late stage—Good cause.

Order VI, r. 17 of the Civil Procedure Code allows a wide discretion to the Court in permitting an amendment, but the discretion is with the Court, and when that discretion has been exercised on materials which have been admitted legally and for judicial reasons it should not be lightly interfered with in appeal. [p. 825, col. 1.]

It is the duty of a plaintiff to frame his plaint properly before he brings it into Court. It is for him to see that it includes the whole of the claim which he is entitled to make in respect of the cause of action unless he wishes to relinquish some portion of the claim, and where he has omitted to do so the Court will not at a late stage permit an amendment of the plaint so as to include the omitted claim also, unless very good cause is shown for the previous omission. [p. 825, cols. 1 & 2.]

First appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 13th January, 1927.

Mr. Niamat Ullah, for the Appellant.

JUDGMENT.—This is a plaintiffs' appeal. Rai Sri Ram Bahadur C. I. E., was a Vakil, who practised in the Lucknow Courts. He was a resident of Fyzabad, where he possessed extensive property. He died on the 26th August, 1914, leaving three sons Babu Sitapat Ram, Babu Ramapat Ram and Babu Tulshipat Ram. He executed on the 22nd May, 1911, a registered Will by which he devised his property to his sons and their heirs. His eldest son Babu Sitapat Ram died on the 3rd November, 1925. He was predeceased by his younger brother Babu Ramapat Ram. The plaintiffs in the suit out of which this appeal arises are Babu Tulshipat Ram and Babu Ambika Dat Ram son of the deceased Babu Ramapat Ram. Their case was that a simple money decree was passed against Babu Sitapat Ram in favour of Jagjiwan Das and that Jagjiwan Das in execution of this decree brought to sale as the property of Babu Sitapat Ram the village of Miranpur Sadar Ali in the Fyzabad District and that the whole village was sold in execution of this decree to Lala Kishan Narain. The allegations in the plaint were to the effect that under the Will of the late Rai Sri Ram Bahadur the village in question had been devised in three equal shares to Babu Sitapat Ram, Babu Ramapat Ram and Babu Tulshipat Ram and that in consequence the sale in execution, in so far as it exceeded the sale of the one-third share belonging to Babu Sitapat Ram, was invalid as against the plaintiffs. The date of the sale is not mentioned in the plaint but it admittedly took place on the 27th October,

1925. The plaintiffs arrayed as defendants the heirs of Babu Sitapat Ram, Lala Jagjiwan Das the decree holder and Lala Kishan Narain the auction-purchaser. The plaint was filed on the 25th of August, 1926. The heirs of Babu Sitapat Ram and the decree-holder Jagjiwan Das did not enter an appearance and proceedings against them were *ex parte*. Lala Kishan Narain did not defend the suit as it stood originally. He admitted that a mistake had been made and that he had only acquired by virtue of his purchase in the Court sale, one-third in the village of Miranpur Sadar Ali. In so far as he was concerned the suit came to an end by confession of judgment, but the trial Judge adjourned the hearing to the 30th November, 1926, in order to record evidence as against the defendants who had not entered an appearance. Upon that date the plaintiffs made an application for leave to amend the plaint. This application does not state accurately the relief which they sought. That relief is, however, stated accurately by the learned Counsel who has appeared for them in the present appeal. It appears that Rai Sri Ram Bahadur was the holder of an usufructuary mortgage of what is known as the Ilaqa Jaipur. Included in the Ilaqa Jaipur is one village known as Salahpur Rajao. In the sale in execution of Jagjiwan Das's decree, which took place on the 27th October, 1925, not only was the village of Miranpur Sadar Ali sold, but the mortgagee rights possessed by Rai Sri Ram Bahadur in Salahpur Rajao only out of the mortgagee rights in the whole Ilaqa Jaipur (which consists of a large number of villages) were brought to sale and purchased by Lala Kishan Narain. The plaintiffs sought to amend the plaint by seeking in addition a relief in respect of two-thirds of the mortgagee rights in Salahpur Rajao and they put this application for amendment on the 30th November, 1926. Lala Kishan Narain opposed the application for amendment. The learned trial Judge then proceeded to decide it. He decided it in a lengthy order in which he refused to allow the amendment. He then proceeded to decide the suit in respect of Miranpur Sadar Ali and he decreed that suit in favour of the plaintiffs. The plaintiffs appeal here solely against the refusal to permit them to amend their plaint. The respondents have not appeared and the hearing of this appeal has been *ex parte*.

The portion of the rules under the Code of Civil Procedure which deals with alteration of amendment of pleadings is contained in O. VI, r. 17. The Rule is as follows:—

“The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

This rule allows a wide discretion to the Court in permitting an amendment, but the discretion is with the Court, and where that discretion has been exercised on materials which have been admitted legally and for judicial reasons, that discretion should not be lightly interfered with. The question for decision has been somewhat complicated by the fact that Lala Kishan Narain pressed certain objections which in our opinion had little force. The learned trial Judge has not always arrived at the conclusions at which we should have arrived upon these objections. For example Lala Kishan Narain put forward that the claim of the plaintiffs to two-thirds of the mortgagee rights in Salahpur Rajao was obviously barred by limitation. The learned trial Judge found that it was obviously barred by limitation. We do not agree there. That claim may be barred by limitation or it may not be barred, but on the materials before the learned trial Judge it was impossible to decide one way or another. The trial Judge has however based his decision, amongst other grounds, upon the ground that the plaintiffs had not been able to show that they had made a *bona fide* mistake and this carried him to the point as to whether they had made out a case for the indulgence which they sought; and here we consider that he was on firm ground when he decided that they had not shown that they had made a *bona fide* mistake and that consequentially they had made out no claim for indulgence. The principles which, in our opinion, should apply in a matter such as this are these. It is the duty of a plaintiff to frame his plaint properly before he brings it into Court. It is for him to see that it includes the whole of the claim which he is entitled to make in respect of the cause of action unless he wishes to relinquish some portion of the claim. Relaxations can be

made, and may be made, to meet the case of an ignorant plaintiff who has not had the advantage of proper legal advice. The plaintiffs in this case, however, are not ignorant people. They are men of position and standing, and admittedly have engaged on more than one occasion in litigation. They were presented by legal advisers who were in a position to know the law and to apply it. In preparing the plaint it was necessary for them to look at the sale of the 27th October, 1925. According to the learned Counsel for the appellants there can be no doubt as to the fact that that sale, not only covered the proprietary rights in Miranpur Sadar Ali but that it also covered the mortgagee rights in Salahpur Rajao. We can find no excuse for the omission to include the mortgagee rights in Salahpur Rajao in the plaint if the plaintiffs wished to bring a suit in respect of them. What have the plaintiffs done? They filed this plaint on the 25th August, 1926. Various proceedings took place. Lala Kishan Narain admitted their claim as it stood. Nothing was left except the final recording of evidence against those persons who were absent and at the very end they asked on the 30th November, 1926, for permission to amend the plaint.

It is to be noted that by the proposed amendment they brought into contest matters which were foreign to the matters previously in contest. We have referred already to the Will which was executed by Rai Sri Ram Bahadur on the 22nd May, 1911. In this Will he divided his property partially by lists. He left villages in one list to one son; villages in another list to another son and so on. Miranpur Sadar Ali was included in list 2 and by the eleventh clause of the Will the list 2 property was clearly divided in equal shares amongst his three sons, but the mortgagee rights in Salahpur Rajao are mentioned in none of the lists and Salahpur Rajao is not itself mentioned anywhere in the Will, although in the eleventh clause the mortgagee rights in Ilaga Jaipur are mentioned. The division of certain of the property amongst the three sons was subject to certain preliminaries, and it was necessary to prove exactly what had happened before it could be determined with any certainty whether Ramapat Ram and Tulshipat Ram had acquired any interests in the mortgagee rights in Salahpur Rajao. Those

mortgagee rights might have been divided according to villages. Many points of contest could arise in respect of the mortgagee rights. The determination of the rights in Miranpur Sadar Ali was comparatively simple and provoked no contest. As we have seen Lala Kishan Narain admitted the claim in respect of Miranpur Sadar Ali. We thus have it that after Lala Kishan Narain had, as far as he knew, terminated his connection with the case the plaintiffs some months after they had filed their original plaint applied to amend the plaint and introduce into it matter of a much more contentious nature than the matter which it previously contained. No Court would have any right to permit an amendment of this kind unless very good cause was shown for the previous omission. But so far from good cause being shown for the previous omission, no cause of any kind was shown. The plaintiffs came forward with a statement that they had made a mistake for which they were very sorry and gave no explanation as to how their legal advisers, while reading the account of the sale of the 27th October, 1925, had left out half the relief which they could have claimed as a result of that sale. In these circumstances we do not consider that we should be justified in interfering with the discretion of the learned trial Judge in refusing to permit the amendment. Our reasons have not been stated exactly as he has stated his reasons, but he had good grounds upon which he could exercise his discretion judicially and we consider that he did exercise his discretion judicially and correctly. The learned Counsel for the appellants has urged that as an effect of our refusing to grant this appeal his clients may be debarred from claiming any relief in respect of the mortgagee rights in Salahpur Rajao. We do not express any opinion as to whether they are or are not so debarred. It is true that O II, r. 2, directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that when a plaintiff omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted. But the question, as far as we are concerned, is open as to whether the claim for the mortgagee rights in Salahpur Rajao should be included in the claim for the proprietary rights in Miranpur Sadar Ali as having arisen out of the same cause

of action. We do not consider we should be justified at this stage in deciding the point one way or another. It is certainly open to the plaintiffs, should they so desire, to bring a fresh suit for a portion of the mortgagee rights in Salahpur Rajao and should they do so, the Court will then decide whether such a suit is or is not barred under the provisions of O. II, r. 2. At this stage we do not wish to express an opinion upon the latter point. We, therefore, dismiss this appeal. The appellants will pay their own costs. The respondents incurred no costs.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1278 of 1926.

November 17, 1927.

*Present:—Mr. Justice Zafar Ali.*GANESHI LAL AND ANOTHER—OBJECTORS—
APPELLANTS*versus*FIRM SHEO SINGH-Rai NIHAL SINGH
THROUGH SULTAN SINGH AND ANOTHER.

—DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Objection by transferee of judgment-debtor—Appeal, competency of—Limitation Act (IX of 1908), s. 5—Preliminary order, copy of, filed beyond time—Extension of time for appeal—Registration Act (XVI of 1908), ss. 17, 49—Compromise decree relating to immoveable property—Registration, necessity of.

Where the objectors to the execution of a decree are transferees of the rights of the judgment-debtors, they are entitled to appeal as representatives of the judgment-debtors from the order disposing of their objection even though they were no parties to the suit in which the decree was passed. [p. 827, cols. 1 & 2.]

Ishar Das v. Parma Nand (1), followed.

Although in an appeal a copy of the order on a preliminary issue as well as a copy of the final order must be filed along with the memorandum of appeal, where the preliminary order is not contested the delay in filing it may be condoned under s. 5 of the Limitation Act. [p. 827, col. 2.]

Where the terms of a compromise relating to immoveable property have been embodied in a decree its registration is unnecessary. [p. 828, col. 1.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Karnal, dated the 19th January, 1926.

Mr. H. C. Kumar, for Mr. J. G. Sethi, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This is a miscellaneous first appeal against an order of the Senior Subordinate Judge of Karnal allowing in part an objection to an attachment in execution of a decree. The property attached was a ginning factory and the judgment-debtors were Nathu Ram and his two brothers. They are residents of Karnal and the factory is also situate in that very town. There were two decrees against them and the decree-holders being (1) the firm of Sheo Singh-Nihal Singh of Delhi, (2) the firm of Magni Ram-Ganeshi Lal of Lahore. The objection petition was filed as against one of these decree-holders only, namely, the firm of Sheo Singh-Nihal Singh of Delhi. In the suit brought by that firm an order was made on 2nd of July, 1920, for attachment of the factory before judgment and the warrant of attachment issued was duly served on Nathu Ram's two brothers but not on him. Nathu Ram, however, eventually made a compromise with the firm of Sheo Singh-Nihal Singh and a consent-decree which was *ex parte* against the brothers was accordingly passed on the 5th December, 1923. The decree was for Rs. 12,100 which amount was made payable by two instalments and recoverable from the property already attached before judgment by order of the Court and the judgment-debtors were not to alienate that property before satisfaction of the decree. In the other suit also attachment before judgment was ordered but the order of attachment was not duly communicated to any one of the defendants. A similar consent-decree for Rs. 6,500 was, however, passed on the 13th December, 1923, on the basis of a compromise filed by Nathu Ram and the plaintiffs of Lahore. The latter not having been impleaded as respondents in the objection petition now in question, the order made on that petition cannot affect them.

The objectors' claim was that half the factory was sold to them by Nathu Ram for Rs. 19,000, on the 15th January, 1924. The learned Senior Subordinate Judge had found that the objectors paid, as a matter of fact, Rs. 15,000 only and ordered that they had a valid charge on half the factory to the extent of Rs. 15,000. The objectors appeal.

Mr. Shamair Chand who appears on behalf of the decree-holders of Delhi raised three preliminary objections. The first is that the appeal does not lie as the objectors

were no parties to the suit in which the decree was passed. To this, the reply of the appellants' Counsel is, that the objectors being the transferees of the rights of the judgment-debtors were their representatives and were as such competent to appeal under s. 47 of the Code of Civil Procedure as held in *Ishar Das v. Parma Nand* (1). Mr. Shamair Chand in view of that ruling withdrew this objection.

His second objection is that the decree-holders of Lahore who were no parties to the objection case could not be impleaded as respondents in the appeal. The appellants' Counsel has nothing to say against this objection and this must prevail.

His third objection is that the appeal was barred by limitation inasmuch as a copy of the order of the Court below on a preliminary issue was not filed along with the copy of the final order and that when it was filed the period of limitation had expired. He relies upon *Abdullah v. Behari Lal* (2) and *Bhiwani Cotton Spinning & Weaving Mill Co., Ltd. v. Firm Bishen Sahai-Bhagwan Das* (3). There can be no doubt that the copy of the order on the preliminary issue as well as that of the final order should both have been filed along with the memorandum of appeal but in the circumstances of the present case when the preliminary order was not contested it will be but fair to condone the delay and I accordingly extend the time under s. 5 of the Limitation Act.

But the objectors' appeal must fail on the merits. The question whether they paid Rs. 19,000 or Rs. 15,000 only was decided on the testimony of Lala Ram Chandra, Pleader, who was the mortgagee of half of the factory, and had obtained a decree to recover his mortgage-money by sale of the property. He realised his money and gave a receipt to the objectors (purchasers) for Rs. 18,100 on the 5th February, 1924. His evidence, however, was that this sum included (1) Rs. 1,500 and (2) Rs. 1,000, which he had previously received from the mortgagors themselves on the 20th November, 1923, and 17th November, 1922, respectively and (3) Rs. 593-13-0 which he had remitted in favour of the mortgagors. The learned Senior Subordinate Judge has ex-

(1) 93 Ind. Cas. 30; A. I. R. 1926 Lah. 134; 6 Lah. 544.

(2) 97 Ind. Cas. 780; 27 P. L. R. 701; 8 Lah. L. J. 361; A. I. R. 1926 Lah. 638.

(3) 105 Ind. Cas. 593; 28 P. L. R. 537.

pressed in respect of this witness the opinion that he is a gentleman of probity and he has believed his evidence on this point. There appears to me no adequate reason for discrediting his testimony and I, therefore, consider that the finding of the Court below that Rs. 15,000 only was paid by the objectors to this witness is correct.

The next point is whether the decree created a valid charge on the factory to the extent of the amount decreed. That the decree does create a charge on the property that was attached before judgment is clear from the decree itself. Whether the attachment was valid or not is of no consequence because of the phrase 'the property that was attached' was used in the decree only to describe that property. Further as the judgment debtors are bound by that decree so are the objectors, who stand in their shoes and are their representatives.

Lastly, it was urged that the compromise requires registration, but it did not, because its terms were embodied in the decree and it is the decree that is to be enforced.

The appeal fails and I dismiss it with costs.

Appeal dismissed.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 373 OF 1926.

June 14, 1927.

Present.—Mr. Justice Brown.

MAUNG SHWE AN AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MAUNG TOK PYU AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 123, 144.

Suit by co-heir for partition of share—Limitation.

A suit by a co-heir for a share in the corpus of an inheritance is governed by Art. 123 of Sch. I of the Limitation Act and not by Art. 144 unless it is shown that the person in possession of the inheritance was holding it with the consent express or implied of all the heirs on behalf of them all. [p. 829, col. 1.]

Maung Po Kin v. Maung Shwe Bya (1), *Maung Tun Tha v. Ma Thit* (2) and *Tok v. Ma Yin* (3), 4 fol-
lowed.

Mr. Ko Ko, for the Appellants.

Mr. Loo Ni, for the Respondents.

JUDGMENT.—The plaintiff-respondents, Maung Tok Pyu and Ma Me Ma, are the grandchildren of one U Kadoot, deceased by his first wife Ma Gya U. Their parents are dead. Ma Gya U died many years ago and U Kadoot then married one Ma Su. By Ma Su he had three children and he died about 25 years before the present suit was brought. The respondents filed a suit for partition of his estate. They joined as defendants, Ma Su and her children or grandchildren and others who are or have been in possession of the estate property. The suit was contested by Maung Po Sein a son of Ma Su and by other defendants. The trial Court gave the plaintiffs a decree and Ma Su, Maung Po Sein and the present two appellants appealed to the District Court but were unsuccessful. The original defendants who are descendants of Ma Su have not appealed in this Court this appeal having been filed by Maung Shwe An and Ma Zin, who are in possession of a major part of the property, a piece of paddy land. The main objection taken to the suit in the lower Courts was that the suit was barred by limitation. Both the lower Courts have found in favour of the plaintiffs on this point, but, unfortunately, neither Court seems to have appreciated fully what the Law of Limitation on the point is.

It was held in the case of *Maung Po Kin v. Maung Shwe Bya* (1), that the appropriate article for suits instituted by co-heirs for a share in the corpus of an inheritance was Art. 123 of the Limitation Act. This was based on a previous decision by their Lordships of the Privy Council in the case of *Maung Tun Tha v. Ma Thit* (2), and the ruling has been followed in the case of *Ma Tok v. Ma Yin* (3). It may therefore, be taken as settled law that ordinarily such a suit as the present is governed by the provisions of Art. 123 of the Limitation Act.

As pointed out by Lentaigne, J., in *Maung Po Kin's case* (1), however, there is an exception in a case where the co-heirs including the plaintiff claiming a share have

(1) 76 Ind. Cas. 855; 1 R. 405; A. I. R. 1924 Rang. 155.

(2) 38 Ind. Cas. 209; 9 L. B. R. 56; 19 Bom. L. R. 204; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 44 C. 379; 26 C. L. J. 169; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.).

(3) 92 Ind. Cas. 489; 3 R. 77; A. I. R. 1925 Rang. 228.

gone into possession and the plaintiff is subsequently ousted and refused his share. Similarly, if the heirs agreed amongst themselves that one of the heirs should hold the whole estate on behalf of them all, they might then sue for a distribution of the estate and claim that the provisions of Art. 142 or Art. 144 of the Limitation Act applied. But, unless it can be shown that whoever holds the property is holding it with the consent, express or implied of all the heirs on behalf of them all then the Article applicable is Art. 123. The Courts below have found that the defendants did not establish the 12 years' adverse possession of the land; but they assumed that the Article applicable was Art. 144. If Art. 123 is applicable then it is quite clear that the suit has long been barred by limitation. The question for decision, therefore, is whether after the death of U Kadoot the land has been held by Ma Su or anyone else jointly on behalf of all the heirs recognising their claims as heirs. The descendants of Kadoot by his former wife undoubtedly had a right to claim partition as heirs of U Kadoot against Ma Su and the surviving children by her on U Kadoot's death.

[His Lordship then discussed the evidence and held that Art. 123 applied to the facts of the case and that the suit was barred].

ANNA *Decree set aside.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 197 OF 1927.

November 7, 1927.

Present: Mr. Justice Dalip Singh.

ALLAH DITTA AND ANOTHER—PLAINTIFFS—

PETITIONERS

versus

THE SECRETARY OF STATE (NORTH WESTERN RAILWAY) FOR INDIA

THROUGH THE COLLECTOR OF GUJRAT—

DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 75, Sch. II, cl. (a)—

"Gold manufactured or unmanufactured," whether includes sweepings from goldsmith's shop—Punjab Courts Act (VI of 1918), s. 44—Error of law—Revision—Interference.

Sweepings and gatherings from a goldsmith's shop from which gold is separated do not come within Sch. II, cl. (a) of the Railways Act [p. 830, col. 1.]

A mere error of law is no ground for revision. [*ibid.*]

Petition for revision of the decree of the Senior Subordinate Judge, Gujrat, dated the 19th February, 1927, reversing that of the Subordinate Judge, Fourth Class, Gujrat, dated the 22nd December, 1926.

Mr. Azim Ullah, for the Petitioners.

Mr. C. H. Carden Nood, Government Advocate, for the Respondent.

JUDGMENT.—The plaintiffs consigned three bags of *niara* at Ludhiana for Gujrat. Two bags were duly delivered, the third is alleged to be lost through the negligence of the defendant, the North Western Railway. The plaintiffs claimed the price of the bag. The only plea of the Railway that need concern us in this revision is the question whether *niara* comes within the excepted articles given in Sch. II, cl. (a) of the Railways Act. If it does then the plaintiffs' suit must fail as held by the learned Senior Subordinate Judge in appeal. If it does not the plaintiffs' claim succeeds as held by the learned trial Court originally. *Niara* has been stated by both Courts to be sweepings and gatherings from a goldsmith's shop from which gold is separated by *Niaras* who make a profession of this kind of thing. There can be no doubt that *niara* ordinarily contains some gold mixed with a good deal of rubbish such as dust etc. The question is whether it can be said to be gold manufactured or unmanufactured. The rulings cited by the learned Senior Subordinate Judge have admittedly no bearing on the point. *Firm Kidar Nath Rajnarain v. East Indian Ry. Co.* (1), *Saminadha Mudali v. South Indian Ry. Co.* (2) and *Lakhmidas Hirachand v. Great Indian Peninsula Ry. Co.* (3) have been cited before me to show that whether *niara* is or is not gold etc. depends on the proportionate value of the gold and silver in it. The argument is that as all the rest of the rubbish is of no value and only value of the *niara* is due to the presence of the

(1) 74 Ind. Cas. 300; 45 A. 453; 21 A. L. J. 351; A. I. R. 1923 All. 538.

(2) 6 M. 420; 2 Ind. Dec. (N. S.) 572.

(3) 4 B. H. O. R. 129.

gold and silver in it the mere fact that gold and silver is mixed with a lot of rubbish does not mean that the article ceases to be gold and silver. The form of s. 75 of the Railways Act is also referred to in this connection. *East Indian Ry. Co. v. Changa Khan* (4) is cited by way of preliminary objection that the finding is a finding of fact and, therefore, is not open to revision.

I have given much thought to the matter which does not seem to me to be free from difficulty. One way of looking at it is that the mere concealment or placing of pieces of gold and silver in a mass of rubbish does not take the complete parcel out of the provisions of s. 75. The other way of looking at it is that when a mass of material is collected which may contain some gold and silver which could only be extracted by an elaborate process whether physical or chemical it can hardly be said that the complete parcel is gold and silver. As regards the preliminary objection as to whether this is a question of fact or not, no doubt if the proper test is applied then the mere fact that the Court errs in applying the proper test would not make the point a question of law or a ground of revision but the difficulty comes in deciding whether the Court has or has not applied the proper test. It is not very clear what test the learned Senior Subordinate Judge applied but as far as can be made out, he seems to have accepted the first view that I have put forward. Each case, however, has to be judged on its own circumstances and on the whole I am of opinion that *niara* does not come within the meaning of Sch. II, cl. (a). At the same time at best this could only be held to be an error of law on the part of the learned Senior Subordinate Judge and I do not see that I can interfere in revision on this ground. I, therefore, dismiss the revision but I make no order as to costs which parties will bear themselves throughout.

R. L.

Application dismissed.

(4) 28 Ind. Cas. 245; 42 C. 888 at p. 895; 19 C. W. N. 1034; 22 C. L. J. 212.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 346 of 1927.

November 18, 1927.

Present:—Mr. Justice Zafar Ali.

FIRM KNOWN AS MAHESHA MAL-DAYAL
DAS THROUGH SALIG RAM—PLAINTIFF—
PETITIONER—

versus

MUHAMMAD JAMIL—DEFENDANT—

RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Setting aside ex parte decree without deposit or security, legality of—Dismissal of suit on date on which case is not fixed for hearing, legality of.

The provisions of s. 17 of the Provincial Small Cause Courts Act are imperative and it is not competent to a Court to set aside an *ex parte* decree in a Small Cause suit if the defendant fails either to deposit the amount under the decree or give security for its due performance.

An order dismissing a suit for non-appearance of the plaintiff on a date to which the case was not posted for hearing is *ultra vires* and illegal.

Petition for revision of the order of the Subordinate Judge, First Class, Ohunian, District Lahore, dated the 10th May, 1926.

Mr. Harcharan Das Kumar, for the Petitioners.

Mr. Asghar Beg, for the Respondent.

JUDGMENT.—The facts that need be stated in connection with this application in revision are briefly as below:—

The plaintiff-petitioner having obtained an *ex parte* decree the defendant applied to have the decree set aside but he did not deposit with the application the amount due from him under the decree, nor gave security for the performance of the decree as he was bound to do under s. 17 of the Small Cause Courts Act, the suit having been decided by a Judge of the Court of Small Causes. The Judge, however, did not notice this omission and issued a notice to the plaintiff. A copy of the notice was affixed on his door on the 11th March, 1926, when he was absent from home but his wife was at home. He did not turn up and eventually the application was accepted and the *ex parte* decree was set aside and at the same time the suit was dismissed because the plaintiff had not appeared. It is clear that the order dismissing the suit was *ultra vires* as the date on which it was dismissed was not the date fixed for hearing it. Secondly, the proceedings on the application for setting aside the *ex parte* decree were also *ultra vires* because the defendant-applicant had not complied with the provisions of s. 17 of the Small Cause Courts Act.

I, therefore, accept this application for

revision and set aside both the orders and restore the original order granting the plaintiff and *ex parte* decree. No order as to costs in this Court.

R. L.

Application accepted.

ODDH CHIEF COURT.

FIRST CIVIL APPEAL No. 34 OF 1927.

December 6, 1927.

Present :—Sir Louis Stuart, Kt.,
Chief Judge, and Mr. Justice Pullan.

BISHUN DAYAL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

GAYA PRASAD AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Agreement by purchaser to discharge prior encumbrance—Breach of agreement—Damages—Liability of purchaser's representatives—Contract Act (IX of 1872), s. 37.

The plaintiffs whose properties were under a mortgage sold half of the same to the defendants' father. The latter agreed as part of the consideration to discharge the prior mortgage and free the plaintiffs' half share from the encumbrance. He failed to do so. The mortgagee sued for foreclosure and the entire property was foreclosed. In a suit for damages by the plaintiffs:

Held, (1) that there was a breach of contract on the part of the defendants' father and that the defendants, as his legal representatives were liable to pay damages for the same; [p. 833, col. 1.]

(2) that the amount of damages was the value of the half of the properties which the plaintiffs lost under the foreclosure decree. [p. 833, col. 2.]

First appeal against the decree of the Subordinate Judge, Kheri, dated the 28th February, 1927.

Messrs. Bisheshar Nath, Ali Zaheer and Radha Krishna, for the Appellants.

Messrs. A. P. Sen, M. H. Qidwai and S. C. Das, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal against a decree of the Subordinate Judge of Kheri, dated 28th February, 1927, dismissing the plaintiffs' suit. The facts of the suit out of which this appeal arises are comparatively simple. The plaintiffs together with their deceased brother Janki Prasad, to whose property they have succeeded by survivorship, were originally the owners of a 10-*biswas* share in the village of Pasgawan together with 19·12 acres of under-proprietary land. They had borrowed money on security of their landed property. Amongst other liabilities there were two liabilities to a certain Musammat Bilasa Kalwarin of Tarwar. They had executed in her favour on the 29th June, 1914,

a registered deed of mortgage by conditional sale of the whole of this share of 10-*biswas* and the whole of 19·12 acres of under-proprietary land in consideration of Rs. 6,000. That deed bore interest. On the 6th January, 1917, they borrowed a further sum of Rs. 300 from the same mortgagee on interest, and executed a deed of further charge for which the same property stood security. In the year 1918, the present plaintiffs (Janki Prasad having died) entered into a transaction under which they were to clear off their liabilities and receive a substantial amount in cash by selling half the property in question. They entered into this transaction with Lallu Ram, the father of the defendants-respondents. On the 22nd February, 1918, a registered deed of sale was executed, by which they transferred to Lallu Ram a share of 5 *biswas*, and half of the 19·12 acres of under-proprietary land in lieu of the following consideration. Lallu Ram agreed, that he would satisfy the deed of mortgage by conditional sale registered on the 7th July, 1914, and the deed of further charge registered on the 8th of January, 1917, which were held by Musammat Bilasa. In his deed it was calculated that the amount due in respect of these two liabilities was on the date of the execution of the deed Rs. 7,685-6. It is clear to us upon our construction of the deed that it was not intended simply to write off Rs. 7,685-6 in respect of this portion of the transaction, but that Lallu Ram agreed that he would satisfy the amount due on these two deeds. If he paid up the money at once, Rs. 7,685-6 alone were due, but if he delayed in the payment of the amount necessary to discharge these liabilities they increased daily by the addition of interest. This is the first liability which Lallu Ram undertook—the liability to satisfy the deeds in favour of Musammat Bilasa and to clear the whole of the 10-*biswas* share and 19·12 acres of under-proprietary land which were encumbered by these deeds. It is to be noted at the beginning, that neither Lallu Ram, nor his sons after his death ever carried out the undertaking to satisfy those claims. There was further an amount due to Jagdamba Prasad of Rs. 1,515-10 upon a deed of the 12th of August, 1915, and an amount due to Kirpa Dayal of Rs. 472 on a deed of the 12th July, 1926. Lallu Ram undertook to satisfy those amounts. He did so

satisfy them and cleared off the liability in respect of those deeds. In addition Lallu Ram paid the vendor Rs 500 before the date of registration. Rs. 7,827 were paid by him at the time of registration. Lallu Ram agreed to pay Rs. 2,000 to the vendors after registration. It is admitted that he paid that amount. Thus in actual payment of cash and in paying off Jagdamba Prasad and Kirpa Dayal Lallu Ram expended Rs. 12,314-10. He should have paid Rs. 7,685-6 as soon as the deed was executed to *Musammât Bilasa*, but he did not do so. If he had paid that Rs. 7,685-6 to *Musammât Bilasa* on the day that the deed was registered he would have expended Rs. 20,000 in all, which was the price fixed for the sale of the 5 *biswas* share and half the 19-12 acres of under-proprietary land. We should note here that it was to the obvious advantage of Lallu Ram to pay off *Musammât Bilasa* as soon as possible, for by paying her off he not only cleared the 5 *biswas* share and the under-proprietary land which the vendors had retained, but the 5 *biswas* share and the under-proprietary land which he had purchased. For reasons which have not been explained, and which are very difficult to surmise, although he had expended a considerable amount of money in the purchase, he omitted to pay a little more than a half of what he had originally expended in order to make his title secure. He died about February 1920, having done nothing to satisfy the amounts due to *Musammât Bilasa*. In 1924, *Musammât Bilasa* instituted a suit on the deeds already mentioned for the foreclosure of the whole of the 10 *biswas* share and the 19-12 acres of under-proprietary land. She joined as parties both the plaintiffs-appellants as representing the original mortgagors, and the defendants-respondents as representing the vendees of the half share. She obtained on the 21st of November, 1925, a final decree for foreclosure. This decree could have been satisfied by the payment of Rs. 12,611-11-5, but none of the judgment-debtors under the decree took steps towards satisfying it. The decree became final, and the whole of this property has now passed into the possession and ownership of *Musammât Bilasa*. The plaintiffs-appellants then filed the suit out of which this present appeal has arisen against the defendants-respondents demanding compensation from them owing to

the failure to satisfy the liabilities to *Musammât Bilasa* which had been undertaken for good consideration by their father Lallu Ram. The defendants-respondents in their written statement asserted that the sale-deed in favour of their father contained many mis-statements and falsehoods. They stated that it was the real intention of the parties that the liability to satisfy *Musammât Bilasa* should remain with the vendors, that Lallu Ram had never undertaken this liability but that it had been falsely stated in his deed that he would undertake it, in order that the amount of Rs. 7,685-6 should be added fictitiously to the purchase-money so that intending pre-emptors might be defeated. The Court below has rightly held that oral evidence could not be produced to vary the terms of this written agreement and it has also rightly held that there is nothing to justify a conclusion that the sale-deed of the 22nd February, 1918, contains other than a genuine statement of what occurred at the period. These conclusions have not been contested by the learned Counsel who has represented the defendants-respondents. We thus have it that Lallu Ram actually paid Rs. 10,327 in cash to the vendors, that he paid off liabilities due from the vendors amounting to Rs. 1,987-10 and we find, on our construction of the document, that he agreed to pay off everything due to *Musammât Bilasa* in respect of the amounts due on the deed of mortgage by conditional sale and the deed of further charge. His undertaking in the last respect was a contract to pay these amounts. The figure of Rs. 7,685-6 set aside for the purpose was an estimate (and probably a correct estimate) of the amount that was necessary for the satisfaction of those liabilities, if the payment had been made at once. We have no hesitation in finding that Lallu Ram undertook to satisfy *Musammât Bilasa* and that his undertaking to satisfy *Musammât Bilasa* formed a portion of the consideration for which the transfer by sale was made in his favour. We can now approach the decision of the learned trial Judge. He has arrived at the conclusion that the plaintiffs-appellants are entitled to nothing. He bases this conclusion on the following reasoning. He says that the defendants-respondents' father had parted with a considerable amount of money amounting to Rs. 12,314-10 and now that the whole of the property has been foreclosed they have

got nothing for that money. He considers that it will be most unjust and inequitable, if in those circumstances they have to pay anything more. He considers further that the plaintiffs-appellants were guilty of contributory negligence, because after the foreclosure decree had been passed against them and the respondents jointly they did not themselves satisfy it. We are unable to accept the reasons which appealed to the learned trial Judge. He has completely ignored the facts that Lallu Ram had contracted to pay off *Musammatt Bilasa* in full, and that if Lallu Ram had observed his contract, the plaintiffs-appellants would have retained the 5-biswas share and the moiety of the under-proprietary land which they had not sold free of all incumbrances. As a result of Lallu Ram's breach of contract the plaintiffs appellants have lost that property. The learned Counsel for the defendants-respondents did not attempt to support the decision of the learned trial Judge upon the reasons advanced by him. He has further admitted that Lallu Ram committed a breach of contract. He has admitted that Lallu Ram made a contract and that that contract has been broken; but he has argued upon a point, which was not previously raised, that his clients, as the sons of Lallu Ram, are not liable to pay damages in respect of the breach of the contract which their father made. We must decide against him upon that point. The promise made by Lallu Ram bound his sons when Lallu Ram died before performing it. No contrary intention appeared from the contract. The law on the subject is well-known. It is contained in India in the provisions of s. 37 of the Indian Contract Act (IX of 1872). This much is clear. Lallu Ram undertook to satisfy the claims of *Musammatt Bilasa*, and because he had undertaken this liability in addition to satisfying other liabilities and paying certain sums of money he obtained certain property. The defendant-respondents, as his heirs, continued to hold and enjoy that property. At the time that their father died, *Musammatt Bilasa's* claims could still have been settled. They remained open to settlement until the enforcement of the final foreclosure decree. The defendants-respondents are clearly liable for damages now that the contract has been finally broken by the passing of the property into the hands of *Musammatt Bilasa* under her decree.

The only question which remains for us now to decide is the question of damages. We are satisfied that there has been a breach of contract and that the defendants-respondents are responsible for paying damages on that breach of contract to the plaintiffs-appellants. The learned Counsel for the defendants-respondents has pointed out to us that the learned trial Judge had formed the view that the plaintiffs appellants had deliberately avoided satisfying the foreclosure decree because they had formed a sinister plan, that after the decree was passed they would put up a claimant fictitiously to recover the property by means of a pre-emption suit, and that, having at the same time recovered large damages from the defendants-respondents they would be in a better position, than if they had satisfied the foreclosure decree themselves. The learned trial Judge based this conclusion upon the evidence of a school master of Pasgawan called Bangsopal. This man calls himself a "decree-holder" in addition to being a school master. He apparently means by this that he has obtained certain under-proprietary rights in land under a Settlement Court decree. He is a neighbour of the defendants-respondents and a great friend of theirs. He pays a portion of his rent to them and is distantly connected with one of them by marriage. His statement upon the point is vague to a degree. It refers to a conversation which he alleges had taken place two years before in Pasgawan. According to the note of evidence of this conversation the defendant No. 1 told the plaintiff No. 2 to try to manage for money for the foreclosure suit. The plaintiff No. 2 said in reply that he could not get money although he tried for it. The plaintiff No. 2 also said that he would take property by means of a pre-emption suit through his relation. That is all. Although the learned trial Judge heard the evidence and we have not had that advantage, the evidence in question is so scanty and so flimsy that we are not disposed to attach the slightest value to it. The scheme which the learned trial Judge believes existed appears to us fantastic. According to this scheme the plaintiffs-appellants were in hopes of extracting large sums of money from the defendants-respondents (who on this witness's own showing could not find Rs. 12,611-11-5 with which to satisfy the foreclosure decree)

and then hoped subsequently to get the property back by a fictitious pre-emption suit filed through one of their relations. If the plaintiffs-appellants had had such financial dreams it would appear to have been easier for them to exchange those dreams for the solid reality of selling in conjunction with the defendants respondents a portion of the mortgaged property in order to pay off the foreclosure decree. What appears to us to have happened was this. The plaintiffs-appellants and the defendants-respondents were alike singularly lacking in business sense and in business capacity. They have allowed a valuable property to go out of their hands owing to their inaction and incapacity. But the fact remains that the defendants-respondents were under the liability to pay off *Musammam Bilasa*. They were bound by a contract so to pay her off. They did not pay her off. However foolish the plaintiffs-appellants may have been, the defendants-respondents committed a breach of contract and are liable for damages. What should be these damages? Clearly by their omissions they have deprived the plaintiffs-appellants of a 5-biswas share and a certain amount of under-proprietary land. For an exactly similar share their father paid Rs. 20,000. Arguments have been addressed to us to show that as the land revenue upon the share was only Rs. 90 the property could not possibly have been worth Rs. 20,000; but those arguments have little, if any, force. The land revenue as fixed at the last Kheri Settlement was sometimes very low, and even the recorded figure of rentals is not always reliable. This much we know. Lallu Ram valued the share at Rs. 20,000. The defendants-respondents have produced no evidence worth consideration to show that it is worthless. In these circumstances we consider that the plaintiffs-appellants are entitled to Rs. 20,000. We accordingly allow this appeal and grant the plaintiffs-appellants a decree against the defendants-respondents for Rs. 20,000 with full costs of this Court and the Court below. We see no reason to allow future interest.

A. N. A.

Appeal allowed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1294 of 1927.

November 15, 1927.

Present:—Mr. Justice Tek Chand.

SANT SINGH AND ANOTHER—SECOND PARTY
—APPELLANTS

versus

LAL CHAND—FIRST PARTY—

RESPONDENT.

Hindu Law—Guardianship—Mother's right to appoint guardian by Will—Evidence—Expert evidence—Report, admissibility of—Examination of expert, necessity of.

Under Hindu Law a mother has no power to appoint a guardian of her children by means of a Will. [p. 835, cols. 1 & 2.]

The report of an Expert on similarity of thumb impression is not admissible in evidence unless he has been examined in Court or on commission. [p. 835, col. 1.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Rawalpindi, dated the 23rd March, 1927.

Mr. Amar Nath Chona for *Sardar Mehtab Singh*, S. B., for the Appellants.

Mr. Ram Lal Anand, for the Respondent.

JUDGMENT.—This is an appeal under s. 47 of the Guardians and Wards Act, preferred by one Sant Singh against an order passed by the Senior Subordinate Judge, Rawalpindi, under s. 25 of the Guardians and Wards Act, directing the appellant to make over *Musammam Harnam Kaur*, minor, to Lal Chand respondent, who has been duly appointed guardian of the person and property of the aforesaid minor by order, dated the 15th August, 1925. The relevant facts are these:—

One Atma Singh, who was a *Brahmin* by caste and a *garanthi* by profession, died many years ago leaving him surviving a widow *Musammam Harbans Kaur* and a minor daughter from *Musammam Harbans Kuar*, named *Musammam Harnam Kuar* and also two sons *Mohan Singh* and *Sohan Singh*, minors, from a predeceased wife. In March, 1923, *Musammam Harbans Kuar* died and on the 19th of April, 1923, Lal Chand, respondent, filed an application for appointment as guardian of the person and property of *Sohan Singh*, *Mohan Singh* and *Musammam Harnam Kaur*. This application was resisted by *Savaya Singh*, *Narain Singh*, *Kartar Singh* and *Harnam Singh*, who described themselves as members of the *panchayat* of the village and who were alleged to be in possession of a portion of the property of the minors. After a lengthy enquiry the application of Lal Chand was

granted on the 8th of December, 1923, and he was appointed guardian of the person and property of all the three minors.

The present application was filed in August, 1925, by Lal Chand under s. 25 stating that the minor girl was in possession of one Sant Singh, *Khatri*, who keeps a *halwai's* shop and is in no way connected with the minor. In defence Sant Singh propounded a Will purporting to have been executed by *Musammât Harbans Kaur* on the 24th of March, 1923, a few days before her death, whereby she appointed Sant Singh as the guardian of the person and property of her minor girl. The respondent did not admit the genuineness of this Will.

It is significant that this Will was not mentioned in the proceedings, which took place in 1923, relating to the appointment of Lal Chand as guardian, though among the witnesses, who have now appeared in support of its due execution by *Musammât Harbans Kaur*, are *Savaya Singh*, etc., who had opposed the application of Lal Chand at that time. The Will which purports to bear the thumb-impression of *Musammât Harbans Kaur*, was sent to Phillaur for comparison with certain other thumb-impressions alleged to have been affixed by her in her lifetime, but the report of the Expert was that the two thumb-impressions did not tally. This report, however, is not admissible in evidence as the Expert was not examined in Court or on commission and must, therefore, be left out of consideration. The oral evidence of the scribe and the witnesses who stated that *Musammât Harbans Kaur* had affixed her thumb-impression on the document in their presence, is interested and has been rightly rejected by the learned Subordinate Judge. There is no doubt that the members of the so-called *panchayat* having failed in their attempt to oppose Lal Chand's application for appointment as guardian, have in collusion with Sant Singh subsequently prepared the Will with a view to retain the girl in their possession. I agree with the lower Court in holding that the appellant has failed to prove the Will as having been executed by *Musammât Harbans Kaur*.

Mr. Amar Nath Chona for the appellants concedes that even if this Will were genuine, Sant Singh would not be a testamentary guardian of *Musammât Harnam Kaur*, as under Hindu Law the mother has got no power to appoint a guardian of her children

by means of a Will. The appointment of the respondent as guardian was, therefore, not contrary to s. 7 of the Act.

Mr. Chona contends that the appointment of Lal Chand was improper and was made without proper enquiry. Lal Chand was, however, appointed guardian as far back as December, 1923, and no appeal against that order was lodged. Nor has Sant Singh or any other person taken any steps to have Lal Chand removed from his office as guardian under s. 39. I cannot, therefore, re-open that matter in these proceedings.

The sole point before me is whether any valid reason has been shown by Sant Singh against the order of the lower Court directing him to make over the girl to the duly appointed guardian, Lal Chand. Mr. Chona is unable to suggest any such reason and I see no reason why the ordinary rule should not be followed in this case and the minor allowed to remain with an irresponsible stranger like Sant Singh.

The appeal is devoid of all force and I dismiss it with costs.

E. L.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 398, 421 AND 454 OF 1925.

November 7, 1927.

Present:—Mr. Justice Das
and Mr. Justice Wort.

RAMDAS SINGH AND OTHERS—APPELLANTS
versus

RAMPUR SINGH AND OTHERS—

RESPONDENTS.

Co-sharers—Suit by co-sharer for his share of rent—Other co-sharers, whether necessary parties.

A co-sharer is not entitled to maintain a suit for his share of rent unless he makes the other co-sharer-landlords parties to the suit in the absence of a contract, express or implied, by the tenants to pay the plaintiff's share of the rent separately. [p. 838, col. 1.]

Second appeals against a decision of the District Judge, Saran, dated the 26th January, 1925, confirming that of the Munsif, Chapra, dated the 12th July, 1924.

Messrs. *Sambhu Saran* and *B. P. Sinha*, for the Appellants.

Mr. *Harnarayan Prasad*, for the Respondents.

JUDGMENT.

Das, J.—These analogous appeals arise

out of certain rent suits. Second Appeal No. 398 of 1925, Second Appeal No. 421 of 1925 and Second Appeal No. 454 of 1925 are on behalf of the tenants: Second Appeal No. 420 of 1925, Second Appeal No. 460 of 1925 and Second Appeal No. 461 of 1925 are on behalf of the landlords. In my opinion the appeals on behalf of the tenants must succeed.

The plaintiffs are co-sharer-landlords; the other co-sharer-landlords have not been made parties to these suits either as plaintiffs or as defendants. It is not alleged in the plaint that there was a contract, express or implied, by which the tenants undertook to pay the plaintiff his share of the rent separately. It has been held that in the absence of such a contract a co-sharer is not entitled to maintain a suit for his share of rent unless he makes the co-sharer-landlords parties to the suit. The learned Judges in the Court below have taken the view that as Ram Das Singh, one of the co-sharer-landlords, who is also a tenant, made up his mind to keep his collection separate, the plaintiff was entitled to maintain a suit for his share of the rent. But this is an erroneous view. It was necessary for the plaintiff to establish that the tenants agreed to pay rent separately to the co-sharer-landlords.

I would allow Appeals Nos. 398, 421 and 454 of 1925, and dismiss the rent suits with costs in all the Courts. It follows that Appeals Nos. 420, 460 and 461 of 1925 must be dismissed with costs. There will be three sets of costs payable to each set of tenants.

Wort, J.—I agree.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1159 TO 1161 OF 1925.

July 26, 1927.

Present:—Sir George Claus Rankin, Kt., Chief Justice, and Mr. Justice Mitter.

Srimati SIBA KUMARI DEVI

—PLAINTIFF—APPELLANT

versus

DOSHI GHOSAIN—DEFENDANT—

RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 105 (1)—Application for settlement of fair rent—Impleading of

parties after two months from date of publication of Record of Rights, legality of—Application against some of co-tenants—Remand for impleading all, propriety of.

It is not necessary for the landlord or the tenant in making an application under s. 105 (1) of the Bengal Tenancy Act to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought. An application under the section which is filed within two months of the final publication of the Record of Rights is not, therefore, barred even though a person interested in the tenancy is added only after the expiry of two months. [p. 837, col. 1.]

Birendra Kishore Manikyā Bahadur v. Ambika Charan Dutta Mazumdar (1), followed.

But where a landlord fights out the matter in the presence of one only of several co-tenants and his application is ultimately dismissed on the ground that such an application must be brought against all the joint tenants, it is not right to remand the case in order that the other joint tenants may also be impleaded as parties. [p. 837, col. 2.]

The heirs of a deceased recorded tenant can be impleaded as parties to such an application even after the expiry of two months from the date of the final publication of the Record of Rights. [*ibid.*]

Appeals against the decrees of the District Judge, Nadia, dated the 15th December, 1924, affirming those of the Assistant Settlement Officer, Krishnagar, dated the 26th September, 1923.

Dr. Sarat Chandra Basak, Babus Mritunjoy Chatterjee, Urukram Das Chakravarty and Rama Prosad Mookerjee, for the Appellant.

Moulvi Mahammad Syed Nasim Ali, for the Respondent in No. 1159 of 1925.

Babu Nirod Bandhu Ray, for the Respondent in No. 1161 of 1925.

JUDGMENT.

Rankin, C. J.—These are three appeals from a decision of the District Judge of Nadia sitting as a Special Judge affirming a decision of the Assistant Settlement Officer of Krishnagar.

In each of these cases the landlord-appellant made an application to the Settlement Officer for a settlement of fair and equitable rent. The application appears to be in a printed form and it is somewhat difficult to make sure of the nature and exact scope of the claim intended to be conveyed by it. The body of the document appears to raise every possible claim including questions of excess area of lands. However, taking the document as a whole, we are not satisfied that the only matter dealt with by that application is settlement of rent within the meaning of those words in s. 109-A and we are not prepared to say that in these cases there is no

right of second appeal. Accordingly it becomes necessary to examine into the particular facts.

In S. A. No. 1159 it appears that an application was made within two months of the final publication of the Record of Rights. It would seem that the Record of Rights recorded the tenancy in the name of a lady Bhussani. The Record of Rights was finally published in November, 1922. On the 14th of April, 1923, the defendant Doshi Ghosain was added as a party. It then turned out that while she was added as being the heiress of Bhussani she was not the heiress of but a purchaser from Bhussani. In these circumstances she set up a defence to say that she purchased a *jama* bearing a rental of Rs. 9-12-9 pies. The learned Special Judge said that it was unnecessary to decide the question of fact whether the land appertained to the *jama* of Rs. 9-12-9 pies. The Assistant Settlement Officer having found the point in favour of the defendants and the landlord being desirous of contesting it before the Court the learned Special Judge proceeded upon the footing that as Doshi Ghosain was brought on the record on the 14th of April, 1923, the proceedings against her were out of time because she was not impleaded until after two months from the final publication of the Record of Rights. It does not seem to me that that view is consistent with the decision of this Court in the case of *Birendra Kishore Manikya Bahadur v. Ambika Charan Dutta Mazumdar* (1). There three Judges of this Court laid it down that when s. 105 (1) of the Bengal Tenancy Act speaks of an application it is not necessary for the landlord or the tenant in making the application to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought. Accordingly there was a perfectly good application in this matter brought within the two months and, on the doctrine of that case, it appears to me that this matter ought to go back to the learned Special Judge, the preliminary objection as to time being overruled, in order that he may decide the case upon its merits. The appellant is entitled to her costs of this appeal.

The next Appeal is No. 1161 and in this case it seems that the original defendant

(1) 97 Ind. Cas. 142; 43 C. L. J. 591; 31 C. W. N. 860; A. I. R. 1926 Cal. 1937.

or tenant recorded in the Record of Rights was Danej Mia. One Jogendra Nath Ghosal was brought on the record by a petition filed after two months from the date of the final publication, namely, on the 16th of April, 1923. It turned out that Danej Mia's interest had been sold at auction, the sale certificate being in May, 1922, and possession is said to have been taken in April, 1923. In this case, however, it appears that although Jogendra Nath Ghosal's name had been substituted for Danej Mia on the application of the plaintiff, Jogendra was only one of several persons interested in the tenancy. Now, the matter was fought out to a finish in his presence and ultimately the application was dismissed on the ground that such an application must be brought against all the joint tenants. It does not seem to me to be right that in these circumstances this matter should be sent back in order that the other joint tenants should be impleaded. If the landlord went on against one only, then his advantage such as it is in being able to proceed under s. 105 must come to an end. She must be left to take such steps by way of suits in Civil Courts as she may be advised. In these circumstances, I think, this appeal must be dismissed with costs.

As regards Appeal No. 1160 there it appears that the recorded tenant was one Nagendra Nath Mukerjee but that by the time the final publication took place in November, 1922, this man was dead for about two years. Then an application was made on the 18th of July, 1923, to bring the present defendant on the record and that was refused because it was more than two months from the date of the final publication. The case seems to me to be governed by the decision of the case of *Birendra Kishore Manikya Bahadur v. Ambika Charan Dutta Mazumdar* (1) to which I have already referred. As regards this matter I think the appeal should be allowed, the decree of the lower Appellate Court should be set aside and the case should be sent back to the Assistant Settlement Officer to proceed with the application against the proper parties. The appellant is entitled to her costs of this appeal.

We assess the hearing fee in each case at one gold mohur.

Mitter, J.—I agree.

Appeals Nos. 1159 and 1160 allowed.

A. N. A. Appeal No. 1161 dismissed.

MADRAS HIGH COURT.

CIVIL SUIT No. 30 OF 1927.

October 10, 1927.

Present:—Mr. Justice Venkatasubba Rao.
M. DURASAMI IYENGAR AND BROTHERS

—PLAINTIFFS

versus

P. VARADARAJULU NAIDU AND

OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. I, r. 3, O. XXXIV, r. 1—Mortgage suit—Person claiming paramount title already party in another capacity—Question of title bound up with other questions—Adjudication of title, legality of—Amendment.

To a mortgage suit a person claiming an adverse or paramount title is not ordinarily a necessary or proper party; but this rule is not absolute or inflexible, and in certain circumstances, it may not only be proper, but even desirable to implead him as a party. [p. 840, col. 1.]

[Case-law considered.]

The object of O. XXXIV, r. 1, Civil Procedure Code is to define the scope of a mortgage suit as such, that is of a mortgage suit pure and simple but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and, if it may be joined, in what circumstances. [*ibid.*]

Where in a suit to enforce an equitable mortgage by one defendant by deposit of title-deeds standing in the name of another defendant, it was alleged that the deposit was made on behalf of both, but that other person denied such right and authority to deposit, and the plaintiff thereupon applied to amend the plaint so as to include the allegation that the properties belonged to the defendant who deposited the title-deeds and were purchased by him *benami* in the name of the other defendant:

Held, that, inasmuch as the alleged *benamidar* had already been impleaded as a party to the suit, and since the question of ownership as a question of fact was bound up with the other questions in the case, the issue relating to the title of the alleged *benamidar* should be allowed to be raised and the amendment prayed for permitted. [p. 840, col. 2.]

Application by the plaintiff to amend the plaint.

Messrs. S. Doraiswami Iyer and V. C. Gopalarathnam, for the Plaintiffs.

Messrs. D. Adinarayana, N. Babu Rao and K. Krishna Swami Ayyangar, for the Defendants.

JUDGMENT.—This is an application made by the plaintiff for permission to amend his plaint. The amendment proposed affects the 3rd defendant who opposes the application. The question I have to decide is, can the proposed amendment be allowed?

I shall refer to such allegations in the plaint as are relevant to the present purpose. The suit is brought to enforce an equitable mortgage created by the 1st defendant by his depositing certain title-deeds. There were dealings between the

plaintiffs' firm and the 1st defendant's firm and in the course of those dealings the latter executed promissory notes in favour of the former. About the month of December, 1925, there was a sum of a little over Rs. 12,000 due to the plaintiffs and it is alleged that the 1st defendant then deposited with them title-deeds of properties mentioned in Schs. B, C and D to the plaintiff with a view to create an equitable mortgage over them. Although the deeds were deposited by the 1st defendant it is alleged that he represented that he was making the deposit both on his own behalf and on behalf of the 3rd defendant who was described as his adoptive mother. The properties mentioned in Sch. B stood in the name of the 3rd defendant and the plaintiff alleges that the 1st defendant represented at the time that he was duly authorised by the 3rd defendant to deposit the title-deeds of those properties. There is a further allegation in the plaint that the 3rd defendant is bound in respect of the last mentioned properties for the additional reason that she allowed the 1st defendant to be in possession of the title-deeds relating to them and is, therefore, estopped from disputing the plaintiffs' right thereto.

The first point to note is, that the plaintiffs seek to enforce the mortgage both against the 1st and the 3rd defendants. Although in this respect the plaint is lacking in clearness, there can be no reasonable doubt, on a reading of the whole plaint, that this is what is intended. In para. 9 it is stated that the 1st defendant agreed that when called upon, he and the 3rd defendant would execute a deed of mortgage in due form and get it registered. It is then alleged that the plaintiffs got prepared a draft deed of mortgage but that neither did the 1st defendant nor the 3rd execute it in spite of demands. Then again the first prayer in the plaint is that a mortgage-decree may be passed against both the 1st and the 3rd defendants. The suit must be, therefore, regarded as one to enforce a mortgage against both the 1st and the 3rd defendants alike.

The 3rd defendant has filed a written statement denying

(a) that the 1st defendant is her adopted son;

(b) that she authorised the mortgage;

(c) that she empowered the 1st defendant to make the deposit of the title-deeds of the properties in Sch. B; or

(d) that she is estopped by her conduct from questioning the plaintiffs' right to the last mentioned properties.

On these pleadings issues were raised on the 19th of July and the Judge's summons for the amendment in question was taken out on the 19th of August. The plaintiffs seek to amend the plaint by alleging that, as a matter of fact, the properties in Sch. B belong to the 1st defendant by whom they were acquired *benami* in the name of the 3rd defendant; in other words, the plaintiffs desire to raise the question of ownership in regard to these properties. The 3rd defendant's objection is that her paramount title cannot be litigated in the plaintiffs' mortgage suit and that as the object of the amendment is to obtain a decision on this adverse right, the same ought not to be allowed.

The question I have to decide is, therefore, one of law; can the title of a person claiming adverse to the mortgagor and the mortgagee, be adjudicated on in a mortgage suit?

In *Bhuban Mohan Ghose v. Co-operative Hindustan Bank Ltd.* (1), which was a suit on a mortgage, those that were impleaded as defendants were the mortgagors as well as a lady by name Susila, the wife of one of them. She was made a defendant on the ground that she was the *benamidar* in respect of the premises mortgaged, the true owner being her husband. The point was raised whether she was a proper party and whether her adverse claim could be investigated in the mortgage suit. The Court held that she was not only a proper party, but, in the circumstances, it was desirable that there should be an adjudication in regard to her title in the suit itself. Sanderson, C. J., expresses the opinion that the question is one of misjoinder and inconvenience and not one of jurisdiction and that at the most the joinder is an irregularity. Rankin, J., who discusses the point at some length points out that mortgage suits with reference to multifariousness do not stand on a footing different from other classes of suits and holds that there is nothing to prevent a question of this kind being litigated in the mortgage action itself. The learned Judge traces the history of the English and Indian procedure and shows that the course ob-

jected to is not opposed to the present law on the point as contained in O. I, r. 3, of Civil Procedure Code.

The same question in a somewhat different form arose in *Zakir Raza v. Madhusudan Dass* (2). The property was mortgaged, *inter alia*, by the mother of the 2nd defendant. She died before the suit and the 2nd defendant was impleaded as a party as being one of her heirs who inherited the property. He pleaded that he was entitled to the mortgage property by reason of a deed of gift executed in his favour by his mother long prior to the mortgage-deed. An issue was raised in regard to his title based upon the gift and the trial Court decided the same against the 2nd defendant and in the appeal to the High Court it was urged at a late stage that it was improper to raise an issue as regards title in such a suit and that an ordinary mortgage-decree should have been passed without determining the question of ownership. This contention was overruled. Sir Dawson Miller, C. J., observes that to grant a decree without deciding the matter raised would be to encourage fresh litigation. Jwala Prasad, J., points out that although the general principle is that questions relating to titles paramount should, as far as possible, be excluded from the trial of a mortgage suit, this was not an absolute or inflexible rule to be applied without regard to circumstances. The learned Judge adds

"Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit."

In *In re Obalampalli Ramalakshman* (3), Sadasiva Aiyar, J., holds that there is no prohibition in the Code against impleading as a defendant in a mortgage suit a party who sets up a paramount or adverse title.

Jaggaswar Dutt v. Bhuban Mohan Mitra (4) is generally treated as the leading case on the point. The main judgment is that of Mukerjee, J., who himself points out in a later case that the rule against joinder which he adopted in the earlier one is not inflexible. See *Gokul Chandra Roy v. Rasheswari Chowdhurani* (5).

(2) 45 Ind. Cas. 691; 4 P. L. W. 417.

(3) 22 Ind. Cas. 976; (1914) M. W. N. 623.

(4) 33 C. 425; 3 C. L. J. 205.

(5) 11 Ind. Cas. 826; 14 C. L. J. 108.

The observation of the Judicial Committee in *Radha Kunwar v. Reoti Singh* (6) does not militate against the view that has been taken in the decisions I have cited. In that case a person who set up an adverse claim was made a party to a mortgage suit and in the course of the judgment there is an *obiter dictum* that such joinder is irregular and tends to confusion. Generally, it is undoubtedly so; but the question remains, are there circumstances in which such a joinder is proper or even desirable?

I may also refer to *Yennamani Ramanna v. Masunari Venkatanarayana* (7) where Devadoss, J., while dealing with a question of *res judicata* notices some of the rulings on the point.

What is the result of the authorities? To a mortgage suit a person claiming an adverse or paramount title is not ordinarily a necessary or proper party; this rule is not absolute or inflexible, for, in certain circumstances, it may not only be proper but even desirable to implead him as a party. Is O. XXXIV, r. 1, Civil Procedure Code, inconsistent with this conclusion. It says:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

As Rankin, J., points out in *Bhuban Ghose v. Co-operative Hindustan Bank Ltd.* (1) to which I have already referred, the object of this rule is to define the scope of a mortgage suit as such, that is of a mortgage suit pure and simple but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and, if it may be joined, in what circumstances.

Let me now examine the facts of this case to ascertain whether it will be convenient or desirable to raise an issue regarding the title of the 3rd defendant. Both the 1st and the 3rd defendants distinctly allege that the property belongs not to the former but to the latter. The form in which the question generally

arises is, is the party setting up an adverse or paramount title a necessary or proper party? It is important to note that in the present case the question does not arise in that form. The 3rd defendant has been made a party on grounds which are independent of, adverse or paramount, title. The form in which this question, therefore, arises is, whether, she being already on the record as a necessary party, the issue relating to title should be permitted to be raised or not. There is an issue raised in the case, namely, did the 3rd defendant authorise the mortgage? There is a further issue to the effect, was her conduct such as to have misled the plaintiff into believing that the 1st defendant was the owner? In deciding these questions as questions of fact, the Court, while weighing the evidence, will, in all probability, be obliged to treat the fact of the 3rd defendant being or not being the owner, as an important element, rendering the case of either party either probable or improbable. Why should then this question be left over to be decided in another suit? The mere opinion of the Court as such will not be binding upon the 3rd defendant, but if the issue is raised and tried the Court's decision will be binding. It is certainly not desirable that the Court should express an opinion in this case which may happen to be opposed to its decision in the next. The question of ownership as a question of fact is bound up with the other questions that necessarily arise in the case and it seems to me that this is a strong reason for holding that the issue should be tried and decided in this action itself.

Moreover, the 3rd defendant is already before the Court in another character. Supposing the Court holds that she authorised the mortgage, or, by reason of the rule of estoppel, she is bound by the mortgage and passes a mortgage-decree against her, of what practical use is this decree to the plaintiff if it turns out that she is not the owner? Supposing again the Court holds that the 3rd defendant is not bound by the mortgage on the grounds taken and the question of her title is left open, is not the result very unsatisfactory seeing that at the sale a proper price will not be obtained and the purchaser himself may get no title? There is another important consideration; whether the 3rd

(6) 35 Ind. Cas. 939; 43 I. A. 187; 14 A. L. J. 1002; 20 O. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 38 A. 488; 5 L. W. 456 (P. C.).

(7) 99 Ind. Cas. 468; 52 M. L. J. 52; 25 L. W. 238; 38 M. L. T. 20; A. J. R. 1927 Mad. 301.

defendant having been rightly made a party she is bound to assert her title in this case at the risk of the question becoming *res judicata*, is a matter of some doubt. See *Yennamani Rammanna v. Masunari Venkatanarayana* (7) already referred to and the Letters Patent Appeal therefrom, *In re Musumuri Venkatanarayana* (8).

Having regard to these various circumstances, I am clearly of opinion that the issue must be raised and tried in this case. As the point was not originally taken in the plaint, I direct, while allowing the amendment, that the applicant shall pay the 3rd defendant her costs which I fix at Rs. 150. The 3rd defendant's Vakil says that he intends to raise a point of jurisdiction if the amendment is allowed. He will have liberty to file a fresh written statement and he may take this point. Plaint shall be amended within one week, the 1st, the 3rd and the 4th defendants shall file their further written statements within two weeks, and the case shall be posted for further issues one week thereafter.

V. N. V.

A. N. A. *Amendment allowed.*
(8) 106 Ind. Cas. 574; A. I. R. 1927 Mad. 945.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 686 OF 1926.

July 25, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.
SAILENDRA NATH MAHATA—
PLAINTIFF—APPELLANT.

versus

SATISH CHANDRA BHATTACHARJEE
AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10C, O. XXVI, r. 10—Irregular report of Commissioner—Both sides relying upon report in trial Court—Appellate Court's power to discard report—Defect of procedure—Second appeal—Interference.

Where both sides proceeded in the trial Court to rely on the evidence of witnesses taken before the Court as well as before a Commissioner, it is not open to the Appellate Court to discard the evidence taken before the Commissioner on the ground that the Commissioner's report does not strictly comply with the requirements of O. XXVI, r. 10 of the Civil Procedure Code. [p. 842, col. 1.]

A defect of procedure which has materially affected the merits of a case is a ground for interference under s. 100 of the Civil Procedure Code. [p. 842, col. 2.]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 9th January, 1925, reversing that of the Munsif, First Court, Berhampur, dated the 30th April, 1923.

Mr. D. N. Bagchi, Babus Mohini Mohan Bhattacharyya and Nirod Bandhu Ray, for the Appellant.

Mr. Sarat Chandra Bose, Babus Apurba Charan Mookerjee and Ramani Mohan Banerjee, for the Respondents.

JUDGMENT.

Mitter, J.—This is an appeal from a judgment and decree of the Subordinate Judge of Murshidabad, dated the 9th of January, 1925, which reversed a judgment and decree of the Munsif of Berhampur, dated the 30th April, 1923.

The appeal arises out of a suit commenced by the plaintiff for rent for the last *kist* of 1325 and for the years 1326 to 1328 B. S. in respect of a tenure which was held by the defendant respondent under the plaintiff-appellant. Defendant's plea was that he was dispossessed from a portion of the land which he purchased at a rent sale in February, 1920, and which he got possession in May, 1920. His case is that after he had purchased the disputed tenure at a sale held at the instance of the plaintiff he was dispossessed from plots Nos. 1 and 5 of the sale certificate in June 1921. The rent was a consolidated rent.

A local investigation was directed at the instance of the defendant for the purpose of determining as to whether the land from which he alleged he had been dispossessed by the landlord was really covered by the sale certificate. The local investigation proceeded to some extent. Evidence of certain witnesses was recorded on both sides. The costs payable to the Commissioner fell short and the defendant was directed to pay the balance of the costs of the Commissioner in order to enable him to complete his report. The defendant failed to pay that sum. The Munsif then directed the Commissioner to return all the papers. Subsequently at the instance of the plaintiff the Commissioner completed the map of the lands measured by him for which he was paid by the plaintiff and he submitted a letter forwarding the map and the evidence to the Munsif.

Upon the result of the local investigation such as it was and upon the other evidence in the case the Munsif came to the conclusion that the defendant had failed to establish his defence, and he granted a modified decree to the plaintiff for the amounts claimed for the years 1326 to 1328 B. S. with damages thereon at 25 per cent. and proportionate costs.

An appeal was taken by the defendant to the Court of the Subordinate Judge of Murshidabad and the learned Subordinate Judge discarded the report of the Commissioner such as it was and the evidence which was taken before him and after discarding the evidence which was taken by the Commissioner he proceeded to deal with the appeal on the other evidence in the case and came to the conclusion that the defendant had been dispossessed from plots Nos. 1 and 5 of the plaint, and, as it was a tenancy in which the rent was a lump rent, he held that the entire rent should be suspended. He accordingly allowed the appeal and dismissed the suit of the plaintiff.

A second appeal has been taken to this Court by the plaintiff No. 1 and it is contended on his behalf that the lower Appellate Court was clearly in error in discarding the proceedings before the Commissioner and the evidence taken before him as the lower Appellate Court seems erroneously to think that there was no report of the Commissioner. We have looked into the report and we find that there was a letter which was filed along with the map and the evidence taken before the Commissioner. As to whether there was a report as is required strictly under O. XXVI, r. 10 of the Code of Civil Procedure it appears that in this case both sides proceeded in the trial Court to rely on the evidence of witnesses taken before the Commissioner. As will appear from some of the observations made by the Munsif in the trial before him, the defendant-respondent relied on the evidence of one Jatu Pramanik who was examined before the Commissioner as the strongest piece of evidence in his favour. Both sides having agreed to proceed not only on the evidence taken before the Munsif but before Commissioner also, it seems little hard that the plaintiff-appellant was told in the lower Appellate Court that the case should proceed after dis-

carding the evidence that was taken before the Commissioner.

There has been a defect of procedure in the trial of the appeal before the lower Appellate Court such as calls for our interference under s. 100 of the Civil Procedure Code and I think that this defect has affected the merits of the case. The defendant raised the plea of dispossession and it was essential for him to establish the plea to defeat the plaintiff's suit for rent which was justly due to him.

In these circumstances I think that the judgment and decree of the lower Appellate Court dismissing the suit should be set aside and the case should be sent back to that Court for a re-trial of the appeal on the evidence which was taken before the Munsif and also on the evidence which was taken before the Commissioner. Costs will abide the result.

Rankin, C. J.—I agree.

A. N. A.

*Appeal allowed:
Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 859 OF 1927.

October 10, 1927.

Present:—Mr. Justice Jai Lal.

Musammat SAHIBJI—PLAINTIFF—

APPELLANT

versus

MOHAMMAD SARWAR KHAN—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 25—Remand under s. 151, when permissible—Nature of remand, determination of—Order for refund of Court-fee, presumption from—Case not decided on preliminary point—Remand, legality of.

A remand is permissible under s. 151, Civil Procedure Code, but recourse should be had to this section only in very exceptional cases. [p. 843, col. 1.]

A remand cannot be construed to be one under s. 151, Civil Procedure Code, simply because the Court has failed to express that the remand is under r. 23 or r. 25 of O. XLI of the Civil Procedure Code. [*ibid.*]

Where a remand order is accompanied by an order for refund of Court-fee, the remand should be considered to be one under r. 23, O. XLI, Civil Procedure Code. [p. 843, col. 2.]

Where a suit has not been disposed of by the trial Court on a preliminary point but has been decreed after recording and considering the evidence produced by both the parties, a remand under O. XLI, r. 23, Civil Procedure Code, is incompetent. [*ibid.*]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 21st

February, 1927, reversing that of the Senior Sub-Judge, Rawalpindi, dated the 22nd December, 1926.

Mr. *Shamair Chand*, for the Appellant.

Mr. *N. C. Pandit*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff against an order of remand made by the District Judge of Rawalpindi on the 21st of February, 1927. The final portion of the judgment of the learned District Judge is as follows:—

“As has been remarked, the question of title and dispossession has not been properly inquired into and I am of opinion that the case should be re-heard and decided afresh on its merits. I accordingly accept the appeal and remand the case for fresh trial and decision. Stamp on appeal to be refunded. Costs to follow event.”

A preliminary objection is taken on behalf of the respondent that no appeal lies from the order mentioned above because, it is contended, that the remand is under s. 151 of the Civil Procedure Code. Admittedly no appeal lies from such an order of remand but the Counsel for the appellant contends that the remand is under O. XLI, r. 23 and admittedly an appeal lies from an order of remand under that rule. It is to be noted that the learned District Judge has not mentioned the law under which the remand has been made. This should have been done but in the absence of an express indication as to the law under which the remand had been made it becomes necessary for me to determine under what law it was made. There is no doubt that a remand is permissible under s. 151, Civil Procedure Code but it has often been laid down that a recourse should be had to s. 151 only in very exceptional cases. The question is whether when the District Judge made this remand he intended to do so under s. 151. I am unable to hold that he did. If, as contended by the Counsel for the respondent, I were to construe every remand illegally made by the lower Appellate Court to be one under s. 151 in the absence of an express mention of O. XLI, r. 23 or r. 25 the result would be that it would be impossible for this Court to interfere, in exercise of its appellate powers with the illegal orders of remand passed by the lower Appellate Court. There is an indication in the case before me as to the law under which the learned District Judge in-

tended to make the remand. He has ordered the stamp on appeal to be refunded. This under s. 13 of the Indian Courts Fees Act could be done only in the case of a remand under O. XLI, r. 23. I hold, therefore, that the remand in this case was intended to be one under O. XLI, r. 23 and, therefore, an appeal lies to this Court.

On the merits it is quite clear that an order of remand under O. XLI, r. 23 was incompetent under the circumstances of this case. The trial Court had not disposed of the case on a preliminary point. On the other hand it had decreed the plaintiff's suit after recording and considering the evidence produced by both the parties in support of their respective cases. I accept this appeal, set aside the order of the District Judge and remand the case to him under O. XLI, r. 23 with directions to hear and decide the appeal on its merits. The lower Court may, if it considers such a course necessary, pass a proper order of remand after hearing the parties. The Court-fee paid on the memorandum of appeal in this Court shall be refunded. Other costs will abide the result.

R. L.

A. N. A.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 84 AND 85 OF 1925.

July 22, 1927.

Present:—Justice Sir Zahhadur Rahim
Zahid Suhrawardy, Kt., and
Mr. Justice Mallik.

MAGNAMOYI RAI—PLAINTIFF—
APPELLANT

versus

BROJENDRA LAL DAS CHOWDHURY
AND OTHERS—DEFENDANTS—RESPONDENTS.

Partnership—Suit by partner for specific share in sale-proceeds of stock-in-trade, whether maintainable—Suit for general accounts, necessity of—Conversion of suit into one for accounts, legality of.

An action by one partner against the other partners for a specific share in the sale-proceeds of the stock-in-trade is not maintainable without a suit for accounts. [p. 845, col. 1.]

Durga Prasanno Bose v. Raghu Nath Dass (1), *Ram Chandra Pal v. Krishna Lal Pal* (2) and *Karri Venkataraddi v. Kollu Narasayya* (3), explained.

The general rule of law is that a suit by a partner after the dissolution of the partnership must be for a general account unless special circumstances exist which entitle one partner to bring a suit against another or others for a particular item. But if the suit relates to the loss and profits of the partnership

business or to the stock-in-trade or capital employed in the business in respect of which all partners have equal rights, it must be one for a general account of the partnership business. [p. 844, col. 2; p. 845, col. 1.]

A suit for recovery of a specific sum of money cannot be converted into a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. [p. 846, col. 1.]

Kshetra Nath Bhuiya v. Kali Dasi Dasi (4) and *Konduru Runga Reddi v. Subbiah Setty* (5), relied on.

Appeals against the decrees of the Subordinate Judge, Second Court, Sylhet, dated the 23rd May, 1924, affirming those of the Munsif, First Court, Habiganj, dated the 17th September, 1923.

Babus Birendra Kumar Dey and Nikunja Behary Ray, for the Appellant.

Mr. Gopal Chandra Das, Babus Satyendra Kishore Ghose and Nirode Bundhu Ray, for the Respondents.

JUDGMENT.—The plaintiff and defendants Nos. 6 to 8 in the first suit who are defendants Nos. 2 to 4 in the second suit were partners in a business. They fell out and the present suits were brought by the plaintiff. The first suit which we will call the money suit was for recovery of a sum of money, being one-third share of the plaintiff in certain ornaments and cash which were in the iron safe of the firm and were wrongly taken away by the defendants. Her case against the first defendant was that he, in collusion with the partners, misappropriated the ornaments and cash taken out of the iron safe. There were four more defendants the neighbouring shopkeepers who were said to have helped the other defendants in the taking out of the money and articles. The defence was that the plaintiff's brother Bama Charan was at one time acting as the Manager of the firm and he was dismissed because of his defalcations and defendant No. 1 was requested by the other partners to help them in the payment of creditors and for that purpose money was taken out of the safe and applied in the payment of the debts of the firm. As regards the ornaments, the defendants were willing to produce them in Court and to abide by the order of the Court with regard to their disposal. The Munsif who tried the case found that the defendants' version of the story was true and the suit for money was dismissed and it was decreed in respect of the one-third share of the plaintiff in the ornaments. The lower Appellate Court upheld the decree of the trial Court and

hence this appeal by the plaintiff. At the hearing the suit was withdrawn as against defendants Nos. 6 to 8 (partners) who were dismissed from the suit. On the findings of the trial Court which were endorsed by the lower Appellate Court we do not think that there is any question in this case which entitles us to interfere with the decree. The finding is that defendant No. 1 who is a highly respectable man under the authority of the other partners took out the money and paid the debts of the firm with great advantage to the firm, the debts being paid off at 55 per cent. That there was no misappropriation by defendant No. 1 and that the present suit was instituted apparently at the instigation of Bama Charan—the brother of the plaintiff. On these findings no question of law arises and the suit was rightly dismissed. The Appeal No. 84 is dismissed with costs.

The other suit which may be called the title suit was brought by the plaintiff for recovery of one third share in the sale-proceeds of the stock-in-trade. Defendant No. 1 is Brojendra Lal Das Chowdhury who was defendant No. 1 in the other suit and his defence is that he acted *bona fide* under instructions from the other partners. On the findings there can be no question that the suit was rightly dismissed against him. As regards the claim against the partners the Munsif found that the amount of debt paid off by the other partners far exceeded the value of the stock-in-trade as put by the plaintiff. He also held that the suit was not maintainable without a general suit for accounts as between partners. In this view the suit was dismissed. The Subordinate Judge in appeal did not discuss the merits of the case but dismissed the appeal on the ground that the suit in the form against the partners was not maintainable. The learned Vakif for the appellant argues that the view of the lower Appellate Court on law is wrong as the suit was maintainable. There can be no question that the general rule of law is that a suit by a partner after the dissolution of the partnership must be for a general account unless special circumstances exist which entitle one partner to bring a suit against another or others for a particular item. But if the suit relates to the loss and profits of the partnership business or to the stock-in-trade or capital employed in the business in respect of

which all partners have equal rights, it must be one for a general account of the partnership business. But maintains the learned Vakil for the appellant that an action for a specific sum as for the price of the plaintiff's share in the sale-proceeds of the stock-in-trade is maintainable without a suit for accounts. He also contends that if in order to give proper relief it is necessary to take accounts from the defendants the Court should take such accounts. With reference to the second branch of the argument it may be said that the first Court did go into the question and found that the other partners used the proceeds of the sale of the stock-in-trade in paying off the debts and they will not, therefore, be liable. As to the first contention our attention has been drawn to the decision in the case of *Durga Prosonno Bose v. Raghū Nath Dās* (1). In that case one partner under arrangement amongst the partners borrowed a sum of money and put it into the partnership till. Subsequently the creditor by a suit against that partner realised the amount. Thereupon the partner sued his other partners for contribution of the money which he had to pay under the decree of his creditor. The learned Judges held that such a suit was maintainable without a general suit for accounts on the ground that the money secured by the promissory note for which the suit was brought against the plaintiff did not become an item of the partnership accounts. On the facts of that particular case the decision seems to be perfectly justifiable. One partner had to contribute to the capital of the firm out of which profit was received by all the partners in equal shares and if that partner had to pay the money which he had so employed in the partnership business, there does not seem to be any reason why he could not recover by way of contribution the share of the debt payable by the other partners. The suit had nothing to do with the partnership business or with reference to the assets of the partnership. The learned Judges in that case went thoroughly into the law as to the rights of partners amongst themselves. But on the facts of that particular case it was evident that the general rule that a suit between partners relating to the partnership business must be a suit for general accounts of the dissolution did not apply. Moreover, the

rule has been stated in Lindley on Partnership, 9th Edition, page 663, in answer to a question formulated by the learned author "When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions?" This question, according to the learned author, "can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such account." In the present case it must be admitted that the plaintiff cannot sue for a specific sum without calling upon the other partners to show how the price of the stock-in-trade was applied by them, in other words, she cannot bring a suit for a specific sum without a general suit for accounts for the purpose of ascertaining if she is entitled to a share in the assets of the firm. In *Ram Chandra Pal v. Krishna Lal Pal* (2) a suit was brought in the Small Causes Court by one of the partners for a sum of money alleged to be due by the other partners. The question before the Court was whether the suit was maintainable in the Court of Small Causes. The learned Judges held that a dispute between partners whose business has come to an end regarding the division of the assets can only be finally settled in a proper suit for adjustment of accounts; and it is not proper that each of the parties should proceed by separate suits in order to recover from the others any sums due to the partnership business which they may have realised. We have also been referred to the case of *Karri Venkatareddi v. Kollu Narasayya* (3) but we do not see what bearing that case has on the facts of the present case. There under the terms of the contracts between the partners the working partner was to make over all the cheques and moneys received by him to the capitalist partner. He had omitted to do so and a suit was brought by the partner supplying the capital for the recovery of the cheques. It was held that a suit did lie. There is no special contract in this case and, in our opinion, the general law must prevail, namely, that the plaintiff cannot maintain a suit for her share in the assets of the partnership without bringing a suit for a general account. We

(2) 17 Ind. Cas. 603; 17 C. W. N. 351.

(3) 1 Ind. Cas. 384; 32 M. 76; 19 M. L. J. 10; 4 M. L. T. 456.

(1) 26 C. 254; 3 C. W. N. 299; 13 Ind. Dec. (N. S.) 767.

further do not think that in the present case it was the duty of the Court to take accounts from the defendants and give proper relief to the plaintiff. As has been held in *Kshetra Nath Bhuiya v. Kali Dasi Dasi* (4) a suit for recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. Though the question before the Court then was whether the suit was maintainable in the Small Causes Court the general principle that a suit for a specific sum of money cannot be converted into a suit for accounts is sound. To the same effect is the case of *Konduru Runga Reddi v. Subbiah Setty* (5) in which it is stated that a suit for an account is a special form of suit in which a special process is required for the purpose of taking accounts and that every case in which accounts have to be looked into to ascertain the amount due to the plaintiff cannot be said to be a suit for accounts. In our judgment the suit as brought by the plaintiff is not maintainable and the plaintiff is entitled to no relief. It would not have been necessary on the findings of fact arrived at by the trial Court to go into the question of law but for the extremely unsatisfactory judgment of the lower Appellate Court which gave sufficient indication that the learned Subordinate Judge did not fulfil his function as presiding over the Appellate Court. This appeal is accordingly dismissed with separate costs to respondent No. 1 and to respondents Nos. 2 to 4.

A. N. A.

Appeals dismissed.

(4) 41 Ind. Cas. 929; 27 O. L. J. 96; 21 O. W. N. 784.

(5) 28 M. 394.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2033 OF 1923.

October 26, 1927.

Present:—Mr. Justice Ffiorde and

Mr. Justice Zafar Ali.

Musammat CHARAGH BIBI—DEFENDANT—
APPELLANT

versus

SULTAN BAKHSH AND ANOTHER
REPRESENTATIVES OF NAWAB KHAN AND
OTHERS—PLAINTIFFS AND GHULAM NABI
AND OTHERS—DEFENDANTS—RESPONDENTS.Custom—Succession—Daughters' daughters and
collaterals, rights of—Muhammadan Naru Rajputs ofHoshiarpur District—Riwaj-i-am, presumption in
favour of—"Aulad," meaning of.

Among Naru Muhammadan Rajputs of Hoshiarpur District daughters are by custom entitled to succeed in the presence of collaterals more remote than the descendants of the great-grandfather of the deceased proprietor; and where daughters have succeeded to their father's land as heirs excluding his collaterals, their daughters are entitled to succeed to their mothers' estate in the absence of direct male heirs. [p. 847, cols. 1 & 2.]

Ranjhi Khan v. Kamun (1) and Ilahi Bakhsh v. Budhi (2), followed.

Lehna v. Thakri (4) and Sharfo v. Ramzan (5), distinguished.

In places where the right of females to succeed is widely recognised, the word "aulad" should be construed as including both male and female issue. [p. 847, col. 2; p. 848, col. 1.]

Charagh Bibi v. Hassan (3), followed.

Where a Riwaj-i-am of a District sets up a particular custom, there is a presumption in favour of the existence of such custom and the onus of proving the contrary is on the party contesting such custom. [p. 847, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Hoshiarpur, dated the 7th May, 1923.

Messrs. Niaz Mohammad and Mohammad Amin, for the Appellants.

Messrs. Shamair Chand and Qabul Chand, for the Respondents.

JUDGMENT.

Zafar Ali, J.—The last male owner of the land in suit was Khuda Bakhsh, a Musalman Naru Rajput of village Harta in the Hoshiarpur District. On his death there was a contest as to succession between his daughter Musammat Mamon and his collaterals in the sixth degree; but the suit brought against her by the collaterals ended in dismissal. Musammat Mamon enjoyed possession of the estate all her life and died some four years before the present suit leaving her surviving a daughter named Charagh Bibi. On the death of Musammat Mamon the collaterals again laid claim to the estate of her father and took possession of it. But the Revenue Authorities sanctioned mutation in favour of Musammat Charagh Bibi. The collaterals, therefore, sued for a declaration that by the Customary Law of Inheritance the estate reverted to them on the death of Musammat Mamon and that they were entitled to oust Musammat Charagh Bibi. The latter contested their claim and pleaded that the estate should descend to her. So the sole question on which the parties joined issue was whether, where the daughter of the last male owner had succeeded to his ancestral estate excluding his collaterals in the sixth degree the latter were entitled

to succeed on her death in the presence of her daughter. The suit was tried by the learned Senior Subordinate Judge of Hoshiarpur who granted the plaintiffs the declaration that they sought, holding that a daughter's daughter had no right to succeed. *Musammam Charagh Bibi* appeals.

In arriving at the above finding the learned Judge of the Court below has given effect to the general rule of the Customary Law of the Province that a daughter like any other female successor is a limited owner and that she inherits the estate of her father to transmit it eventually to his agnates or to her own sons but not to her daughter. He failed to realise that the real question for determination was one of a special custom which might obtain in a particular tribe in spite of the general custom being to the contrary. Almost every general rule has exceptions to it, and no person is precluded from establishing a special custom at variance with the general one.

In the present case the appellant's claim was that she was by custom entitled to succeed to the exclusion of the distant collaterals of her maternal grandfather. One thing is quite clear, *viz.*, that among Naru Muhammadan Rajputs of Hoshiarpur daughters are by custom entitled to succeed in presence of collaterals more remote than the descendants of the great-grandfather of the deceased proprietors. This was ruled so far back as 1889: *v. de Ranjhi Khan v. Kamum* (1). The appellant goes a step further and claims her right of succession by custom on the death of her mother. This claim should not have been thrown out merely because it was opposed to the general custom. The question is whether the special custom set up by the daughter was proved or not. For an answer to a question of this description one naturally looks first of all to the *Riwaj-i am* of the District, but the *Riwaj-i am* was unfortunately not consulted by the learned Senior Subordinate Judge, presumably because his attention had not been drawn to it. But *Ilahi Bakhsh v. Budhi* (2) was brought to his notice in which a Division Bench of the Punjab Chief Court had held that "among Muhammadan Rajputs of Hoshiarpur (an endogamous tribe) where daughters have

succeeded to their father's land as heirs, excluding his collaterals, their daughters are entitled to succeed to their mothers' estate in the absence of the direct male heirs....."

The Court below refused to follow the above ruling on the ground that "the weight of authority was against the defendant."

It may be observed here that the plaintiffs examined no less than ten witnesses but every one of them made a very brief statement each to the effect that among Muhammadan Naru Rajputs where a daughter succeeded to the ancestral estate of a sonless proprietor the collaterals of the latter, howsoever remote, excluded from succession the daughter's daughter. None of them could, however, give even one instance of the exclusion of a daughter's daughter by the collaterals. The *Riwaj-i am* being, however, clearly against the plaintiffs on this point, the onus of establishing the alleged custom lay heavily upon them. The defendants produced only two witnesses who cited a judicial instance. This was no other than that of *Ilahi Bakhsh v. Budhi* (2). We could not decide the case without taking into consideration the *Riwaj-i am* and we, therefore, allowed the appellant's Counsel to refer to it. We did not consider it necessary to remand the case because the plaintiffs were not in a position to supplement their evidence in order to rebut the *Riwaj-i am* when confronted with it.

The questions and answers of the *Riwaj-i am* that are in point are Nos. 45 and 47. To question No. 45: "Under what circumstances can daughters inherit?" the answer of Rajputs and several other tribes was that "daughters can succeed in the absence of descendants of a great-grandfather." To the further question No. 47: "What is the nature of the daughter's interest in property that she inherits?" the answer was: "Where a daughter succeeds by inheritance as is related in answer to question No. 45, if she has children, she succeeds as full owner, if she is childless she succeeds to a limited life-estate the same as that of a widow 'without rights of alienation'". The word 'children' (*aulad*) applies to sons as well as to daughters, and it was held in *Chiragh Bibi v. Hassan* (3) that "in places where the right of females

(1) 179 P. R. 1889.

(2) 5 Ind. Cas. 247; 5 P. R. 1910; 10 P. W. R. 190; 159 P. L. R. 1910

(3) 19 P. R. 1906; 570 P. L. R. 1906; 51 P. W. R. 1906.

to succeed is widely recognised the word 'aulad' should be construed as including both male and female issue." The answer to question No. 47, therefore, is to the effect that a daughter becomes full owner if she has sons or daughters.

In *Ilahi Bakhsh v. Budhi* (2) Counsel for the plaintiff's collaterals contended that as the daughter left only daughters and no sons, the daughter's daughter could not succeed in the presence of the collaterals. In respect to this contention the learned Judges observed as below:—

"Now this is a proposition (*i.e.*, daughter's daughter cannot succeed and the collaterals are entitled to come in) which we are unable to accept. We have considered the rulings quoted to us for the appellant, *Lehna v. Thakari* (4), *inter alia*, Roe's Tribal Law, page 61, s. 13, etc. We do not think that there is sufficient authority for saying that when a daughter has been allowed to succeed as heir to her father's estate, that her daughter again cannot succeed to her. We admit that in dealing with Customary Law, logic is often apt to lead us astray, but we can see no logic in the proposition—Why is the succession to be limited to one female step?"

The learned Senior Subordinate Judge chose for his guidance *Lehna v. Thakari* (4) and certain other rulings to the same effect based generally on the principles laid down in Roe and Rattigan's Tribal Law, at page 61, s. 13. Now, all that was decided in *Lehna v. Thakari* (4) was that the ancestral estate of a sonless proprietor does not cease to be ancestral when it devolves upon his daughter or descends from her to her sons, etc. There can be no quarrel with this proposition in the present case. In Roe and Rattigan's Tribal Law, s. 13, general principles are stated relating to the rights of female successors but exceptions to the general custom are also noted and it is mentioned that in Multan and Dera Ismail Khan where a daughter succeeds at all she succeeds absolutely with a full power of disposing, as she pleases, of the property. Thus the right to succeed as full owner is given to daughters by some tribes and there can be no wonder if Naru Rajputs did the same. In *Ilahi Bakhsh v. Budhi* (2) Roe and Rattigan's Tribal Law, s. 13 and *Lehna v. Thakari* (4) were taken into consideration

and these authorities do not in any way militate against the finding arrived at in *Ilahi Bakhsh v. Budhi* (2).

Another case relied upon by the Court below was *Sharfo v. Ramzan* (5). The parties to that case were Gujars of the Gujrat District and it was found that among Gujars of that District a daughter's daughter had by custom no right to succeed. Obviously it does not follow that Naru Rajputs of Hoshiarpur follow the same custom.

The *Riwaj-i-am* being in favour of the daughter's daughter and *Ilahi Bakhsh v. Budhi* (2) being in accordance with the *Riwaj-i-am* the plaintiffs' claim to the contrary must fail. This appeal is accordingly accepted and the plaintiffs' suit dismissed with costs throughout.

Fforde, J.—I agree.

R. L.

A. N. A.

(5) 14 P. R. 1907; 20 P. L. R. 1908; 126 P. W. R. 1907.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 11
of 1927.

November 8, 1927.

Present:—Justice Sir Charu Chunder Ghose, Kt., and Justice Sir Philip Lindley Buckland, Kt.

SHYAM SUNDAR CHAKRAVARTY—

DEFENDANT—APPELLANT

versus

TITAGHAR PAPER MILLS Co., LTD.

—PLAINTIFFS—RESPONDENTS.

Promissory note—Description of maker in body of note as Managing Director—Unqualified signature—Personal liability—Defence not involving question of fact—Summary judgment, legality of.

Where the maker of a promissory note described himself in the body of the note as the Managing Director of a Company but signed his name without any qualification whatsoever and did not take any steps to indicate that he was signing the document not in his personal capacity but for and on behalf of the Company;

Held, that the mere description in the body of note as Managing Director had not the effect of excluding the personal liability of the maker. [p. 849, col. 2; p. 850, col. 1.]

A High Court can pass a summary judgment on a promissory note where there is no triable issue dependent on facts to be investigated but there is only a question of law which does not involve the taking of evidence. [p. 849, col. 2.]

(4) 32 P. R. 1895.

Appeal against the decree of Mr. Justice Pearson, dated the 6th December, 1926, in Original Suit No. 1844 of 1926.

Mr. S. C. Roy, for the Appellant.

Mr. S. M. Bose, for the Respondents.

JUDGMENT.

C. C. Ghose, J.—This is an appeal from an order made by my learned brother Mr. Justice Pearson on the 6th December, 1926, on an application made by the plaintiff Company under Chap. XIII-A of the Rules of this Court for summary judgment.

The facts shortly stated are as follows:—The defendant Shyam Sundar Chakravarty who is the appellant before us was on all material dates the Editor of the "Servant" newspaper and Managing Director of the defendant Company, namely, the Servant Publishing Company, Limited. It appears that the plaintiff Company supplied paper from time to time for the use of the defendant Company and as and when the goods were delivered, the appellant Shyam Sundar Chakravarty executed certain promissory notes for the value thereof. The promissory notes were eight in number. The plaintiff Company made attempts to realise the monies due but did not succeed. There was on the date of the application a sum of Rs. 8,910-2-6 due to the plaintiff Company for principal and a sum of Rs. 463-4-4 on account of interest. The promissory notes were all alike and one of them which is printed at page 13 of the paper-book may be quoted herein as a sample: "On demand I, Sham Sundar Chakravarty Esqr. Editor and Managing Director 'The Servant,' promise to pay the Titaghar Paper Mills Co., Ltd., or order, the sum of rupees nine hundred twenty-two and annas four only together with interest thereon at the rate of twelve per cent. per annum from the 10th February, 1925, being the value of one hundred and thirty-six reams of paper sold and delivered to me from their godown as per their Delivery Order No. L 788." The appellant filed an affidavit in answer to the application of the plaintiff Company in which he contended that he did not sign the said promissory notes in his personal capacity in consideration of the paper being supplied to the defendant Company and that, under the circumstance, the Servant Publishing Company, Ltd., were alone liable for the price of the paper supplied and that there was no personal liability undertaken by the appellant. The matter came on be-

fore my learned brother, Mr. Justice Pearson on the 6th December, 1926, when he made an order in terms of the plaintiff Company's summons for summary judgment. He held that, having regard to the terms of the promissory notes, it could not be contended that the appellant had not undertaken any personal liability in respect of the sums mentioned in the said promissory notes.

On appeal it is argued on behalf of the appellant by Mr. S. C. Roy, firstly, that there was a triable issue raised by the appellant and that no summary judgment should have been passed; and, in the second place, that on the construction of the promissory notes themselves there was no personal liability undertaken by the appellant and that, therefore, no decree should have been made against him.

As regards the first point, it is sufficient to observe that, on the materials before us, it is clear that there was no triable issue dependent on facts which were to be investigated, but there was a question of law raised by the appellant, namely, whether, having regard to the terms of the promissory notes, any personal liability had been undertaken by the appellant. That question did not, in my opinion, involve the taking of evidence. It was a pure question of law and had to be decided with reference to the terms of the promissory notes. On the decision of that question depended as to whether there should be a summary judgment in favour of the plaintiff Company or whether leave to defend the suit should be given to the appellant. Mr. Justice Pearson held on the construction of the promissory notes that the appellant had undertaken a personal liability and passed summary judgment in favour of the plaintiff Company. That amounted to saying that, in the circumstances disclosed, no leave should be given to the defendant to put in a defence in the ordinary way. That disposes of the first point raised by Mr. Roy.

As regards the second point, it is sufficient to observe that, having regard to the cases, some of which are referred to in my judgment—*In the matter of Jajodia Cotton Mills Ltd.* (1), it cannot be contended on the documents in this case that the appellant had not undertaken and did not undertake any personal liability. The appellant's description as Managing Director in the body

(1) 103 Ind. Cas. 629; 31 C. W. N. 683; A. I. R. 1927 Cal. 612.

of the promissory notes had not the effect of excluding his personal liability. It is noteworthy that the appellant when he put his signature on the promissory notes, signed his name without any qualification whatsoever and did not take any steps whatsoever to indicate that he was signing the document not in his personal capacity but for and on behalf of the Servant Publishing Company Ltd., and as their Managing Director. Under these circumstances, there could only have been one answer to the question raised by the appellant, and, in my opinion, Mr. Justice Pearson rightly negated the contention raised by the appellant.

Mr. Roy has drawn our attention to the case of *Elliott v. Bax-Ironside* (2). That case, as I read it, is entirely against Mr. Roy's contention. What happened in that case is this:—The action was against two defendants as indorsers of a Bill of Exchange. Those defendants were the Directors of a Company called the Fashions Fair Exhibitions Ltd., and one of the defendants was a person named Mason who was the Managing Director. The Company accepted two Bills of Exchange for 1,000 pounds each, but inasmuch as the capital of the Company was not more than 400 pounds it was suggested that the two Bills of Exchange should be indorsed by the two Directors, namely, Sir Henry Bax-Ironside and Mr. R. A. Mason. They accordingly indorsed the two Bills of Exchange and the contention that was sought to be canvassed on their behalf before the Judge in the Court of first instance and in the Court of Appeal was that they had not accepted any personal liability. It was held that having regard to the facts, although they had described themselves as Directors, they were really guaranteeing a debt due by the Fashions Fair Exhibitions Ltd., and that they accordingly could not avoid liability as guarantors. Both on law and on facts, this case, as I read it, is against the contention put forward before us by Mr. Roy.

On all these grounds, I am of opinion that this appeal should stand dismissed with costs.

Buckland, J.—I agree.

A. N. A.

Appeal dismissed.

(2) (1925) 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 75 OF 1926.

May 4, 1927.

Present:—Justice Sir William Watkins
Phillips, Kt.

RAMA SASTRIAR—PLAINTIFF—
PETITIONER

versus

PAKKIRI AMBALAKARAN—DEFENDANT
RESPONDENT.

Contract Act (IX of 1872), s. 18—Bond providing for payment of interest by work—Very low wages—No provision for re-payment of loan—Legality of contract—Slavery bond.

Where a bond executed by a servant in favour of his master provided for the payment of interest in the shape of work, but the work was to be paid at a certain definite rate which was very low and the work included that of the executant as well as that of his wife and no provision was made for the re-payment of the loan:

Held, that the bond was a slavery bond and was, therefore, not enforceable.

Ponnusami v. Palayathan (3), distinguished.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Nannilam, in S. O. S. No. 456 of 1925.

FACTS.—A bond executed by a servant to his master provided as follows:—"As I have to day taken Rs. 25 in cash agreeing to do *pannayal* service under you in respect of 15 *mahs* of land of yours, I shall, in lieu of interest, plough the land by using your bull, attend to cultivation, take wages for myself at 2½ measures and for my wife at 1½ measures a day. Further, at the time of harvest, I shall receive *kalandai* at 2 measures per *kalam*. For other work, I shall receive ¼ *marakal* a day. I shall attend to local channel digging without payment. Binding myself to the above conditions both myself and my wife being bound to do aforesaid *pannai* work, I have executed *aulsurandi*. Should I fail to do work as per condition or if I commit fraud, I hereby agree to render myself criminally liable." In a suit on the bond, relying on *Ram Sarup Bhagat v. Bansi Mandar* (1) and *Scari Ayyangar v. Subbarayar* (2) the learned District Munsif held that the bond was a slavery bond and, therefore, unenforceable and accordingly dismissed the suit. The plaintiff applied to the High Court for revision of the said decree.

Mr. T. S. Ramaswami Iyer, for the Petitioner.

Mr. V. Ramaswami Iyer, for the Respondent.

(1) 30 Ind. Cas, 955; 42 C 742; 19 C. W. N. 1118.

(2) 40 Ind. Cas, 235; 5 L. W. 700.

JUDGMENT.—The District Munsif dismissed the suit on the ground that the bond sued on was a slavery bond and its terms are not enforceable. The bond provides for the payment of interest in the shape of work, but the work is to be paid at a certain definite rate which appears to be very low and the work includes that of the executant as well as that of his wife. No provision is made for the re-payment and although, of course, a debtor can in law always re-pay his debt, still in the case of these *pannayals* it is quite likely that they do not realise this right. The case relied upon by the petitioner which was decided by myself in *Ponnusami v. Falayathan* (3) can be differentiated on the ground that in that case the ordinary wages were to be paid for the man's work and that the period was restricted to five years. The Munsif, on the other hand, relied on *Ram Sarup Bhagat v. Bansi Mandar* (1) and I am certainly not prepared to say that he is wrong in this case.

The petition is dismissed.

v. N. v.

Petition dismissed.

(3) 51 Ind. Cas. 252; (1919) M. W. N. 534; 10 L. W. 202.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECISIONS Nos. 1805 OF 1925 AND 42 OF 1926.

August 24, 1927.

Present.—Sir George Claus Rankin, Kt., Chief Justice, and Mr. Justice Mitter.

NAWAB BAHADUR OF MURSHIDABAD

—DEFENDANT—APPELLANT

versus

Raja BHUPENDRA NARAIN SINHA

BAHADUR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—

Revision—Error of law—Interference.

Section 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. [p. 852, col. 2.]

Balakrishna Udayar v. Vasudeva Aiyar (3) followed.

Appeals against the decrees of the Subordinate Judge, Murshidabad, dated the 21st April, 1925, and of the District Judge, Murshidabad, dated the 10th September, 1925, respectively, affirming those of the Munsif, Second Court, Berhampur, dated

the 14th February, 1924, and of the Munsif First Court, dated the 10th May, 1924 respectively.

Mr. Amarendra Nath Bose, Babus Suresh Chandra Mukherjee and Amulya Charan Sen, for the Appellant.

Babus Sitaram Banerjee and Bejoy Prosad Singha Roy, for the Respondent.

JUDGMENT.

S. A. No. 1805 of 1925.

Mitter, J.—This appeal arises out of a suit by the respondent for recovery of the balance of Road and Public Works Cesses from the appellant payable for 4 years, viz., 1326 to 1329 B. S., with damages at 25 per cent.

The defendant in this suit, now appellant, is the *patnidar* under the plaintiff, now respondent, who is the *zemindar* of the *mahal* in suit and the terms of the *patni* are to be found in a *kabuliyat* to some of the terms of which reference will be made later.

The plaintiff alleges that out of the cesses payable by the defendant only a smaller sum has been realised and the plaintiff consequently sues for the excess cesses.

The defence of the defendant substantially was (i) that the plaintiff was realising cesses at the legal rate without adverting to a clause in the *kabuliyat* which runs to the following effect:—

“If there be any demand from the state on the *zemindari* for any new amount on account of rent or revenue payable to the King or if any order is passed, I shall abide by it and pay my rent along with it without any objection”, (ii) that the plaintiff's claim for recovery of cesses for the year 1926 was barred by limitation.

The Munsif granted a decree to the plaintiff for the excess cess. An appeal was taken by the defendant to the Court of the Subordinate Judge of Murshidabad who affirmed the decision of the Munsif.

A second appeal has been taken to this Court by the defendant and three points have been raised before us by the learned Advocate for the appellant. It is argued in the first place as that the covenant in the *kabuliyat* that the defendant would pay *rajaswa* would not include the excess cess claimed, i. e., the cess in excess of the legal rate. It is contended in the second place that the excess cess claimed does not fall within the definition of rent as given in the Bengal Tenancy Act, for unders 3, cl. (b) of the Act “rent includes also money recoverable under any enactment for the

time being in force as if it was rent" and as the excess cess was recoverable not under the Cess Act but under the covenant in the *kabuliyat* the excess cess could not be regarded as rent within the meaning of the Bengal Tenancy Act and that the suit for excess cess was not a suit to which the provisions of Art. 2 of Sch. III, cl. (iii)(b) of the Bengal Tenancy Act would apply and consequently the claim for 1326 B. S. is barred by limitation. It is contended in the third place that in any view the plaintiff is not entitled to damage at 25 per cent. on the excess cess having regard to the provision of s. 68, cl. (2) of the Bengal Tenancy Act which applies only to a suit for rent.

Basing his argument on the ground taken by the appellant that the sum claimed in the suit cannot be regarded as rent, the learned Vakil for the respondent has taken a preliminary objection to the hearing of this appeal. He contends that according to the appellant's argument the present suit would be a suit not for rent but for money and as the suit is valued at less than Rs. 500 there would be no second appeal to this Court by reason of s. 102 of the Code of Civil Procedure. The appellant is in the horns of a dilemma for if his argument is accepted that the present suit is not a suit for rent then he has no right of second appeal. If, on the other hand, his argument is not accepted and the suit is regarded as a suit for rent then there is no substance in any of the three grounds taken. The learned Advocate for the appellant is prepared to accept the position that this is a suit for money and not for rent; consequently he is met by the preliminary objection which must prevail and the appeal is dismissed with costs.

It is next argued in reply that this petition of appeal should be treated as a petition for revision and this Court should interfere under s. 115 of the Civil Procedure Code. With reference to the second and third grounds raised on behalf of the appellant it is said that the lower Appellate Court has applied the law to a case to which it does not apply and has thus exercised his jurisdiction with material irregularity. Reliance has been placed in this connection on the decisions of this Court in *Brajabala Debi v. Gurudas Mandal* (1) and *Mohini Mohan Roy v. Ramdas* (1) 3 C. L. J. 293 at p. 201; 33 C. 437.

Paramhansa (2). All that these cases lay down is that in a proper case where there has been an error of jurisdiction the High Court may treat a petition of appeal as a petition for revision and interfere under s. 115 of the Code. But we do not think that s. 115 applies in the present case for in deciding the three points raised by the appellant against him the lower Appellate Court has merely arrived at conclusions of law contrary to the contention of the appellant. It has been observed by the Judicial Committee of the Privy Council in the recent case of *Balakrishna Udayar v. Vasudeva Aiyar* (3) that s. 115 applies to jurisdiction alone, the "irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

I think, therefore, that this is not a case which calls for our interference under s. 115.

S. A. No. 42 of 1906.

With regard to this appeal which arises out of a suit between the same parties as in Appeal No. 1805 of 1925 which I have just dealt with, it has been frankly admitted by the learned Advocate for the appellant that the case is governed by a previous decision of the High Court dated the 1st of June 1922 which has been marked as Ex. 3 in the suit and that that decision is against him.

I think that the decision of this Court referred to concludes this second appeal which must be dismissed with costs.

Rankin, C. J.—I agree.

A. N. A.

Appeals dismissed.

(2) 80 Ind. Cas. 210; 39 C. L. J. 532 at p. 535; 28 C. W. N. 271; A. I. R. 1924 Cal. 487.

(3) 40 Ind. Cas. 650; 44 I. A. 261 at p. 267; 26 C. L. J. 143 at p. 148; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.).

RANGOON HIGH COURT.

LETTERS PATENT APPEAL No. 155 OF 1926.

June 20, 1927.

Present:—Sir Guy Rutledge, Kt., Chief Justice, and Mr. Justice Brown.**CO-OPERATIVE TOWN BANK OF PADIGON—PLAINTIFFS—APPELLANTS***versus***S. V. K. V. RAMAN CHETTIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.***Civil Procedure Code (Act V of 1908), O. XXI, r. 16**—Assignment of decree—Subsequent attachment and execution of decree by third party—Assignee's rights, whether affected—Failure to get assignment recognised by Court, effect of—Trust in favour of assignee.**A person who attaches and executes a decree for money after it has been assigned by the decree-holder to a third person does not acquire any beneficial interest in the amounts realised in execution but holds the same as a trustee for the assignee of the decree. [p. 854, col. 2.]**The assignment of a decree operates from the date of the assignment and does not depend for its validity upon any recognition by the Court. [p. 854, col. 1.]**Co-operative Town Bank v. Raman Chettyar, 99 Ind. Cas. 309, overruled.*

Letters patent appeal against the judgment of Mr. Justice Mya Bu, in S. A. No. 589 of 1925, dated the 10th August, 1926, and reported as 99 Ind. Cas. 309.

Mr. Thein Maung, for the Appellants.

Mr. P. S. Chari, for the Respondents.

JUDGMENT.—The second respondent Maung Myo obtained a money decree against one Mg. Po Hlaing. This decree was attached by the first respondent S. V. K. V. Raman Chettiar in execution of a decree against Maung Myo. After obtaining the attachment the Chettiar applied to the Court under the provisions of r. 53 of O. XXI of the Code of Civil Procedure and was allowed to execute the decree against Po Hlaing. A sum of Rs. 2,700 had been deposited in Court towards the satisfaction of the decree against Mg. Po Hlaing and the respondent Chettiar withdrew this sum in execution of that decree. The plaintiffs appellants, the Co-operative Town Bank of Padigon, claimed that, prior to the attachment of the decrees by the Chettiar, Maung Myo had transferred the decree to them. They say that the Chettiar executed his decree and the decree against Mg. Po Hlaing without their knowledge, the transfer having been made to them before the attachment. The Chettiar had no right in that decree, and they, therefore, claim to recover Rs. 2,700. The Chettiar did not admit the assignment to the Bank, and pleaded that in any case the

plaintiffs were estopped from making this claim for this money now. These questions have not yet, however, been adjudicated upon. The suit was dismissed on the ground that, the respondent Chettiar having executed the decrees in accordance with the provisions of the Code of Civil Procedure, the mere fact that the Bank had a previous assignment of the decrees would not give them any right to follow the money in the hands of the Chettiar. The suit was dismissed by the trial Court and by the District Judge in appeal, and these decisions were affirmed on second appeal by a Single Judge of this Court.

The point raised is a difficult point of law, on which we have been unable to find any clear judicial pronouncement, and has, in our opinion, been quite rightly certified as a fit case for appeal under cl. 13 of the Letters Patent. A number of cases have been cited in favour of the respondents to the effect that the only person entitled to execute a decree is the person who has followed the procedure laid down in O. XXI of the Code of Civil Procedure. We do not, however, think that these decisions necessarily conclude the matter. The Code of Civil Procedure, as the term implies, regulates procedure, and does not ordinarily affect substantive rights, and although the Executing Court was bound to allow the Chettiar to execute his decree, it does not necessarily follow that the Chettiar was entitled to retain the benefit of that decree for his own purpose. The holder of a money decree acquires no right, title or interest in the property of his judgment-debtor merely by virtue of that decree, and he has no right to execute this decree against any property that is not the property of his judgment-debtor at the time of attachment. If then at the time of the attachment of the decree in this case the Chettiar's judgment-debtor had no longer any rights in the decree attached, the Chettiar could obtain no rights in that decree and could not utilize that decree for the purpose of satisfying his debt. Rule 16 of O. XXI provides for the application by the assignee of a decree to the Court to be allowed to execute the decree. The rule does not however say, and we know of no other provision of law to that effect, that the assignment has no legal force until the assignee is brought on the record under the provisions of r. 16. It was held in the case of *Puthiandi Mammed*

v. *Avalil Moidin* (1) that all that the transferee of a decree gets in law for the money paid by him to the decree-holder for the transfer of his decree is an agreement to transfer it, not a complete transfer until recognised by the Court. If this decision is sound law, then we think this appeal is bound to fail. But this decision has been dissented from by another Bench of the same Court in the case of *Sadagopachariar v. Ragunadachariar* (2). The learned Judges who decided that case remarked in their judgment: "There is nothing in s. 232, Civil Procedure Code, to suggest anything of the kind. On the other hand it can be gathered, from the section itself, that the completion of the transfer does not depend upon any recognition by the Court for it begins by saying: 'If a decree be transferred by assignment in writing,' thus assuming that there has been a complete transfer." With these remarks we agree. We see no reason why the transfer by a decree holder of his rights in the decree should not operate on the date of transfer any more than in the case of the transfer of any other kind of property. The Code of Civil Procedure lays down the method by which the rights can be enforced, but does not itself confer the rights, and it seems to us that the transferee of a decree purporting to contract should put in an application under r. 53 of O. XXI of the Code of Civil Procedure to remove an attachment of the decree made subsequently to this transfer whether he has himself taken steps to be entered on the record in place of the original decree-holder or not.

It is suggested on behalf of the respondents that the rights of a transferee of a decree are set forth in r. 16 of O. XXI and the rights of an attaching decree-holder in r. 53, and that whichever party enforces his rights to his decree is entitled to the benefit of those rights. It has been pointed out that cl. (3) of r. 53 lays down that the holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-r. (1) shall be deemed to be the representative of the holder of that decree, and that no such words occur in r. 16, dealing with the transferee by assignment. It is clear that so far as the Executing Court is concerned the provisions of rr. 16 and 53 must

(1) 20 M. 157; 7 Ind. Dec. (N.S.) 110.

(2) 3 Ind. Cas. 938; 33 M. 62; 6 M. L. T. 73.

be followed. But we are unable to agree that it further follows that, when the attaching decree-holder has executed the decree, he is necessarily entitled personally to the beneficial interest of his execution if in fact at the time of the execution he had no legal right to execute it on his own account. In such circumstances it seems to us that he must be regarded as the trustee of the person beneficially entitled to the profit of the decree. In this view of the law the order dismissing the suit in the present case cannot be confirmed. The Chettiar raised in his written statement, amongst others, the defence that the appellants were estopped from claiming the money now. That may or may not be so, but that will depend on the facts of the present case which have not yet been tried.

We accordingly set aside the decrees of the lower Courts dismissing the suit, and direct that the suit of the plaintiffs-appellants be re-admitted and heard on its merits. The costs of this appeal and of the appeals before the District Judge and the Single Judge of this Court will be borne by the respondents. The appellants will be entitled to a refund of the Court-fees paid by them in the three appeals.

A. N. A.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 608 OF 1927.

July 12, 1927.

Present:—Justice Zahhadur Rahim
Zahid Suhrawardy, Kt., and Mr. Justice
Mallik.

TARAPADA GHOSE—PLAINTIFF—
PETITIONER
versus

Srimati BAGALA SUNDARI BASU AND
ANOTHER—DEPENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, r. 11—
'Person', meaning of—Conduct of suit, whether can be
given to person not party to suit.

The word 'person' in O. I, r. 11 of the Civil Procedure Code means a party to the suit, and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of the rule. [p. 857, col. 1.]

Civil revision against a decision of the Subordinate Judge, Third Court at Alipore, dated the 12th April, 1927.

Sir Provas Chandra Mitter, Mr. Bimala Charan Deb and Babu Indu Prokash Chatterjee, for the Petitioner.

Mr. *Gunada Charan Sen* and *Babu Ramendra Chandra Roy*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule has been obtained by the plaintiff against an order of the Subordinate Judge of 24 Parganas, dated the 12th April, 1927, permitting the wife of the defendant to conduct the defence on his behalf under the following circumstances. The defendant *Protap Chandra Basu* was the Cashier and Collecting Agent for a number of years working under the plaintiff. The plaintiff's case is that on one morning he found the defendant absconding with the key of the iron safe in his charge. A criminal case was brought against him but he is still absconding. The present suit has been instituted for accounts against *Protap Chandra Basu* and the plaintiff also applied for attachment before judgment of certain sums of money. Thereafter, the opposite party No. 2, *Bagala Sundari Dasi*, applied for permission to conduct the case on behalf of her husband on the ground that her husband was either murdered by the plaintiff or was being kept in solitary confinement at the plaintiff's instance. The learned Subordinate Judge has been unable to find whether the version of the plaintiff was true or the defendant's wife's version relating to the disappearance of the defendant was true and permitted the wife to conduct the case on behalf of her absent husband. The order passed by the Subordinate Judge is based on two grounds. His interpretation of O. I, r. 11 gave him enough jurisdiction to entrust the defence to the wife though she was not a party to the suit. The other ground is that if O. I, r. 11 does not apply the Civil Procedure Code is silent and there is no express provision to meet the contingency that has arisen in the present case and, therefore, in the exercise of inherent jurisdiction vested in the Court he can give the conduct of the suit to the opposite party No. 2.

It has been argued before us that O. I, r. 11 does not authorise the Court to give the permission as above stated and that as there is no provision in the Code for allowing a third party to conduct a suit on behalf of an absent party without special authorisation the Court has no power to give such permission. As regards the first ground, it is contended on behalf of the opposite party that the word 'person' in O. I, r. 11 includes any person—be he a

party to the suit or not—and the Court has jurisdiction to give such permission to the wife in the present case to conduct the defence on behalf of her husband. As this is a case of first impression and no authorities are available either for or against, I have given my very careful consideration to the contentions raised on both sides and I find myself unable to agree with the interpretation put upon the rule by the Court below and urgently pressed before us by the learned Advocate appearing for the opposite party. The main argument upon which this view is supported is that O. I, r. 11, reproduces the provision of the last paragraph of s. 32 of the Code of 1882 which was as follows: "The Court may give the conduct of the suit to such plaintiff as it deems proper." The present Code has in O. I, r. 11 reproduced all the words of the repealed section except that the word 'plaintiff' has been changed into 'person'. It is accordingly argued that this change is instructive and gives an inkling into the mind of Legislature as to what was really meant by the change and it is said that the Legislature intended by the alteration of the words to invest the Court with power to give the conduct of the suit to any person whom it deems proper—be such person a party to the suit or a stranger to it. I do not think that the idea with which this alteration was made was as has been suggested by the opposite party. The alteration has been made in order to assimilate the wording of the rule of the Code to the corresponding rule of the Supreme Court in England. Order XVI, r. 39 of the Rules of the Supreme Court is, so far as is relevant for our present purpose, in these words: "The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit." Under the English Law the few cases which have been decided under this rule show that the Court has as much power to give the conduct of the suit to one of the plaintiffs as the conduct of the defence to one of the defendants. See the case of *Peek v. Ray* (1). The further reason for the alteration seems to be that under the law as it stood under the repealed Code of Civil Procedure the Court had power to entrust one of the plaintiffs with the prosecution of the suit. As it was

(1) (1894) 3 Ch. 282; 63 L. J. Ch. 647; 7 R. 259; 70 L. T. 769; 42 W. R. 498.

deemed to be desirable that the power of the Court to put one of the parties in charge of the suit should be extended to the conduct of the defence, a general word was used to include both the plaintiff and the defendant. As I have said, there is no case in support of the view pressed by the opposite party or that which I feel disposed to adopt; but the commentators of the Civil Procedure Code have put an interpretation on this rule which accords with my reading on the law. I only refer to their opinion in support of the view which I take in this matter independently of what they have stated. Sir John Woodroffe in his well known Edition of the Civil Procedure Code observes, commenting on O. I, r. 11, as follows: "The word 'suit' does not ordinarily include defence, but, according to the English practice, the conduct of the defence also is often given to one of the defendants..... Apparently with a view to adopt that practice, the 'person' has been substituted for the plaintiff." This view has been accepted and adopted by another commentator Mr. Nandlal in his useful Edition of the Civil Procedure Code. There is a decision in the Madras Court which shows how this rule has been understood. In *Saminatha Pillay v. Rajagopala Mudaliar* (2) the learned Judges held that it was permissible under O. I, r. 11 to transpose a defendant as a plaintiff and give him the conduct of the suit. The order within which r. 11 appears is described in the heading as relating to parties to suit, which lends strength to the view I have adopted. The word 'person' has been used in several rules under that Order. Though I do not think that the meaning which may be given to that word in any rule will necessarily govern the meaning of the word used in r. 11, a reference to the various rules in O. I may be made to show that the word 'person' was not used in any particular sense by the Legislature and that it should be interpreted according to context. Rule 1 says that all persons may be joined in one suit.....if such persons brought separate suits, any common question of law or fact would arise. Rule 3 says that all persons may be joined as defendants.....where if separate suits were brought against such persons any common question of law or fact would arise. There can be no doubt that the word 'person' used in these rules

means persons who are parties to the suits. Rule 6 empowers the plaintiff to join as parties to the same suit all or any of the persons severally or jointly and severally liable. Rule 7 says "Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants....." In these two rules the word 'person' has been used to indicate a person who is or may be a party to the suit. Some stress has been laid upon the use of the word in r. 8. It says "Where there are numerous persons having the same interest in one suit, one or more of such persons may...sue or be sued." The second clause of the rule says: "Any person on whose behalf or for whose benefit a suit is instituted.....may apply to the Court to be made a party to such suit." It is argued that the word 'person' in this rule means a person who is not a party to the suit and the use of the two words 'person' and 'party' in the second clause indicates that the Legislature intended to mark some distinction between the two classes of persons described as 'person' and 'party.' I do not think that there is much substance in this contention. The word 'person' has been used in the rule in the ordinary sense and it cannot be suggested that any other word could have been used. The rule deals with cases in which various persons are interested and it authorises one of such persons to sue or defend on behalf of the others. As I have said the rule opens with the words 'one or more of such persons may sue or be sued'; the word 'persons' there must mean those who are virtually parties to the suit. The second clause makes no distinction between 'person' and 'party' but only says that any person may apply to be made a party. In r. 10 the word 'person' has been similarly used without bearing any special significance. The rule says: "Where a suit has been instituted in the name of the wrong person as plaintiff.....the Court may order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just." Here the word 'person' has been used for the plaintiff on the record as also for a person who may be substituted or added as plaintiff. In cl. (2) it is laid down that if a party is improperly joined or the name of any other person ought to have been joined whether as plaintiff or defendant, the Court may pass order as authorised by the rule. Here the person who has been improperly joined has been described as a 'party'.

(2) 62 Ind. Cas. 360; 40 M. L. J. 208; 13 L. W. 148; (1921) M. W. N. 108; 29 M. L. T. 151

because he is a party to the suit and any one whom the Court thinks should be added as a party to the suit has been described as a person because he was not a party at the stage. The third clause of the rule says that no person shall be added as a plaintiff or as the next friend without his consent. This use of the word 'person' does not give us much help in interpreting the word in r. 11. It is contended on behalf of the opposite party that the word 'person' in r. 11 must be taken in its ordinary sense meaning anyone including a person who is not a party to the suit. But one of the canons of construction of a Statute is that reasonable interpretation should be given to each word. It seems unreasonable to hold that the Legislature by the use of the word in r. 11 has intended that the Court may authorise anyone to appear on behalf of a party to the suit and have the conduct of the suit except under special provisions contained in the Code itself. The result of adopting the view which has been pressed upon us will be that no party to a suit may appear and the Court may give power to any one to conduct the suit or defend it on behalf of a party. Of course there is the safeguard that the Court will exercise judicial discretion but the investing of the Court with such general authority seems to be unreasonable. A reference to r. 12 may be made. There it is laid down that where there are more plaintiffs or defendants than one, they may authorise one of them to conduct or defend the suit. If it was intended that any one who is not a party to the suit may be entrusted with the conduct of the suit it was not necessary under r. 12 that one of the parties should be empowered for the purpose. On all these considerations I am of opinion that the word 'person' in O. I, r. 11 means a party to the suit and that a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of that rule. In this view this Rule is made absolute with costs and the order of the lower Court empowering the opposite party No. 2 Bagala Sundari Lasi to conduct the defence on behalf of the defendant Pratap Chandra Basu is set aside. We assess the hearing fee at four gold mohurs.

Mallik, J.—I agree.

A. N. A.

Rule made absolute.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 32 OF 1927.

August 3, 1927.

Present :—Sir Guy Rutledge, Kt., Chief Justice and Mr. Justice Carr.

NACHIMAI ACHI—APPELLANT

versus

S. N. SUBRAMONIAN CHETTY—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 39—Execution of decree—Transmission of decree—Ministerial act—Power of Court transmitting decree to add legal representatives and leave question of limitation to be decided by Executing Court.

An order in execution which determines the question of the right of a judgment-debtor to have the decision of the Court on the contentions raised by him is appealable. [p. 858, col. 2.]

An order transmitting a decree for execution to another Court is a ministerial act and could rightly be made *ex parte*. The transmitting Court has also power to allow execution against the legal representatives of a judgment-debtor and transfer the decree for execution without giving any notice to them leaving them to raise the objections on the score of limitation in that Court; and the mere fact that notice was given and objections were raised cannot affect the power of the Court to act in the same way. [p. 859 col. 2.]

Banku Behary Chatterji v. Naraindas Dutt (1), relied on.

Mr. Cowasjee (with him Mr. B. K. B. Naidu), for the Appellant.

Mr. Paget, for the Respondent.

JUDGMENT.—In Suit No 308 of 1909 of the Chief Court of Lower Burma the respondent, Subramonian Chetty, obtained a simple money decree against five defendants, of whom the fifth was K. M. P. R. S. Palaniappa Chetty of Karakudi, in the Madras Presidency. The decree was passed on the 3rd of June, 1910, and in July of that year it was transmitted to the District Court of Ramnad, in Madras, for execution. There it remained until the 25th February, 1922, when the Ramnad Court returned it to this Court with a letter stating that it was returned "so as to enable the decree-holder to bring in the legal representatives of the deceased defendants on record" and that no satisfaction had been obtained by execution in that Court.

Nothing was done in this Court until on the 20th April, 1923, the decree-holder (respondent) applied to have the appellant Nachimai Achi brought on the record as the heir and legal representative of K. M. P. R. S. Palaniappa Chetty, deceased. On this petition notice was issued to the appellant. This was held to have been duly served and as the appellant did not appear

an *ex parte* order was passed directing that the appellant be brought on the record as the legal representative of the fifth defendant. This was done by adding her name as legal representative in the plaint and decree in the suit. The formal propriety of this procedure is at least questionable, since the Civil Procedure Code does not provide for it on the lines of the provisions of O. XXII in respect of suits. The only actual provision in the Code is s. 50, which says that the decree-holder may apply to the Court which passed the decree to execute it against the legal representatives. The point, however, is not now of material importance.

This order was passed on the 4th July, 1923, and on the 9th of August the respondent applied for re-transmission of the decree to the Ramnad Court for execution. This was granted and the amended decree was so transmitted.

On the 24th of November, 1923, the appellant applied to have these two *ex parte* orders vacated. Notice was issued to the respondent, who contested the application. After much delay it was decided on the 19th of January, 1926, when the learned Judge on the Original Side allowed it and set aside the *ex parte* orders. His order came before this Bench in Civil Miscellaneous Appeal No. 43 of 1926, which appeal we dismissed on the ground that the order was not a judgment within the meaning of cl. 13 of the Letters Patent of this Court and was, therefore, not appealable.

The matter then went before another Judge on the Original Side, whose order on it is now appealed from.

The contention of the appellant was that the decree was no longer executable, being time-barred under s. 48 of the Civil Procedure Code, and that the application to bring her on the record, or to execute the decree against her, was also time-barred under Art. 181 of the Schedule to the Limitation Act. The respondent contends that there is no bar in either case because of the various proceedings in execution in the Ramnad Court.

The learned Judge has refused to decide between these two contentions. The view he has taken is that the questions raised are questions which ordinarily should be decided by this Court, but that in the peculiar circumstances of this case they ought to be decided by the District Court

of Ramnad, because the decision will involve the construction of the previous order in execution of that Court.

The appellant urges before us that she is entitled to have these questions decided by this Court. The respondent supports the order under appeal and contends further that there is no right of appeal against that order.

On this last question we are of opinion that an appeal does lie because the order finally determines so far as this Court is concerned the question of the right of the appellant to have the decision of this Court on the contentions raised by her. In this respect it differs from the order in question in Civil Miscellaneous Appeal No. 43 of 1926, which merely set aside certain *ex parte* orders and left the questions raised for decision on contest.

As regards the first contention this case is strikingly similar to *Banku Behary Chatterji v. Naraindas Dutt* (1) which was decided by the Privy Council. The facts of that case are somewhat more fully stated in the judgment of the Calcutta High Court in *Narain Dass Dutt v. Banku Behary Chattopadhyaya* (2). From the last-mentioned report it appears that more than twelve years after the passing of a mortgage decree by the Calcutta High Court the decree holder "applied to the High Court praying that the (deceased) mortgagor's widow and his two sons.....be substituted on the record in his place; and that.....the decree be transmitted to the Hoogly Court for execution." This was done without notice to the widow and sons. The Hoogly Court issued notice to them under O. XXI, r. 22 of the Civil Procedure Code and they then filed objections not in the Hoogly Court, but in the High Court itself. The principal objections were that the widow was not a legal representative of the mortgagor, and that execution was barred by the Law of Limitation. These objections were heard by a Judge of the High Court and a consent order was passed. Of this order Mr. Justice Richardson says in his judgment "as it seems to me, its only appreciable effect was to amend..... the order for the transmission of the decree by striking out the name of the mortgagor's widow." Later he says "As

(1) 101 Ind. Cas. 24; 31 O. W. N. 589; A. I. R. 1927 P. O. 73; 52 M. L. J. 565; (1927) M. W. N. 336; 4 O. W. N. 474; 29 Bom. L. R. 850; 38 M. L. T. 90; 45 C. L. J. 507; 54 C. 500; 26 L. W. 180 (P. C.).
(2) 78 Ind. Cas. 1001; A. I. R. 1925 Cal. 213.

I regard the matter, the parties or their legal advisers recognised when they came before Pearson, J., that what I may call the substantial objections of the appellants to the execution of the decree fell to be decided not by the learned Judge but by the Hoogly Court to which the decree had been transmitted. The agreement arrived at related merely to the form of the order for the transmission of the decree and not to its substance. When the original order, made without notice to the appellants, gave liberty to the respondent to execute the decree against them, such liberty was merely a liberty to the respondent to proceed in execution subject to all just exceptions on the part of the appellants and it would, perhaps, have obviated misunderstanding if some such words had been introduced."

Again he says "Under the scheme of the Code, the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of Execution."

This judgment was passed on an appeal from the Hoogly Court before which the legal representatives had urged the objections that execution of the decree was time-barred under Art. 183 of the Limitation Act. The Hoogly Court held that the original *ex parte* order of the High Court, coupled with the subsequent consent order and as amended thereby, constituted a revivor of the decree. In the appeal the High Court held that it did not and that execution of the decree was in fact time-barred.

The decree-holder appealed to the Privy Council, which upheld the judgment of the High Court. The judgment of their Lordships was delivered only on the 22nd February in this year, that is, after the order now under appeal had been passed. They say expressly that the order of transmission would be rightly made *ex parte* and as a ministerial act. And although they do not expressly say so it follows by necessary implication from their judgment, in view of the facts before them, that the order permitting execution against the legal representatives would also rightly be made *ex*

parte. On this point we ourselves expressed a contrary opinion in our judgment in Civil Miscellaneous Appeal No. 43 of 1926, but in the face of this judgment of their Lordships we can no longer sustain that opinion.

There are, of course, differences of detail between the cases now before us and that dealt with by their Lordships, but as far as at present concerns us the essential features of the two are the same. The effect of the judgment is to show that this Court could rightly have allowed execution against the legal representative, and have transferred the decree to the Ramnad Court for execution, without giving any notice to the appellant and leaving her to raise her objections on the score of limitation in that Court. We do not think that the fact that notice has been given to her and that she has raised the objections in this Court can affect the power of the Court to act in the same way, which is what the learned Judge has done in the order under appeal.

We think also that in the circumstances of the case he was right in adopting that course, although we regret that one result must necessarily be to prolong further this already protracted litigation. The materials on the record are not, in our opinion, sufficient for a satisfactory decision of the question. They appear to be far from complete. On the other hand, the whole of the previous proceedings in execution have been taken in the Ramnad Court and all necessary materials for a decision are, therefore, available to that Court.

We, therefore, dismiss this appeal with costs, ten gold mohurs. A copy of this judgment will be sent to the Ramnad Court.

A. N. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE No. 432 OF 1927.

May 31, 1927.

Present:—Mr. Justice D. N. Mitter.

RADHA BALLABH GUHA—PETITIONER,

versus

PANOHKARI SIL AND ANOTHER—

OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of

1837); Sch. II, Art. 35 (ii)—Suit by landlord for value of trees illegally cut by tenant—Jurisdiction of Small Cause Court—Small Cause suit tried as regular suit—Appeal.

A suit by a landlord for value of trees illegally cut by a tenant is not exempted from the jurisdiction of a Small Cause Court by reason of the provisions of Art. 35 (ii) of the Provincial Small Cause Courts Act where it does not appear from the allegations in the plaint that the act of the tenant constitutes an offence under Chap. XVII of the Penal Code.

No appeal lies from a decree passed in a suit which is really of a Small Cause nature even though it is erroneously tried as a regular suit.

Mohini Mohan Roy v. Ramdas Paramhansa (1), followed.

Civil revision against an order of the Officiating Subordinate Judge, Fourth Court, Dacca, dated 17th February, 1927 reversing that of the Munsif, Fifth Court, Dacca, dated the 30th September, 1926.

Babu *Jatindra Nath Sanyal*, for the Petitioner.

Babu *Bankim Chandra Banerjee*, for the Opposite Party.

JUDGMENT.—This Rule was issued on the opposite party to show cause why the order of the Subordinate Judge of Dacca, dated the 17th of February, 1927, entertaining and allowing an appeal preferred by the opposite party from a decision of the Munsif of Dacca, dated the 30th of September, 1926, should not be set aside.

It appears that the plaintiff, who is the petitioner before this Court, instituted a suit in the Court of the Munsif of Dacca for recovery of a certain sum as the price of trees which had been cut by the defendant. The defendant is plaintiff's tenant, and the plaint alleged that the defendant had, as such tenant no right to cut away and misappropriate any tree without the permission of the plaintiff either under the local custom or under the law, and as the defendant wrongfully and illegally cut away two *hijal* trees from the land he was liable to pay compensation. The Munsif decreed the plaintiff's suit and ordered that "the suit be decreed in part for Rs. 5-2-6 with proportionate costs." The suit was valued at less than Rs. 100 and it is admitted that the Munsif who tried the suit was vested with powers of a Small Cause Court Judge to try cases up to the value of Rs. 100.

It is argued that the present suit was a suit of a Small Cause Court nature and although the Munsif tried it under his ordinary jurisdiction no appeal lay from the decision of the Munsif to the Subordinate

Judge; and, in support of this contention, reliance is placed on a decision of the learned Chief Justice in the case of *Mohini Mohan Roy v. Ramdas Paramhansa* (1). This position is not controverted by the learned Wakil for the opposite party. The question, therefore, on which this Rule turns is this, namely, whether on a true reading of the plaint it can be said that the suit was one which was exempted from the jurisdiction of the Court of Small Causes by reason of the provisions in Art. 35, cl. (ii) of the Provincial Small Cause Courts Act which excludes cases which fall under Chap. XVII of the Indian Penal Code from the cognizance of a Small Cause Court.

It appears to me from the allegations in the plaint that the allegations do not constitute mischief within the meaning of s. 426 which falls under Chap. XVII of the Indian Penal Code. The dispute is between the landlord and a tenant and the question as to whom the right to the trees or the right to the timber when the trees are felled belongs is often a question of considerable difficulty. The tenant for aught one knows might *bona fide* believe that he was entitled to cut the trees and if under such *bona fide* belief he cut the trees the provisions of Chap. XVII of the Indian Penal Code would not be applicable to his acts. I think, therefore, that the suit was one which was not excluded from the cognizance of the Court of Small Causes. That being so, no appeal lay to the Subordinate Judge.

The result is that the order of the Subordinate Judge is set aside and the decree of the Munsif is restored but, in the circumstances of the present case, as no objection was taken to the competency of the appeal before the Subordinate Judge by the petitioner, he is not entitled to costs in this Court.

A. N. A.

Rule made absolute.

(1) 80 Ind. Cas. 210; 33 C. L. J. 532; 28 C. W. N. 271; A. I. R. 1924 Cal. 487.

[106 I. C. 1927]

PAIKU V. KAMALJI.

RANGOON HIGH COURT.
SPECIAL SECOND CIVIL APPEAL NO. 21
OF 1927.

July 26, 1927.

Present:—Mr. Justice Maung Ba.

U PO HLA—APPELLANT

versus

U PO THA—RESPONDENT.

Mortgage—Oral mortgage—Suit by mortgagor based on title—Mortgagee, whether entitled to claim amount borrowed—Equity.

In the case of a mortgage which is invalid for want of a registered instrument evidencing it, it is open to the mortgagor to bring a suit for possession solely based on title; but in such a case the Court should on equitable grounds order the mortgagor to repay the amount borrowed.

Maung San Min v. Maung Po Hlaing (1), relied on.

Mr. Paw Tun, for the Appellant.

Mr. P. K. B. Basu, for the Respondent.

JUDGMENT.—There is no dispute that Ma Hlay was the original owner of the suit property. That property was attached in execution of a decree against her and the respondent Maung Po Tha bought it. The property was at the time of attachment in the possession of Maung Po Hla; the appellant Maung Po Tha consequently brought a suit out of which this appeal has arisen, for the recovery of possession. His suit was resisted on the ground that Maung Po Hla was in possession as a mortgagee. It has been proved that the alleged mortgage was not evidenced by any registered document. If there had been a valid mortgage what Maung Po Tha had actually purchased would only be the right of equity of redemption. Since there was no valid marriage, he had purchased the legal title to the property. But it has been proved that this property formed one third share of the entire piece, which had been mortgaged to Maung Po Hla for Rs. 450. In these circumstances the trial Judge rightly decreed the suit and ordered the plaintiff to pay compensation to Maung Po Hla as an equitable relief. On appeal the learned Additional District Judge modified the lower Court's decree by omitting the payment of compensation. He has done so on the ground that the alleged mortgage was invalid.

His action is not correct. There is a dictum in the Full Bench case of *Maung San Min v. Maung Po Hlaing (1)* that in the case of an abortive mortgage, it may be open to the mortgagor to bring a suit

(1) 94 Ind. Cas. 567; 4 Rang. 1; A. I. R. 1925 Rang. 291; 4 Bur. L. J. 118 (F. B.).

for possession based solely on title and pray for a decree for possession conditioned on equitable grounds on re-payment of the amount borrowed. I see no sufficient reason to disagree with that dictum.

I, therefore, set aside the decree of the District Court and restore that of the Township Court. I make no order as to costs in this Court as well as in the District Court.

A. N. A.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 453 OF 1927.

September 26, 1927.

Present:—Mr. Findlay, J. C.

PAIKU—PLAINTIFF—APPELLANT

versus

Musammât KAMALJI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Suit for building on basis of sale-deed—Title found against—Subsequent suit for site of building on same title—Res judicata.

The plaintiff who had purchased a house and the site of a house under a sale-deed sued for possession of the materials of the house. His title was denied by the defendant and the question was decided against him. He subsequently sued for possession of the house site on the basis of the same sale-deed.

Held, that the subsequent suit was barred by *res judicata* inasmuch as the plaintiff was bound by the decision on the question of title in the previous suit. [p. 862, col. 1.]

Gopala v. Ania (1) and Govind Baba Gujar v. Shrimant Jijibai Sahab (2), distinguished.

Appeal from the decree of the Additional District Judge, Nagpur, dated the 14th July, 1927, in Civil Appeal No. 34 of 1927.

FACTS.—On 12th August, 1908, the appellant obtained a sale-deed of a house. In 1925 he brought a suit against the respondent's deceased husband for recovery of damages for removal of the materials of the house. The defence was that there was no house on the site in question for a long time, that the site was in possession of the respondent and her husband for about 20 years, that no materials were removed by the respondent's husband and that the cause of action did not survive against the respondent. The lower Court found in favour of the respondent on all these points and the suit was dismissed. The appellant did not appeal against that decision but filed the suit out

of which this appeal has arisen for recovery of possession of the same site, alleging that the respondent's husband dispossessed him from it in December, 1925. The defence was that the decision in the former suit on the question of title to the site operated as *res judicata*. This defence prevailed in the lower Court and the suit was dismissed. The plaintiff has appealed.

In appeal it is contended that it was not necessary in the former suit to decide the question of title to the site and the decision thereon does not operate as *res judicata*. The learned Pleader for the respondent does not dispute the correctness of the proposition that if that question was not necessary to be decided in the former suit, the decision thereon would not operate as *res judicata*, but he urges that it was necessary to decide it in the former suit. The only question for determination in this appeal, therefore, is whether the said question was necessary to be decided in the former suit.

Mr. S. Y. Deshmukh, for the Appellant.

JUDGMENT.—I have heard Counsel for the plaintiff-appellant in this case but find myself in full agreement with both the lower Courts in their finding that the judgment in Suit No. 275 of 1925 was necessarily *res judicata* in the present case, for there cannot be the slightest doubt but that in that suit the present plaintiff could and should have joined the relief which he now claims. It is equally clear to me that a decision on the question of the appellant's title to the house had necessarily to be made in that suit, as the then defendant directly raised the question of title, and that was found against the present plaintiff. The facts in *Gopala v. Ania* (1) were very different. In it, in a previous suit the decision in which the lower Courts had held to operate as *res judicata*, the question of title was neither put in issue nor adjudicated upon. In the case quoted, the cause of action in the previous suit on a lease arose *ex contractu*; here, on the other hand, the causes of action, although relating to different details, *viz.*, in the previous suit the materials of the house, and in this suit the site of the house, both arose out of precisely the same title, *viz.*, the plaintiff's claim was that he had acquired the property under the sale-deed of 12th August, 1908. The question of alleged

(1) 2 N. L. R. 94.

res judicata discussed in *Govind Baba Gujar v. Shrimant Jijibai Saheb* (2) was an entirely different one, nor is the decision in *Ramaswami Ayyar v. Vythinatha Ayyar* (3) which has been quoted by Counsel for the appellant, at all apposite to the facts of, or the principles involved in, the present case.

I am in full agreement with the decisions of the Judges of the two lower Courts and dismiss the present appeal without notice to the respondent.

A. N. A.

Appeal dismissed.

(2) 13 Ind. Cas. 849; 33 B. 189; 14 Bom. L. R. 9.

(3) 26 M. 760.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 831 OF 1927.

November 7, 1927.

Present:—Mr. Justice Tek Chand.

NARAIN DAS—DEFENDANT—APPELLANT
versus

BELI RAM—PLAINTIFF—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 41—Finding of fact based on erroneous assumptions—Second appeal—Interference.

A finding of fact based on erroneous assumptions and unwarranted conjectures is liable to be set aside in second appeal. [p. 863, col. 2.]

Second appeal from a decree of the Additional District Judge, Lahore, dated the 3rd January, 1927, affirming that of the Subordinate Judge, Third Class, Kasur, District Lahore, dated the 24th of August 1926.

Mr. Charan Singh, for the Appellant

Mr. Amar Nath Chopra, for the Respondent.

JUDGMENT.—The parties to this case are joint owners of certain agricultural land. The plaintiff sued for a declaration that the land in dispute, which is part of a large area of land jointly held by him and the defendant, had been made fit for cultivation by him alone at his own expense, that he was in exclusive possession thereof and that the defendant had no right to disturb such exclusive possession. The defendant admitted that both parties were joint owners of the land, but, denied that the plaintiff was in exclusive possession of the land in suit. His contention was that the land had been made fit for cultivation by both the parties at their joint expense. The Subordinate Judge decreed the suit and this decree was upheld by the learned District

Judge on appeal. The defendant has come up to this Court in second appeal.

The learned District Judge has found that the land was broken from waste by the plaintiff at his exclusive expense and that he had been in exclusive possession since long. It appears, however, that his finding is vitiated by a number of erroneous assumptions made by him. He states that in the *khasra gir-dwaris* of 1920-21 and 22, the plaintiff's name alone is mentioned in the cultivation column. It is clear, however, from the record, and indeed it is admitted by the respondent's Counsel, that this is incorrect. The *khasra gir-dwaris* show that in 1920-21, 1921-22 and 23-24 the land was cultivated by both the plaintiff and the defendant jointly. It is only in the *jamabandi* of 1922-23 that Beli Ram alone is shown as in cultivating possession.

The learned District Judge while dealing with the entry of 1923-24 has stated that this entry was suspicious and had been made by Gandu Ram Patwari in collusion with the defendant and that "this Gandu Ram had been dismissed from service." The appellant has filed an affidavit that this statement was wrong, that there is nothing on the record to indicate that Gandu Ram Patwari made any such entry or indeed that there has ever been a Patwari in this village of the name of Gandu Ram or that he was dismissed from service. This affidavit has not been contradicted by the respondent and Mr. Amar Nath Chopra had admitted that he is unable to point out anything on the record in support of the learned District Judge's remarks.

Further in deciding whether a certain entry had been signed by the plaintiff or not the lower Court has relied upon the evidence of Amar Nath (P. W. No. 14), who appeared as an expert to identify the respondents' signatures. This Amar Nath, however, is in no sense of the term expert and respondent's Counsel has conceded that his evidence was not admissible as that of expert under the Evidence Act. It also appears that the learned District Judge has misread the evidence of Maghi Ram Patwari on points, which have an important bearing on the case. Various other mistakes in the judgment of the learned District Judge have also been pointed out to me by both Counsel. Having regard to all these circumstances am

of opinion that the finding of the learned District Judge is vitiated by erroneous assumptions and unwarranted conjectures and that the appeal must be heard *de novo* .

I, therefore, accept the appeal, set aside the judgment and decree of the District Judge and send back the case to him for re-hearing and disposal in accordance with law. The Court-fee paid on this appeal will be refunded. Other costs will be costs in the cause.

R. L.

A. N. A.

*Appeal accepted :
Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1412 OF 1924.

May 4, 1927.

*Present :—Mr. Justice Devadoss and
Mr. Justice Jackson.*

KOLA SURAYYA AND OTHERS—
PLAINTIFFS NOS. 2 AND 4—APPELLANTS
versus

KOLA SUBBAMMA AND OTHERS—
DEFENDANTS NOS. 2, 4, 6, 8, 9 AND 11 TO 20—
RESPONDENTS.

*Limitation Act (IX of 1908), s. 7, Sch. I, Art. 44—
Alienation by guardian of minor brothers—Elder
brother, failure of, to set aside sale in time—Sub-
sequent suit by younger brothers—Limitation—Hindu
Law—Minor—Paternal grandmother, competency of,
to act as guardian.*

In the case of an alienation by a guardian of members of a joint Hindu family, who are minors, if the eldest brother, who is naturally the managing member of the family on attaining majority, does not bring a suit within time to set aside the alienation, any suit by the younger brothers, thereafter would be barred inasmuch as the suit would be barred against the elder brother.

Dorisami Sirumudan v. Nondisami Saluvan (1), followed.

Under the Hindu Law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grand-children and is entitled to act as such.

Second appeal against a decree of the Court of the Subordinate Judge, Rajamundry, in A. S. No. 175 of 1923, preferred against that of the Court of the Additional District Munsif of Rajamundry in O. S. No. 440 of 1918.

Mr. Ch. Raghava Rao, for the Appellants.
Mr. Viyanna, for the Respondents.

JUDGMENT.—The first point urged in the second appeal is that the suit is not barred by limitation so far as the plaintiffs are concerned, even though it might be barred so far as the first defendant is concerned. The eldest brother who had attained

ed majority did not sue in time to set aside the sale made by the second defendant, the paternal grandmother and guardian of the plaintiffs and the first defendant during their minority. The point is clearly covered by the decision in *Doraisami Sirumadan v. Nondisami Saluvan* (1), wherein it was held that if the eldest brother, who is naturally the managing member of the family, does not bring a suit within time to set aside an alienation, any suit by a younger brother would be barred inasmuch as the suit is barred against the elder brother. Mr. Raghava Rao, who appears for the appellants, contends that the authority of *Doraisami Sirumadan v. Nondisami Saluvan* (1) is considerably shaken by the decision of the Privy Council in *Jawahir Singh v. Udai Parkash* (2). In that case, their Lordships did not deal specifically with the case in *Doraisami Sirumadan v. Nondisami Saluvan* (1). They simply say that they agree with the High Court of Allahabad as regards the question of limitation, but unfortunately the judgment of the Allahabad High Court is not before us and we do not know on what grounds the learned Judges who decided that case distinguished that case from the case in *Doraisami Sirumadan v. Nondisami Saluvan* (1). The authority of *Doraisami Sirumadan v. Nondisami Saluvan* (1) has not been challenged so far as it has been brought to our notice by any decision of this Court. We are, therefore, bound to accept the authority of *Doraisami Sirumadan v. Nondisami Saluvan* (1) as binding upon us. The point urged by the appellants cannot, therefore, be sustained in view of the decision in *Doraisami Sirumadan v. Nondisami Saluvan* (1).

The next point urged is that the paternal grandmother is not the natural guardian of the plaintiffs and, therefore, the shorter period of limitation is not applicable to the case. There is an observation of Sadasiva Aiyar, J., in *Thayammal v. Kuppanna Koundan* (3) that "nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female

(1) 21 Ind. Cas. 410; 38 M. 118; 25 M. L. J. 405; 14 M. L. T. 401.

(2) 93 Ind. Cas. 216; 48 A. 152; 24 A. L. J. 97; A. I. R. 1926 P. C. 16; (1926) M. W. N. 197; 50 M. L. J. 344; 3 O. W. N. 365; 43 O. L. J. 374; 30 C. W. N. 698; 28 Bom. L. R. 851; 53 I. A. 36 (P. C.).

(3) 26 Ind. Cas. 179; 33 M. 1125 at p. 1126; 27 M. L. J. 285.

ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties." This observation of the learned Judge is relied upon by Mr. Trevelyan in his well-known book "on Minors". There is also an observation of Mr. Justice Banerjee in *Mohanund Mondal v. Nafur Mondul* (4) that "it is not questioned and it cannot be very well questioned, that the *de facto* manager answers to the description of natural guardian in this case." In that case, the paternal grandmother acted as the guardian of the person and property of the minor. There is no direct authority for the contention that the paternal grandmother is not the natural guardian of her grand-children in the absence of their father and mother. Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grand-children in the absence of their father and their mother. We think that, in the absence of the father and the mother, the paternal grandmother is the natural guardian of her grand-children. We find this point against the appellants and, in the result, the second appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

(4) 26 C. 820; 3 C. W. N. 770; 13 Ind. Dec. (N. S.) 1125.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1179 OF 1927.

November 23, 1927.

Present:—Mr. Justice Tek Chand.

RAM CHAND alias KISHEN SINGH

AND OTHERS—DEFENDANTS—APPELLANTS

versus

WARYAM SINGH AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Custom—Succession—Widow of pre-deceased son, right of, to husband's share—Onus of proof.

Under the general agricultural custom the widow of a pre-deceased son is entitled only to maintenance. But in some tribes in which the right of representation is recognised, she is entitled to succeed to the share which her husband would have taken if he had been alive when such succession opened out. The burden of proving such a special custom is on the person who asserts it.

Second appeal from the decree of the District Judge, Jullundur, dated the 27th of January, 1927, affirming that of the Subordinate Judge, Third Class, Jullundur, dated the 21st of April, 1926.

Mr. N. C. Mehra, for the Appellants.

Mr. Anant Ram, for the Respondents.

JUDGMENT.—One Sawan Singh, grandfather of plaintiffs Nos. 1 and 2 and great grandfather of plaintiffs Nos. 3 and 4, sold certain land in 1902. Plaintiffs Nos. 1 and 2 and the father of plaintiffs Nos. 3 and 4 instituted the usual declaratory suit in 1913 to contest this alienation. That suit was ultimately decided by the Chief Court on the 4th of June, 1918, when a decree was passed in favour of the plaintiffs declaring that they would be entitled to possession of the land after the death of Sawan Singh vendor, on payment of Rs. 320. Some years later, Sawan Singh died and the plaintiffs instituted a suit for possession of the land on payment of Rs. 320 against the vendees but this suit was dismissed on the ground that Sawan Singh's widow was still alive and that in her lifetime the reversioners were not entitled to oust the vendees.

The widow having since died the present suit was instituted by the plaintiffs to recover possession of the land. The vendees urged in defence that *Musammatt Dhan Kaur*, the widow of Natha Singh, a pre-deceased son of Sawan Singh, vendor, was still alive and according to the custom of the tribe of the parties she was entitled to succeed to Sawan Singh's property and in her life-time the suit for possession was not maintainable. The first Court held that the vendees had failed to establish that by custom she was one of the heirs of Sawan Singh's estate and passed a decree in favour of the plaintiffs. On appeal by the vendees the learned District Judge held that as *Mussammatt Dhan Kaur* had not been made a party to the suit it was not necessary to decide whether she was or was not entitled to succeed to the estate of Sawan Singh. He was of opinion that according to the terms of the decree of the Chief Court dated the 4th of June, 1918, the plaintiffs were entitled to a decree for possession. He accordingly dismissed the defendants' appeal.

On second appeal Mr. Mehra has urged that the learned District Judge ought

not to have decided the case without determining the rights of *Musammatt Dhan Kaur* in Natha Singh's estate. I do not, however, see how the suit of the plaintiffs can be dismissed in entirety, even if *Musammatt Dhan Kaur* is entitled to succeed to a share in the estate of her father-in-law. Under the general agricultural custom the widow of a predeceased son is entitled only to maintenance, but in some tribes in which the right of representation is recognised, she is entitled to succeed to the share which her husband would have taken if he had been alive when succession opened out. Even if it be presumed that such a custom exists in the tribe of the parties *Musammatt Dhan Kaur* would be entitled to succeed to one-third of the land only and the vendees (defendants) cannot refuse to surrender the remaining two-thirds of the land to the plaintiffs. Mr. Mehra is unable to suggest any grounds to support his clients' case *qua* this two-thirds share and I must hold that the suit has been rightly decreed *qua* it.

As to the remaining one-third it seems to me necessary that before the plaintiffs could succeed they ought to show that they have a right to get immediate possession of it and in order to decide this matter it would be necessary to determine what *Musammatt Dhan Kaur's* rights are even though she is not a party to the litigation. As the learned District Judge had given no finding on it and as the question had been put in issue I allowed the Counsel for both parties to address me on the evidence. The two instances on which the defendants rely are vague and indefinite and it is not clear in what circumstances the widows in those cases succeeded. The evidence is very meagre and inconclusive and is, in my opinion, wholly insufficient to discharge the onus which lay on the defendants to prove a special custom. The defendants cannot, therefore, resist the plaintiffs' claim for possession of this part of the land also.

The appeal fails and is dismissed with costs.

R. L.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 74 of 1924.

July 18, 1927.

- Present:—Mr. Justice Wallace.

VISALAKSHI AMMAL AND OTHERS—

PETITIONERS

versus

VEERASWAMI NAICKER AND OTHERS—

RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 55 (1)(g)—Implied covenant to discharge encumbrances, whether runs with land.

The covenant under s. 55 (1) (g), Transfer of Property Act, imposing liability on a vendor of immoveable property to discharge all encumbrances in the property existing at the time of sale except where the property is sold subject to encumbrances does not run with the land.

Venkatarama Iyer v. Ramaswami Iyer (1), followed.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Mayavaram, in S. O. S. No. 1069 of 1922.

Mr. S. Muthiah Mudaliar, for the Petitioners.

Mr. T. Nallasivam Pillai, for the Respondents.

JUDGMENT.—It is argued for petitioner that the covenant set out in Transfer of Property Act, s. 55 (1) (g), is not one which runs with the land and the difference in language between (1) (g) and the proviso to sub-s. (2) supports that view. It is also supported by the remarks in a case reported as *Venkatarama Iyer v. Ramaswami Iyer* (1) which relies on *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar* (2) a ruling under the corresponding s. 65 as regards the mortgages. The view of the lower Court that the proviso in sub-s. (2) covers sub-s. (1) (g) also cannot be upheld. Exhibit A-1 only purports to sell such interest as the vendor had and not an absolute freehold free of all encumbrances. Sub-s. 2, therefore, does not import the sale of any such freehold.

Plaintiff's claim under s. 55 (1) (g) is limited to a claim against his vendor, i. e., 2nd defendant, and he is not entitled to a decree against 1st defendant.

I modify the decree of the lower Court and direct that the name of the 1st defendant be struck out of the decree. First defendant will get her own costs

(1) 93 Ind. Cas. 670; 22 L. W. 786; A. I. R. 1926 Mad. 173.

(2) 30 M. 67; 2 M. L. T. 36.

from plaintiff here and below, and plaintiff will get his costs from 2nd defendant in the Court below.

V. N. V.

Decree modified.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No.

671 OF 1927.

November 4, 1927.

Present:—Mr. Justice Dalip Singh.

CHATTAR SINGH AND ANOTHER—

JUDGMENT-DEBTORS—APPELLANTS

versus

MESSRS. HARRI DATT-LAKHMI DATT—

DEGREE HOLDERS—RESPONDENTS.

Execution of decree—Security for restitution—Order accepting security—Appeal.

No appeal lies from an order in execution proceedings accepting security, on the ground of insufficiency thereof.

Saraswati Barmonya v. Moti Barmonya (1), followed.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lyallpur, dated the 14th March, 1927.

Sardar Nihal Singh, for the Appellants.

Mr. D. C. Ralli for Mr. Abdul Rashid, for the Respondents.

JUDGMENT.—In this case the appellant has appealed against an order of the Executing Court accepting certain persons as surety for restitution pursuant of the order of this Court, dated the 9th December, 1926. No copy of the order of the Executing Court was filed along with the application. An affidavit was put in that this copy was not available though applied for. It appears that the copy was given about two days afterwards, after the affidavit, i. e., sometime in March, 1927. Up till now, however, the copy has not been filed and the Counsel's only excuse is that he forgot all about it.

A preliminary objection was taken that no appeal lies against an order of a Court accepting security on the ground of insufficiency. *Saraswati Barmonya v. Moti Barmonya* (1) is cited in support of this. In the present case the Court was satisfied with the personal security of the surety offered and never demanded hypothecation of his property. The ground, therefore, of absence of registration does not arise and as regards the other grounds I respectfully

(1) 20 Ind. Cas. 72; 41 C. 160; 17 C. W. N. 1240,

agree with the Calcutta ruling that no appeal lies from an order accepting security concerning sufficiency thereof.

I, therefore, dismiss this appeal with costs.

R. L.

Appeal dismissed.

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPLICATIONS NOS. 118

TO 164 OF 1923.

August 24, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.
Maharajah BIR BIKRAM KISHORE
MANIKYA BAHADUR—PLAINTIFF—

APPELLANT

versus

ALI AHAMAD AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Appeal to Privy Council—Jurisdiction of High Court to order appellant to put guardian ad litem of minor respondent in possession of funds after admission of appeal—Practice of Calcutta High Court.

A High Court has no power, after an appeal to the Privy Council has been finally admitted and the record has been despatched to England to make an order directing the appellant to put the guardian *ad litem* of the minor respondents in funds to have the appeal conducted on their behalf. [p. 868, col. 1.]

Although it is in accordance with the practice of the Calcutta High Court that in default of any more suitable next friend or guardian the Deputy Registrar should be appointed for the purpose of the proceedings in the High Court for obtaining leave to appeal and so forth, upon the final admission of the appeal the Deputy Registrar ceases to act any further as guardian for the minors. [p. 867, col. 2.]

The jurisdiction of a High Court in relation to appeal to the Privy Council is of a very special character. [p. 868, col. 1.]

Application by a Guardian praying for an order on the appellant to put him in funds to have the case argued on behalf of the minors before the Judicial Committee.

Babus Ramesh Chandra Sen, Birendra Chandra Das and Santimoy Majumdar, for the Appellant.

Babu Jatindra Nath Sanyal, for the Respondents.

JUDGMENT.

Rankin, C. J.—This is an application in connection with a batch of 47 appeals now pending before His Majesty in Council. The Privy Council numbers are 118 to 164 of 1923. The appeals arise out of certain settlement proceedings under the Bengal Tenancy Act and they raise a question between the appellant to England and various tenants of his as to the right of the appellant to an enhancement of rent. The High Court decided against the appellant and his application for leave to appeal

to His Majesty in Council was filed on the 10th of December, 1923.

It appears that when the cases were before this Court the Deputy Registrar was representing the interest of certain minors among the tenants and for the purpose of the application for leave to appeal to the Privy Council there was an order made on the 24th of February, 1924, that the Deputy Registrar should continue to represent the minors whom he represented on the High Court appeals, and certain provision was made for his costs. A certificate that the cases were fit to be taken on appeal was granted by this Court on the 8th of June, 1925, and the appeals were finally admitted on the 27th of July, 1925; since that time the record has been printed in India and has lately been forwarded to England.

Now, the practice of this Court with reference to minors in cases of appeals to the Privy Council is as follows:—By rr. 41 and 42 of Chap. VI of the High Court Rules on the Appellate Side it is provided that "all applications by, or on behalf of, an infant shall be made in the name of the infant by the person whose name is on the record as his next friend or guardian; and whenever any application is consented to, or opposed by, an infant the infant shall in like manner be represented by the person who appears on the record as his next friend or guardian." Rule 42 says: "In cases there is no next friend or guardian upon the record, a separate application for appointment of a next friend or guardian must be made."

Now, while it is in accordance with the practice that in default of any more suitable next friend or guardian the Deputy Registrar should be appointed for the purpose of the proceedings in this Court for obtaining leave to appeal and so forth, upon the final admission of the appeal, the Deputy Registrar ceases to act any further as guardian for the minors. It is not our practice that the Deputy Registrar of the Court should act any further on behalf of the minors in cases which go to the Privy Council. Accordingly on the 26th of August, 1925, an application for appointment of a guardian having been made, the gentleman, whose application is now before us, Babu Jatindra Nath Sanyal, was appointed guardian *ad litem* for the minor respondents to England. It appears that out of these 47 appeals there are 10 in which this gentleman

man has been appointed guardian for minor respondents. The numbers of the 10 appeals are as follows : 127, 131, 132, 141, 148, 152, 155, 156, 158 and 163.

We are now concerned with an application made by Mr. Sanyal as guardian asking us to order the appellant to put him in funds to have these cases argued on behalf of the minors by a Solicitor and junior Counsel before the Judicial Committee. Some estimate has been obtained from the agent in England as to the amount of money which would be required for this purpose and it appears that £300 or £400 would apparently be necessary, considering that the paper-book is very large and that there would be a good deal of work connected with the case. In these circumstances I find that no such order in connection with Privy Council appeals has ever been made by this Court hitherto. I am not sure whether any such order has ever been asked for hitherto, and it is necessary very carefully to consider by what right and on what principle such an order could be made by this Court. No doubt in ordinary cases before the Courts in India under the Civil Procedure Code, it would be quite an ordinary practice to direct that the plaintiff in a suit should put the guardian *ad litem* in funds to a certain extent for the defence of the minor defendants; but we are here exercising a jurisdiction of a very special character. Certain rules have been made under statutory powers by the Judicial Committee of the Privy Council. Under those rules certain duties are cast upon the Courts in India in connection with appeals to His Majesty in Council. The Indian Legislature by O. XLV, has commissioned the Courts in India to carry out the duties that are imposed by the rules made by the Judicial Committee but unless we can find that there is express authority given to this Court to make such order as is now asked in connection with an appeal to His Majesty in Council which has been finally admitted and is before His Majesty in Council at the present moment, it is not plain to me that we can have any right to do so. It may or may not be that such an order could be obtained from the Judicial Committee, but our right to make such an order must be granted by an express provision. I have been through the relevant sections of the Civil Procedure Code, O. XLV. I

have been through the rules made by the Judicial Committee called the Judicial Committee Rules of 1908 and also through the Order in Council which came into operation in January, 1921, and was made on the 9th day of February, 1920, I have failed to find in any of these rules a provision that would entitle us to take upon ourselves to make such an order as is asked for. The question is no longer one of the proceedings before this Court. Proceedings before this Court have terminated and the whole matter is before the Judicial Committee. In this connection it is noticeable that under r. 13 of the provisions made by the Privy Council for Indian appeals, where at any time between the admission of an appeal and the despatch of the record to England the record becomes defective by reason of the death or change of status of a party to the appeal, the Court, on an application, may grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status; so that in such a case all that this Court can do is to grant a certificate. In that case the name of such person shall be deemed to be so substituted or entered on the record without express order of His Majesty in Council. On the other hand, by r. 14 where an appeal becomes defective subsequently to the despatch of the record to England the Court may cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted; and there the matter stops so far as this Court is concerned. In my opinion any order such as is herein asked for would be assuming a jurisdiction of a character which is materially different from anything that can be justified by the rules which govern Courts in India. It is, however, right to say that in the present case it does not appear to me that the order asked for would be an order which it would be either reasonable or in the interest of the minors to make. As I understand the matter, the minors in the ten appeals in question are concerned in resisting the claim of the landlord to a certain enhancement of rent. It appears in the present case that out of all the respondents who are *sui juris* no one appears to be entering appearance or defending the case upon appeal to His Majesty in Council. No doubt, that attitude

is adopted with a quite intelligent appreciation of the interest of the parties. It is quite clear that if we were to make an order upon the appellant directing him to put the applicant in funds of £ 400, apart from any question of hardship upon the appellant who has given Rs. 6,000 security for costs for all these appeals already the result upon the interest of the minors might well be disastrous. If by any chance the appeals were to succeed with the result that the minor respondents became chargeable for such a large sum as their own costs in the appeals the result would probably be that the whole of their interest in the tenancies would be sold and they would be deprived probably of their means of life. On the other hand, if the appeals should succeed *ex parte* the result would be presumably that there would be a certain enhancement of rent and it by no means follows that the Privy Council would direct them to pay any costs which in all the circumstances it would be inequitable or unjust that they should pay. I am not in the least satisfied that even if this Court had the power to make such an order as is asked for it would be in the interest of the minor respondents that the order should be made. On the contrary it appears to me that on the question of interest the common sense of the matter is that the attitude adopted by those respondents who are *sui juris* is an indication of the fact that it is better that the appeals should be heard *ex parte* on points of law and that the order asked for should not be made. This is a matter of first impression and I have thought it necessary to explain in detail the position.

The applications, therefore, must be refused. There will be no order as to costs.

Mitter, J.—I agree.

A. N. A.

Applications dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPLICATION NO. 353
OF 1927.

December 5, 1927.

Present :—Mr. Justice Jai Lal.

RUCHI RAM—DEFENDANT—PETITIONER

versus

SARAB NARAIN SHAH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 22, 23, 151.
Transfer of case—Plaintiff's right to choose forum.
Grounds for transfer.

The plaintiff has a right to choose the forum for his action and a very strong case must be made out by the defendant before the plaintiff can be deprived of that right. In deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered but the plaintiff's convenience should also be borne in mind. [p. 870, col. 1.]

Application under ss. 22, 23 and 151 of the Civil Procedure Code on behalf of the Petitioner.

Lala Badri Das, R. B., and Dr. G. C. Narang, for the Petitioner.

Lala Moti Sagar, R. B., and Messrs. Shamair Chand and Qabul Chand, for the Respondents.

JUDGMENT.—This is an application under ss. 22, 23 and 151 of the Civil Procedure Code made by the defendant Ruchi Ram, Khattar, for the transfer of a civil suit for the recovery of Rs. 1,08,974-8-3 instituted in the Court of the Sub-Judge of Rawalpindi to the Dera Ismail Khan District in the North-Western Frontier Province. The suit is based on a promissory note admittedly executed by the petitioner in favour of one Sundar Das. Sundar Das, it is alleged, endorsed the promissory note in favour of Sarab Narain Shah, plaintiff. The promissory note was admittedly executed in Dera Ismail Khan where the petitioner resides, but it is alleged that Sundar Das, who also is a defendant in the suit and is a resident of Rawalpindi, endorsed it to Sarab Narain Shah in Rawalpindi. Sarab Narain Shah himself is a resident of the Jhelum District. He does not carry on any business in Dera Ismail Khan.

The application, for transfer is made on the ground that there was a dispute between Ruchi Ram and Sundar Das with regard to certain contracts alleged to have been jointly taken by them which was referred to arbitration. The award of the arbitrator was that Sundar Das should pay Rs. 1,25,000 to Ruchi Ram. An application was, therefore, made in the Court of the District Judge at Dera Ismail Khan to file the award and it appears that during the pendency of that application Ruchi Ram attempted to attach before judgment the amount due from him to Sundar Das on the basis of the promissory note, but for some reason or other he did not succeed to attach the amount. It is alleged by the petitioner that in order to prevent the attachment of the amount due on the promissory note Sundar Das fictitiously endorsed the promissory note to Sarab Narain

Shah, a relation of his. It is alleged that a good portion of the amount originally due on the promissory note has been paid by the petitioner and that this will be the main defence in the case. It is, therefore contended that it will be very inconvenient for the petitioner (the defendant) if the suit is tried in Rawalpindi as he will have to bring his witnesses all the way from Dera Ismail Khan, or it will be necessary to issue commissions for their examination as the Court is not competent to procure their attendance in Rawalpindi, a course which it is contended will be unsatisfactory. It will thus be observed that the sole ground for the transfer of the suit is the convenience of the defendant.

The petition is strenuously opposed both by Sarab Narain Shah and Sundar Das. Sarab Narain Shah, as I have already stated, has no connection with Dera Ismail Khan and naturally it will be very inconvenient to him if he is made to go to that District to prosecute his case. A large number of judicial authorities were cited by Counsel on both sides in support of their respective contentions. I do not propose to discuss them in this judgment as an examination thereof shows that each depended on its peculiar facts which influenced the learned Judges to transfer or not to transfer the cases before them. The principle, however, is well-established that it is the right of the plaintiff to choose the forum for his action and that in deciding whether the plaintiff should be deprived of that right a very strong case must be made out by the defendant, and further that in deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant, that has to be considered but the plaintiff's convenience should also be borne in mind.

Now, in the present case, while it is true that it suits the petitioner (the defendant) that the case should be tried in Dera Ismail Khan where he resides and carries on business, it is equally clear that it will be very inconvenient to the plaintiff if he is ordered to prosecute his suit in the Dera Ismail Khan District. It also appears from the allegations made by the petitioner in the petition for transfer that the right of the plaintiff to maintain the suit is likely to be questioned on the alleged ground that the transfer was fictitious and *mala fide*. I express no opinion whether such a plea is open to the defendant or

not, or whether there is any substance in that plea, but if such a plea is raised it may be necessary for the Court to adjudicate on the genuineness of the transfer of the promissory note to the plaintiff. Evidence on that point will be available mostly in Rawalpindi.

After a careful consideration of all the circumstances I am not satisfied that this is a fit case in which I should exercise my discretion by transferring it to the Dera Ismail Khan District. It is obvious that both parties are anxious to look to their own convenience only and to disregard the interests of the other party. But the plaintiff having the primary right to choose the Court for the institution of the suit, I see no reason to deprive him of that right in this case. The consequence is that this petition is dismissed with costs.

R. L.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 945
OF 1927.

May 5, 1927.

Present:—Mr. Justice Cargenven.

RY. PRATAP SIMHA RAJA SAHEB—
DEFENDANT—PETITIONER

versus

R. SRINIVASA GOPALACHARIAR—
PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 22—Transfer of suit—Principles—Right of plaintiff to choose forum—Delay in making application, effect of—Time taken to revoke leave, whether can be excused.

On an application by the defendant for transfer of a suit under s. 22, Civil Procedure Code, to another Court, considerations of convenience should not outweigh the cardinal principle that it is the right of the plaintiff as *arbiter lites* to choose his own forum. [p. 871, col. 2.]

Roop Chand v. Gokal Chand (3), followed.

In a suit by an endorsee of a pro-note in the Small Cause Court, Madras, with leave of Court, the time taken by the defendant in proceedings to revoke the leave cannot be taken into account in considering whether a subsequent application by the defendant to transfer the suit to the file of some other Court on the ground of convenience was made "at the earliest possible opportunity." [p. 871, col. 1.]

Petition for transfer of Suit No. 13533 of 1926 on the file of the Court of Small Causes, Madras, from the file of the said Court of Small Causes, to be tried by a Court of competent jurisdiction in Tanjore.

Mr. T. V. Muthukrishna Ayyar, for the Petitioner.

Mr. R. Gopalaswami Ayyangar, for the Respondent.

ORDER.—This is an application to transfer a suit upon a promissory note which was instituted by the endorsee of the note in the Court of Small Causes, Madras, on 3rd November, 1926. The suit was first decreed *ex parte* on the 23rd November, 1926, and subsequently restored on the 2nd February, 1927. A preliminary point has been taken under s. 22, Civil Procedure Code that it is incumbent upon the defendant who seeks a transfer of the suit to make his application at the "earliest possible opportunity" and that this condition was not complied with here. It appears that after the setting aside of the decree on the 2nd February an application was made on the 5th for a revocation of the leave granted to file the suit in Madras and that this application was eventually dismissed on the 25th February. The defendant came here with this petition on the 3rd March, 1927. I do not think, it would be reasonable to have expected him to have moved before the 5th February when the suit was formally restored on the 2nd February, although it is true that a conditional order was made for the restoration as early as the 7th January. I do not, therefore, clearly understand the reasoning of the learned Small Cause Court Judge where he finds that the application before him was liable to dismissal on the ground of delay. It is then for consideration whether the time taken by that proceeding may properly be excluded in considering whether there was delay in coming up here. My attention has been directed to *Shiv Dutt v. Motiram* (1) where an application of this nature was rejected on the ground that defendant instead of coming at the earliest opportunity to the High Court, had challenged the jurisdiction of the lower Court; but that case is distinguishable from the circumstances here, because here there seems to have been no contention that the cause of action did not arise in Madras but the revocation was rather sought because it was just and expedient to try the case elsewhere, which I take to mean that considerations of convenience should be allowed to weigh. When the law provides facilities for obtaining a transfer by proceedings before the

trial Court I do not think it can be said that in taking such proceedings a party has been guilty of delay and has not come here at the earliest opportunity. I think, therefore, that in this respect the terms of s. 22 may be deemed to have been observed.

On the merits, the defendant's case is that the note was obtained from him without payment of consideration and that it was assigned for the purpose of being sued upon to the brother-in-law one Srinivasa Iyengar, who negotiated the execution of it, and that the endorsee is not a *bona fide* holder. It may be the case that the defendant has to examine witnesses to prove these contentions in Tanjore and his accounts which are there in one of the Courts, may have to be produced. I have been shown a number of authorities with regard to the test to be applied as to whether or not a transfer of a suit should be ordered. There is the extreme view taken by Knox, J., in *Madho Prasad v. Moti Chand* (2), namely, that the mere convenience of the parties is not a good reason for ordering a transfer and that such an order should rather be made in view of the personnel of the Judge than personnel of the parties. I do not think that this view, without more qualification, has been accepted in subsequent decisions as a correct view of the scope of s. 22. But undoubtedly in the cases which have been brought to my attention it has been held that the burden lay very heavily on the defendant to show that considerations of convenience should outweigh the cardinal principle that it is the right of the plaintiff as *arbiter lites* to choose his own forum. A decision to that effect is to be found in *Roop Chand v. Gokal Chand* (3).

Two cases were cited for the petitioner in which transfers have been ordered on balance of convenience, namely, *Banarsi Das v. Kishori Lal* (4) and *Herendra Lall Roy v. Sarvamangala Debee* (5). It appears to me that in both these cases the balance of convenience for a transfer was almost overwhelming in character. On a consideration of the circumstances of this case, as they are to be gathered from the affidavits, I am not satisfied that this test will succeed here. I have

(2) 50 Ind. Cas. 363; 41 A. 381; 17 A. L. J. 371.

(3) 73 Ind. Cas. 860; A. I. R. 1924 Lah. 249.

(4) 72 Ind. Cas. 592; A. I. R. 1923 Lah. 383.

(5) 24 C. 183; 12 Ind. Dec. (N. S.) 788.

(1) 88 Ind. Cas. 531; A. I. R. 1925 Lah. 322; 7 Lah. L. J. 93.

stated what the defendant's case is but I am unable to say whether it is a true or a false case, and it appears to me that one should rather look to the allegations of the plaintiff than those of the defendant in considering an application of this description. The plaintiff who lives in Madras claims to be a *bona fide* holder in due course and to prove that a certain part of the evidence must come from Madras. Considering all the circumstances, therefore, I am not prepared to transfer the case to Tanjore. The C. M. P. No. 945 of 1927 will, therefore, be dismissed with costs one set.

V. N. V. *Petition dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 743 OF 1926.

March 7, 1927.

Present:—Mr. De Souza, A. J. C.
ABDUL RAHIM AND ANOTHER—PLAINTIFFS
versus

ABDUL HUSSAIN AND ANOTHER—
DEFENDANTS.

Guardians and Wards Act (VIII of 1890), s. 29 (b)—Sanction to mortgage property—Mortgagee's right to sell without intervention of Court—Transfer of Property Act (IV of 1882), ss. 60 67 (d), 82—Mortgagee, whether bound to distribute his debt rateably upon mortgaged property.

Permission to mortgage a minor's property accorded under s. 29 (a) of the Guardians and Wards Act does not empower the guardian to confer on the mortgagee an absolute power to sell without the intervention of the Court. [p. 873, col. 1.]

Gangapershad Sahu v. Maharani Bibi (1), relied upon.

As between a mortgagee and the holders of the equity of redemption, the former is not bound to distribute his debt rateably upon the mortgaged properties but may recover the debt from any portion of the mortgaged properties. [p. 873, col. 2.]

Mahtab Singh v. Misree Lal (2), *Timaji Kirshna Potdar v. Rama Piraji Bhatkhande* (3), *Raghu Nath Pershad v. Harlal Sadhu* (4), *Krishna Ayyar v. Muthukumaraswamiyar Pillai* (5) and *Hara Kumari Chowdhurani v. Eastern Mortgage and Agency Co. Ltd.* (6), relied upon.

Mr. Dipchand Chandumal, for the Plaintiffs.

Mr. Fatehchand Assudamal, for the Defendants.

JUDGMENT.—The plaintiffs in this suit and defendant No. 2 are brothers. The latter was appointed guardian of the property of the plaintiffs who were then both minors in Miscellaneous Application No. 12

of 1920 by this Court. About the year 1925 defendant No. 2 as such certificated guardian applied for leave to raise a loan of Rs. 50,000 on mortgage of the plaintiff property belonging jointly to plaintiffs and defendant No. 2. Leave was granted by Kennedy, A. J. C. in his District Court Jurisdiction authorising the guardian (defendant No. 2) to raise a loan of Rs. 50,000 on the mortgage of the property. In pursuance of this authority defendant No. 2 raised a loan of Rs. 25,000 only from defendant No. 1, and executed a mortgage deed mortgaging the property to defendant No. 1 to secure payment of the said amount of Rs. 25,000. The mortgage deed contains a provision authorising the mortgagee to sell the mortgaged property without the intervention of the Court on failure of mortgagors to re-pay the mortgage amount at stipulated time. The period stipulated having expired and interest on the mortgage amount being in arrears, the mortgagee (defendant No. 1) in pursuance of the power of sale conferred by the mortgage deed has advertised the sale of the mortgaged property.

The plaintiffs have instituted the present suit for a declaration, *inter alia*, that the power of sale contained in the said mortgage deed is invalid and of no effect and for an injunction restraining the defendant No. 1 from selling the property.

The first issue for decision is, whether the power of sale without the intervention of the Court conferred upon the mortgagee (defendant No. 1) by the certificated guardian (defendant No. 2) is valid so far as it affects the interest of the plaintiffs.

It seems to me that the finding on this issue must be in the negative. Under s. 29, cl. (a) of the Guardians and Wards Act VIII of 1890 it is expressly provided that where a person has been appointed by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court, mortgage or sell or transfer by sale gift, exchange, or otherwise any part of the immoveable property of a ward. On behalf of the mortgagee (defendant No. 1) it was contended that permission to mortgage granted by this Court in the exercise of its District Court Jurisdiction carried with it permission to sell without the intervention of the Court, because it is an ordinary incident of a mortgage in Karachi under the provisions of s. 69, cl. (c) of the Transfer of Property

Act, I am, however, of opinion that the power conferred by the Court upon a certificated guardian to transfer, charge or otherwise encumber any part of the immoveable property of a ward should be strictly construed. Where a guardian raised money on the mortgage of minors' property with the Court's sanction but the order of the Court did not specify the rate of interest at which the guardian was authorised to borrow, although the mortgage-bond provided for 18 per cent., their Lordships of the Privy Council on appeal allowed only 12 per cent. as the reasonable rate of interest. Their Lordships observed that it would certainly seem desirable that a Court which has thrown upon it the responsibility of authorising loans to be raised upon the security of infants' estate should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised. And, where an order which authorises the loan of a principal sum but says nothing about interest, the proper construction is that it authorises a loan at a reasonable rate of interest. *Gangapershad Sahu v. Maharani Bibi* (1). *A fortiori* it seems to me that permission to mortgage will not imply a permission to sell unless it is expressly conferred. And even when permission to sell is expressly conferred it is enacted by s. 31 of the Act that the Court may in its discretion attach to the permission any reasonable condition such as that the sale shall not be complete without the sanction of the Court or such other conditions as are enumerated in cl. 3 of that section.

If defendant No. 1 had sued on the mortgage and obtained a decree for sale, I take it that even then the sanction of the Court would have been necessary before the shares of the minor mortgagors could have been validly sold. I, therefore, hold that the absolute power of sale without the intervention of the Court conferred on the mortgagee is invalid and of no effect so far as it affects the shares of the plaintiffs.

The next question arises whether the defendant No. 1 can exercise his power of sale to the extent of the right, title and interest of defendant No. 2. Mr. Dipchand argued that the mortgage security being one and indivisible the mortgagee cannot exercise his mortgage right against a portion only of the mortgaged property.

(1) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. s.) 1012 (P. C.).

He relied upon the analogy of the provision in ss. 60 and 67 cl. (d) of the Transfer of Property Act. The principle underlying those sections is that the mortgage security being one and single its disintegration by allowing partial redemption might be disastrous to the interest of the mortgagee. A mortgagee, observed Morgan, C. J., is entitled to say to each of several persons who may have succeeded to the mortgagor's interest that he shall not be entitled to redeem a part of the property on payment of part of the debt because the whole and every part of the land mortgaged is liable for the whole debt. *Mahtab Singh v. Misree Lall* (2). And, while s. 82 of the Transfer of Property Act defines the relation of mortgagors *inter se*, there is nothing in the provisions of Transfer of Property Act to support the conclusion that the mortgagee must distribute his debt in a certain manner or that he is unable to enforce it against each and every part of the property made security for the mortgage. *Timaji Krishna Potdar v. Rama Piraji Bhatkhande* (3), *Raghu Nath Pershad v. Harlal Sadhu* (4). The mortgagee's right to be paid the whole of his debt from whatever portion of the mortgaged property he wishes to apply in his suit cannot be questioned. *Krishna Ayyar v. Muthukumarasawamiya Pillai* (5). There is nothing in the provisions of the Act to support the view that as between a mortgagee and the holders of the equity of redemption the former is bound to distribute his debt rateably upon the mortgaged properties. *Hara Kumari Chaudhuran v. Eastern Mortgage and Agency Co. Ltd* (6).

In this view of the law it seems to be that there is nothing to prevent the mortgagee (defendant No. 1) from bringing the right, title and interest of defendant No. 2 to sale in exercise of the power of sale without the intervention of the Court conferred upon him by the mortgage-deed.

For these reasons, I declare that the power of sale without the intervention of the Court conferred by the mortgage-deed executed by defendant No. 2 in favour of defendant No. 1 is invalid and of no effect so far as it affects the shares of the plaintiffs in the mortgaged property and I

(2) 1 Agra H. C. R. 88.

(3) 45 Ind. Cas. 862; 30 Bom. L. R. 175.

(4) 18 C. 320; 9 Ind. Dec. (N. s.) 213.

(5) 29 M. 217.

(6) 7 C. L. J. 274.

grant an injunction restraining defendant No. 1 from selling the right, title and interest of the plaintiffs in the said property. Plaintiffs to recover their costs from defendant No. 1. Defendant No. 2 should bear his own costs.

P. B. A.

A. N. A.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1311 OF 1927.

November 29, 1927.

Present:—Mr. Justice Tek Chand.

BALLA AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

FIRM KNOWN AS RATI RAM-SITA RAM

THROUGH RATI RAM—PLAINTIFF—

RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 75—
Instalment bond—Default of instalment—Waiver—
Acceptance of money by creditor, when constitutes
waiver.*

In order to constitute waiver of the right to enforce a forfeiture clause in an instalment bond by acceptance of payment, the payment must be made on account of the specific instalments in arrears and not a mere part-payment in redemption of the whole debt, and the creditor must accept it as such.

Second appeal from the decree of the Additional District Judge, Karnal, dated the 21st of February, 1927, reversing that of the Additional Subordinate Judge, Fourth Class, Karnal, dated the 29th of January, 1926.

Mr. Shamair Chand, for the Appellants.

Mr. Fakir Chand, for the Respondent.

JUDGMENT.—The suit, out of which this appeal has arisen, was instituted by the plaintiff-respondent for recovery of Rs. 700 alleged to be due to him by the defendant on foot of a balance struck on the 10th February, 1923, it having been agreed that the amount due, would be payable in six monthly instalments of Rs. 50 each beginning with the 2nd of May, 1923, and that if default was made in the payment of any instalment the whole sum would become due. The plaintiff alleged that such default had occurred and deducting Rs. 240 which the defendant had paid on two occasions he sued for the remaining sum of Rs. 700. The suit was dismissed by the Subordinate Judge who

held that, though default had occurred, the plaintiff had waived the benefit of the default clause by accepting a payment of Rs. 200 on 3rd October, 1924. The plaintiff appealed to the learned District Judge who came to a contrary conclusion and decreed the suit in full.

On second appeal it is contended by Mr. Shamair Chand on behalf of the defendant-appellant that the lower Appellate Court has not interpreted the agreement rightly and that, accordingly to a correct reading of it, the defendant was not liable to pay the whole debt on failure to pay any instalment. The agreement is contained in a document written in *Landa* characters and to interpret it, two experts were called. The learned District Judge has accepted the interpretation placed on it by one of them which supported the case of the plaintiff-respondent. I have examined the document and, after hearing Counsel, I agree with the learned District Judge in accepting the interpretation given by the witness Lala Daya Ram. I, therefore, see no force in this contention and reject it.

Mr. Shamair Chand next contends that, even if the whole sum had become payable on default being made in payment of one instalment it must be held that the plaintiff waived his right to enforce the default clause by accepting Rs. 200 on the 3rd of October, 1924. It must be noted, however, that on the date on which this payment was made three instalments had become due and the total sum due was Rs. 150 only. As against this, the defendant paid the sum of Rs. 200. In these circumstances it cannot be said that the payment was made specifically on account of the instalments which were over due or that the plaintiff in accepting this amount can be said to have waived the forfeiture. Mr. Shamair Chand concedes that the law is now settled that in order to constitute waiver the payment must be on account of the specific instalments in arrears and not a mere part-payment in redemption of the whole debt and that the creditor must accept it as such. In the present case there is no doubt that the payment of Rs. 200 was made in account and not for the specific instalments which were overdue. By accepting Rs. 200 the plaintiff-respondents cannot be said to have waived his right to enforce the forfeiture clause and, in my opinion, the

learned District Judge came to a correct conclusion in decreeing the suit.

The appeal fails and is dismissed with costs.

R. L.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 512 OF 1927.

June 22, 1927.

Present:—Sir George Claus Rankin Kt.,
Chief Justice, and Mr. Justice Costello.
KSEMANANDA KUMAR—PETITIONER
versus

RASHAMAYA HALDAR—OPPOSITE PARTY.
Bengal Tenancy Act (VIII of 1885), s. 111—Defendant raising question of status—S. 111, applicability of.

Section 111 of the Bengal Tenancy Act does not mean that in any case in which the defendant-tenant chooses to raise a question as to status the landlord is prevented from taking action under the ordinary law in the Civil Court.

Nasarulla Mia v. Amiruddi (1), relied on.

Rule against an order of the Munsif, Fourth Court, Diamond-Harbour, dated the 16th of March, 1927.

Babu Satindra Nath Roy Chowdhury, for the Petitioner.

Babu Panna Lal Chatterji, for the Respondent.

JUDGMENT.

Rankin, C. J.—In this case a suit in ejectment was brought against the defendant alleging that he was an under-*raiyat* and that notice had been given under s. 49 of the Bengal Tenancy Act. The defendant by his written statement claimed to be an occupancy *raiyat* and having claimed to be an occupancy *raiyat* he contends that by s. 111 of the Bengal Tenancy Act, the proceedings against him should in effect be stayed until three months after the final publication of the Record of Rights.

The Court below has refused this contention and said that the suit is one for recovery of *khas* possession and s. 111 does not apply to the case.

I am of opinion that the Court below is right in the view it has taken of s. 111. I do not think that it can be imputed to the section as its meaning that in any case in which the defendant chooses to raise a question as to status the landlord is prevented from taking action under the ordinary law in such matters.

We have been referred to a judgment in a Civil Rule (No. 10 of 1925). There are certain passages in that judgment which give colour to the contention of the present petitioner but upon a careful consideration of s. 111 and its real meaning, I am not of opinion that it can be laid down that in any case where the defendant chooses to raise a question of status the plaintiffs are rendered powerless so far as the Civil Court is concerned.

The Rule is discharged with costs, the hearing-fee being assessed at one gold mohur.

Costello, J.—I agree. I only desire to add that, in my opinion, the point raised is amply covered by a decision of Mitra, J., in *Nasarulla Mia v. Amiruddi (1)*. In that case the suit was one for rent and the defendant pleaded non-liability denying the relationship of landlord and tenant. He claimed the status of a *jotedar* or occupancy *raiyat* and put forward the Record of Rights and settlement rent-roll published on the 28th October, 1900, as a bar to the plaintiffs' claim. The plaintiffs' contention was that neither s. 104-H nor s. 111-A of the Bengal Tenancy Act applied to the facts of that case and the learned Judge in his judgment said: "We think this contention is sound and the appeal must be allowed." There is also a similar decision in the same volume [see *Rajaram Singh v. Sheo Persad Roy (2)*] of the Calcutta Law Journal at page 63 of the Notes portion at the end of the volume.

A. N. A.

(1) 3 C. L. J. 133 at p. 134.

(2) 3 C. L. J. 63n.

Rule discharged.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 130 OF 1927.

November 16, 1927.

Present:—Mr. Justice Tek Chand.

AMIR CHAND AND OTHERS—PLAINTIFFS—
PETITIONERS
versus

KAHAN DAS AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Appeal by one of several defendants—Reversal of decree in favour of all, legality of.

In an appeal by one of several defendants, the Appellate Court cannot reverse the decree in favour of them all where the appealing defendant does not purport to appeal on behalf of all and his defence is different from that of the others. [p. 876, col. 2.]

Petition for revision of the decree of the Senior Subordinate Judge, Multan, dated the 15th November, 1926, reversing that of the Additional Subordinate Judge, Fourth Class, Khanewal, District Multan, dated the 30th April, 1926.

Mr. *Ram Lal Anand*, for Mr. *Ram Chand Manchanda*, for the Petitioners.

Messrs. *Ghulam Rasul* and *Din Dayal*, for the Respondents.

JUDGMENT.—The plaintiff, Amir Chand, instituted a suit against three persons Kahan Das, Jinda Ram and Hari Chand for recovery of a certain sum of money which was alleged to be due to him on foot of an entry in the *bahi* made by Hari Chand as the *Karinda* of a firm working under the name and style of Kahan Das-Jinda Ram. It was alleged that this firm consisted of two partners Kahan Das and Jinda Ram and that Hari Chand as their agent had made the entry in question.

The defence put forward by Jinda Ram was that the partnership had ended long before the entry in question was made that the firm had no previous dealings with the plaintiff and that Hari Chand had authority to raise the debt. Nor was any portion of the money so raised used for any purpose in which he was concerned.

Kahan Das admitted that he was a partner in the firm and that Hari Chand had authority on behalf of the firm to make the entry. He also admitted that as a member of the firm he was liable for the debt, but pleaded that he had paid off his share of the debt and that he was no longer liable to pay anything more to the plaintiff.

Hari Chand's defence was that he was a mere servant of the other two defendants and was not personally liable.

The Subordinate Judge discharged Hari Chand on the ground that he was a servant and not a partner in the firm. He also held that the defence put forward by Kahan Das and Jinda Ram respectively had not been established. He accordingly passed a decree against both Kahan Das and Jinda Ram.

Against this decree Jinda Ram alone appealed to the learned Senior Subordinate Judge raising the same pleas as he had argued in the trial Court. Kahan Das did not appeal and does not appear to have been present at the hearing. The learned Senior Subordinate Judge accepted the contentions put forward on behalf of Jinda Ram and accepted the appeal, but instead

of dismissing the suit against him alone, he dismissed it against Kahan Das also.

The plaintiff has come up to this Court on the revision side and on his behalf it is urged that the defence set up by Kahan Das and Jinda Ram was separate, that the findings of trial Court against Kahan Das had not been reversed by the learned Senior Subordinate Judge, that O. XLI, r. 4 is inapplicable and the Senior Subordinate Judge ought not to have dismissed the suit against Kahan Das.

The findings of the lower Appellate Court in favour of Jinda Ram are also attacked but after hearing the petitioner's Counsel I do not find any sufficient ground to interfere with this part of the case in revision. There is no material irregularity committed by the Appellate Court in deciding the point on which the suit was dismissed against Jinda Ram. I, therefore, dismiss the revision as against him.

On behalf of Kahan Das I have heard Mr. Ghulam Rasul but after giving due weight to his contentions I am of opinion that the petition must succeed so far as he is concerned. As pointed out already his defence was wholly different from that of Jinda Ram. He had clearly admitted his membership of the firm at the time when the entry was executed as also the authority of Hari Chand to raise the money on his behalf. He had preferred no appeal himself nor did Jinda Ram purport to appeal on his behalf. The grounds on which the appeal of Jinda Ram was accepted were wholly different from the defence set up by Kahan Das. The learned Senior Subordinate Judge was not, therefore, justified in dismissing the suit as against Kahan Das.

Accordingly I accept the petition for revision to this extent that the suit of the plaintiff-petitioner against Kahan Das defendant-respondent will be decreed in full with costs in the trial Court and in this Court, but the suit as against Jinda Ram and Hari Chand is dismissed.

Jinda Ram will have his costs from the petitioner in all Courts.

R. L.

Petition accepted in part.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2771 OF 1923.

October 12, 1927.

Present:—Mr. Justice Broadway and
Mr. Justice Agha Haidar.HIRA SINGH—PLAINTIFF—APPELLANT
*versus**Musammat MANGLAN AND ANOTHER*
—DEFENDANTS—RESPONDENTS.*Hindu Law—Partition—Separation of one member—Effect on others—Allotment of definite shares to all co-parceners, effect of—Re-union of family—Mother, status of, in joint family.*

Where a *farighkhathi* executed by a member of a joint family states in clear terms that defined shares in the whole joint family property have been allotted to the co-parceners and also gives them liberty either to live together or to separate, the effect of the deed is to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate is not inconsistent with separation in estate. [p. 878, col. 1.]

Balkishen Das v. Ram Narain Sahu (1), *Balabuz Ladhrum v. Rukhmabai* (2) and *Kasam v. Jorawa Singh* (3), followed.

Palani Ammal v. Muthuvenkatachala Moniagar (4), distinguished.

It is an elementary principle of Hindu Law of the Mitakshara School that a member of a joint Hindu family once separated can re-unite only with his father, brother or paternal uncle but with no other relation. [p. 879, col. 1.]

A mother is not a member of the co-parcenary body constituting a joint family. She is only entitled to maintenance while the joint status of the family continues and it is only when one of her sons brings a suit for partition that she is entitled to claim a share in the family property. [*ibid.*]

Second appeal from the decree of the District Judge, Amritsar, dated the 4th June, 1923, reversing that of the Senior Subordinate Judge, Amritsar, dated the 1st May, 1922.

Lala Badri Das, R. B., for the Appellant;
Messrs. G. C. Narang and Jai Gopal Sethi, for the Respondents.

JUDGMENT.

Agha Haidar, J.—This is a plaintiff's appeal which arises out of a suit for partition. It was originally instituted by a lady named *Musammat Aso*. While the appeal was pending in the lower Appellate Court, *Musammat Aso* died and her son *Hira Singh* was brought on the record as her legal representative. In order to understand the controversy in suit it is necessary to bear in mind the following narrative of facts.

One *Gulab Singh* was the husband of *Musammat Aso*. He died many years ago, leaving him surviving his widow, *Musammat Aso* and three sons by her, namely,

Nikka Singh, *Ganesha Singh* and *Hira Singh*. The sons constituted a joint Hindu family governed by the Law of Mitakshara. On the 1st of December, 1884, it appears that *Hira Singh* separated from the family and a one-fourth share of the family property was allotted to him. He executed a document called *farighkhathi*. In that document the fact of his separation is mentioned and it is further recited that the family property having been divided into four equal shares, *Hira Singh* had separated with his one-fourth share and had no concern left with the family property, that the remaining three-fourths share of the property was left with *Ganesha Singh*, *Nikka Singh* and their mother *Musammat Aso* and that it would be competent to them to keep the corpus of the property either whole or in separated shares and that they were owners of their respective shares (*aur nam burdgan apne apne hissey ke mukhtar hain*). It appears that the family property was not divided by metes and bounds and *Ganesha Singh*, *Nikka Singh* and their mother *Musammat Aso* continued to live together. *Nikka Singh* died in 1900. In 1917 *Ganesha Singh* made a Will in favour of defendants Nos. 1 and 2, his daughters. Soon after making this Will, *Ganesha Singh* died. In 1918 *Musammat Aso* instituted the present suit in the Court of the learned Senior Subordinate Judge, Amritsar. She claimed two-thirds share in the whole of the family property, one-third as her own share which she got as a result of the partition of 1884 and another one-third as the heir of *Nikka Singh*, her deceased son.

It is important to note the defence which was set up by the defendants in the present suit. Their main defence was that the suit was barred by limitation, that their father *Ganesha Singh* was the sole owner of the whole property moveable and immoveable in which neither *Nikka Singh* nor the plaintiff had any share, that there was no property which jointly belonged to the plaintiff, *Nikka Singh* and *Ganesha Singh* and that the *farighkhathi* of 1884 did not confer any rights upon the plaintiff. The trial Court decreed the plaintiff's claim as regards the immoveable property in suit but as regards the family business it held that the suit was time-barred. The defendant preferred an appeal to the learned District Judge and the plaintiff filed cross-objections. The learned District Judge dismissed the plaintiff's suit *in toto* on two grounds

which shall be discussed later on. Hira Singh, the legal representative of *Musammamat Aso*, has filed the present second appeal.

It may be stated at the outset that Mr. Badri Das, the learned Counsel for the appellant, intimated to the Court that he was not prepared to press his claim as regards the business carried on by the firm of Ganesha Singh and Gulab Singh.

The first ground for dismissing the plaintiff's suit is contained in the following sentences which is to be found in the judgment of the learned Judge of the lower Appellate Court:—

"The first point urged by defendants' Counsel is that the *farighkhathi* of 1884 did not affect the joint nature of the rest of the family property. Ganesha Singh in a previous case stated on 15th January, 1916, that by the *farighkhathi* of 1884 the entire property was divided into four portions, Hira Singh's portion being separated off while portions of the other three, namely, Ganesha Singh, Hira Singh and *Musammamat Aso* remained joint. This being so, I consider that defendants' Counsel is right in arguing that *Musammamat Aso* was not justified in suing for partition."

I may observe here that it is difficult to conceive a more confused and unsatisfactory finding. It appears to be a very unsatisfactory finding of fact which proceeds upon an even more unsatisfactory conception of a question of Hindu Law. The *farighkhathi*, as already stated, while recording the separation of Hira Singh from the joint family, clearly indicates the shares of Ganesha Singh, Nikka Singh and their mother *Musammamat Aso*. A perusal of this document brings the present case clearly within the principle of law as laid down by their Lordships of the Privy Council in *Balkishen Das v. Ram Narain Sahu* (1). In that case their Lordships of the Privy Council observe that where an *ikrarnama* executed by a member of a joint Hindu family stated in clear terms that the defined shares in the whole joint family property had been allotted to the co-parceners and also gave them the liberty either to live together or to separate their own business, the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate.

(1) 30 C. 738; 7 C. W. N. 378; 5 Bom. L. R. 461; 8 Sar. P. C. J. 459; 30 I. A. 139 (P. C.).

In this view of the law there cannot be any doubt that there was a separation among all the members of the family and their mother as a result of the *farighkhathi* transaction. In *Balabux Ladhuram v. Rukhmabai* (2), their Lordships of the Privy Council laid down that there is no presumption when one co-parcener separates from the others that the latter remain united. They further observed that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other question of fact. In *Kasam v. Jorawar Singh* (3) their Lordships of the Privy Council have summarised the law on the subject in the following words:—

"It is settled law that in the case of a joint Hindu family subject to the law of Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place."

All the leading Privy Council cases are quoted by their Lordships in support of this proposition. In view of these authorities there cannot be any doubt that after the year 1884 and by virtue of the deed of *farighkhathi* already mentioned, there was a complete disruption of the joint family and after the separation of Hira Singh's share Ganesha Singh, Nikka Singh and their mother, though living together, were in reality holding their shares in the eye of law separately. The learned Judge of the lower Appellate Court says that Ganesha Singh in a previous suit on the 15th of January, 1916, stated that by the *farighkhathi*, 1884, the entire property was divided into four portions. Hira Singh's portion being separated off while the portions of the other three, namely, Ganesha Singh, Nikka Singh and *Musammamat Aso* remained joint. The learned Judge of the trial Court at the bottom of page 5 of the printed paper-book has observed that "in the present case there is no evidence of it (re-union). That it is not a case of survivorship is clearly proved from the facts that it is not pleaded in the present case". Re-union has neither been alleged nor proved by the defendants. It becomes exceedingly difficult to understand

(2) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

(3) 68 Ind. Cas. 573; 50 C. 84; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; A. I. R. 1922 P. O. 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 49 I. A. 358 (P. C.).

what the learned Judge meant by saying that *Musammatt Aso remained joint*. If he meant that the property was not divided by metes and bounds he is perfectly right because this is the plaintiff's case. If the learned Judge was thinking of re-union and even assuming that such a line of reasoning was open to him on the pleadings, he would be confronted with the elementary principle of Hindu Law of the Mitakshara School that a member of a joint Hindu family once separated can re-unite only with his father, brother or paternal uncle but not with any other relation. And it is hardly necessary to solemnly lay down that a mother is not a member of the co-parcenary body constituting a joint Hindu family. She is only entitled to maintenance while the joint status of the family continues and it is only when one of her sons brings a suit for partition that she is entitled to claim a share in the family property. It comes to this that the finding of the learned Judge that "*Musammatt Aso remained joint*" if he meant to hold that the family re-united and re-newed its joint status, is a finding based upon an erroneous view of law and does not amount to such a finding of fact as would be binding upon this Court in second appeal.

On behalf of the respondents the attention of the Court was directed to a case reported as *Palani Ammal v. Muthuvenkatachala Moniagar* (4). This was a suit for partition and the defence of the defendant-appellant was that the members of the family had already separated long ago. In this case their Lordships observed at page 259* : "In the present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated, and that the property sought to be partitioned is partible". Their Lordships tested the findings of the Courts below by construing certain documents in order to draw legitimate inferences as to the intentions of the parties to the said documents and in the end accepted the findings of fact arrived at by the Courts in India. As a result of those findings the decree of the High Court was affirmed and the defendant's appeal was dismissed. In this view of the case the obser-

vations at pages 257-58* of the Report are more or less in the nature of *obiter dicta*. It may be noted, however, that *Appovier v. Rama Subba Aiyar* (5) and *Balabux Ladhu-ram v. Rukhmabai* (2) are quoted in the judgment of their Lordships.

The learned Judge of the lower Appellate Court has further observed that the plaintiff, in para. 3 of the plaint, states in so many words that after the *farighkhati* she and Nikka Singh and Ganesha Singh remained joint. I have read the original plaint very carefully and in my humble judgment the plaintiff clearly alleges partition and allotment of shares to Nikka Singh, Ganesha Singh and herself after Hira Singh had gone out of the family with his share. It is true that she speaks of the property being joint (*mushtarik*) but what she really meant was that though the shares had been divided and specified the corpus of the property had remained whole. I, therefore, find myself unable to agree with the findings of the lower Appellate Court on this part of the case.

The second ground on which the learned Judge of the lower Appellate Court has found against the plaintiff is that she was estopped from putting forward her present claim. He refers to certain statements made by *Musammatt Aso* as a witness in a previous litigation between Ganesha Singh and his brother Hira Singh. Those statements were found to be false by the Appellate Court in that case. The lady was no party to that suit and the learned Counsel for the respondents totally failed even to formulate his case as to how the lady could be estopped by anything which she might have said as a witness in the previous litigation when she was, apparently, supporting Ganesha Singh, the predecessor of the defendants in his claim against his brother Hira Singh. This finding of the lower Appellate Court also cannot be accepted. The suit having been disposed by the lower Appellate Court on these two points and the other questions arising in the suit not having been disposed of by that Court the case will have to be remanded for trial on the merits.

I would accordingly allow the appeal, set aside the decree of the Court below and remand the case under O. XII, r. 23 of the Civil Procedure Code. Costs here and here-

(5) 11 M. I. A. 75; 8 W. R. P. C. 1; 2 Sar. P. C. J. 218; 1 Suth. P. C. J. 657; 20 E. R. 30 (P. C.)

(4) 87 Ind. Cas. 333; 48 M. 254; A. I. R. 1925 P. C. 49; 48 M. L. J. 83; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 846; 23 A. L. J. 746; L. R. 6 A. (P. C.) 143; 52 I. A. 83 (P. C.).

after would abide the event. The appellant will be entitled to a refund of the Court-fee that he paid on the memorandum of appeal.

Broadway, J.—I agree to the order proposed.

R. L.

*Appeal allowed;
Case remanded.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 698 OF 1927.

August 23, 1927.

Present:—Sir George Claus Rankin, Kt.,
Chief Justice, and Mr. Justice Mitter.
PHANINDRA KRISHNA DUTT—

PETITIONER

versus

Raja PROMATHA NATH MALIA—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 1, 4, 6, 8—Order allowing party to be examined on commission—Revision—Interference with discretion—Evidence on commission, whether should necessarily go in—Procedure where party is able to attend Court on day of hearing—Defendant pleading counter-claim—Examination on commission.

Where a Court is satisfied under r. 1 of O. XXVI of the Civil Procedure Code that a person is sick and unable to attend Court, and has exercised its discretion as to whether in those circumstances a Commission should issue and has issued a Commission, that discretion cannot be revised under s. 115 of the Code even if the judgment of the lower Court is not satisfactory. [p. 881, col. 2.]

The mere fact that a commission has been ordered for the examination of a witness is no reason whatever for any one to look at it unless it is found that at the time of the hearing, sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way. [p. 832, col. 1.]

Mahim Chandra Guha v. Naba Chandra Chowdhury (1) and Satish Chandra Chatterji v. Kumar Satish Kantha Roy (2), relied on.

Dhani Ram Maltha v. Murlal Lal Maltha (3), commented upon.

Order XXVI, r. 8 of the Civil Procedure Code is as much a rule of procedure in the *Moffusil* as anywhere else. [p. 882, col. 2.]

Even although a person's defence consists of an equitable counter-claim it is just that he should be examined on Commission if he is too ill to attend in Court to give his evidence. [*ibid.*]

Rule against an order of the Subordinate Judge, Asansol, dated the 16th May, 1927.

Mr. Amarendra Nath Bose (with him Babus Radhika Ranjan Guha and Sitangshu Bhusan Bose,) for the Petitioner.

Babu Bijay Kumar Bhattacharji, for the Opposite Party.

JUDGMENT.

Rankin, C. J.—This is a Rule in revision obtained by the plaintiff calling upon the defendant to show cause why an order should not be set aside whereby the defendant was ordered to be examined on Commission at his own request.

It appears that the suit was launched in 1925 for the recovery of some Rs. 49,000 as remuneration due for work done as a managing contractor of a colliery and that the defendant had paid Court-fees on a counter-claim for some two and half lacs, on account of damages alleged to have been caused to the defendant's colliery by the negligence of the plaintiff. The issues which were settled in 1925 contained a great many matters arising out of the counter-claim.

In April, 1927 the defendant put in a petition that he might be examined on Commission on the ground that he was suffering from lumbago which made it impossible for him to remain in the same position for more than ten minutes. He filed a medical certificate to that effect. The plaintiff objected. He says that he took the point that the defendant in respect of the counter-claim was really in the position of a plaintiff. He disputed that the defendant was ill as alleged and that there was any necessity for his examination on Commission, and he attacked the independence of the Doctor who gave the medical certificate. The application was repeated and by the order of the 6th of May, 1927, the Subordinate Judge granted the application. It appears from the order recorded that the main ground of opposition was that "the case may not be taken up at an early date and that the witness even if he is unwell may recover in the meanwhile. The plaintiff does not admit that the witness is really ill. It is not known when the case can be taken up". Having set out these matters the learned Subordinate Judge goes on to say this:— "After hearing the Pleaders I do not think that it is a fit case in which the prayer for the examination of the witness on Commission shall be refused. I should, however, recoup the other party by giving the cost of Pleader for the examination of the said witness." He went on to order that the applicant should deposit Rs. 96 as plaintiff's Pleader's fee for three days and if the examination should last for more than three days the witness would

be required to pay at the rate of Rs. 32 per day as the plaintiff's Pleader's fee.

This Rule was obtained by way of challenging that order and reliance has been placed by the learned Advocate who appears for the applicant upon several decisions of this Court. To begin with, it has to be observed that the present case is within O. XXVI, r. 1 of the Civil Procedure Code and that it is not a case under r. 4 to which different considerations may apply. That rule says:—"Any Court may in any suit issue a Commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it."

In this class of cases we have not to deal with the case of a plaintiff who has a choice to bring his own suit in a particular forum and then asks to be examined on Commission on the ground that he cannot attend at the place where he has chosen to sue. We are dealing with an application on the ground of sickness or infirmity and, broadly speaking, even although a man's defence consists of an equitable counter-claim it would *prima facie* be more just that the defendant even if he has a counter-claim—if he really cannot attend to give his evidence in Court—should be examined on Commission. No doubt, it was the duty of the learned Subordinate Judge to satisfy himself very carefully as to the seriousness and reality of the sickness that was alleged and, if I may be allowed to say so, the judgment of the Subordinate Judge is very unhappily phrased. It is phrased in flabby language and it is indefinite to a degree.

The question is not whether this is a fit case in which the prayer for the examination of the witness on Commission should be refused. The question is whether it is a case in which it has been established by reason of the illness of the defendant that the prayer for examination on Commission must in justice be granted. It is, however, in my opinion, an unjust and hypercritical attitude to take to say that the learned Subordinate Judge has not intended to find that the defendant is ill and suffering from lumbago as alleged, and we have, therefore, to consider whether there is any real reason why this order should be interfered with under s. 115 of

the Civil Procedure Code. It is quite clear that in a case of this character the whole jurisdiction to make such an order arises out of the fact which has to be found of the sickness of the person in question. When it is found that he is unable to attend Court by reason of sickness or infirmity the rest is a question of discretion. Indeed, it may be said that in such a case it would be a very strong measure to refuse an examination on Commission.

The learned Advocate for the applicant relied upon certain cases of this Court and of the High Court of Patna. These cases proceeded usually under r. 4 of O. XXVI, and they have reference to the question whether a plaintiff choosing his forum should be examined on Commission. So far as these cases are concerned, there appears to be authority for the proposition that if a Court does not think that the discretion given to the Court by r. 4 of O. XXVI is properly exercised it can treat the matter as a material irregularity. Other cases seem to go upon the footing that the Court can treat the matter as a material irregularity unless it appears from the order recorded by the lower Court that the principles of law which may be thought applicable to the subject-matter being disentangled, they were all considered and separately applied. Whether these cases are in the least consistent with the interpretation of the Privy Council from time to time of s. 115 of the Code may be seriously doubted. In the present case it is not necessary for me to discuss that particular question. Given the fact that the Court is satisfied under r. 1 of O. XXVI that the person is sick and unable to attend Court and that the Court has exercised its discretion as to whether in those circumstances a Commission should issue and has issued a Commission, I am clearly of opinion that that discretion cannot be revised under s. 115 of the Civil Procedure Code, whether the judgment of the Court below on this interlocutory application consists of a complete treatise on the subject or an incomplete treatise on the subject.

In the present case, however, it is advisable to call attention to r. 8 of O. XXVI. In a recent case in this Court [*Mahim Chandra Guha v. Naba Chandra Chowdhury* (1)], before Sir Nalini Ranjan

(1) 98 Ind. Cas. 552; 44 C. L. J. 238; A. I. R. 1927 Cal. 43.

Chatterjea and Mr. Justice Panton it has been pointed out that that rule is to be treated as a reality. That is a case of a man who got himself examined at a time when he was outside the jurisdiction. At the time of the hearing he was within the jurisdiction and the other party wanted him to give his evidence in Court in the ordinary way. The Court, as the man's evidence had been taken on Commission, allowed the Commission evidence to go in and it was pointed out that in those circumstances the evidence taken on Commission could not be read as evidence in the case against the defendant in view of the provisions of O. XXVI, r. 8, there being no material which would ground the exercise of a discretion on the part of the Court to dispense with the proof of the various matters mentioned in that rule. Again, in the case of *Satish Chandra Chatterji v. Kumar Satish Kantha Roy* (2), Lord Atkinson delivering the judgment of the Judicial Committee commented upon a case where it appears that in December, 1916, a Commissioner was appointed, evidence was given on Commission in January, 1917, and the trial commenced in February, 1917; and the Judicial Committee there pointed out: "Evidence taken on Commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in Court or is absent or for other sufficient reason. If Satish went to the Court he could, and presumably would, have been accommodated with a seat" and so on, "The whole procedure in this matter strongly suggests that it was his aversion to undergo the ordeal of an examination in open Court, in the presence of those who knew him, rather than ill-health, which kept him from the witness-box."

I take this occasion to point out that when this case comes on for trial, the mere fact that this Commission has been ordered now will be no reason whatever by any one to look at it unless it is found that at the time of the hearing, sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way. I say that the more emphatically as there is some authority in the books particularly in the case of *Dhani Ram Mahtha v.*

Murli Lal Mahtha (3) which gives colour to the view that once a Commission has been ordered and executed the Commission evidence goes in *ipso facto* and without further consideration. I do not say that that proposition was intended to be laid down in the case to which I have referred but the decision and the reasoning lend colour to that view and I am particularly anxious, therefore, that it should be made clear to the lower Court that r. 8 of O. XXVI is as much a rule of procedure in the *Mofussil* as anywhere else and that what the Privy Council has laid down and this Court has recently laid down in the case to which I have referred is the proper method for conducting the case. It does not seem to me that in this case the question whether the man is shown to be so ill that it was advisable to take his evidence on Commission is a question of such a character that the learned Subordinate Judge is bound to answer it correctly on pain of being guilty of a material irregularity.

In these circumstances I am of opinion that this Rule should be discharged with costs; hearing-fee two gold mohurs.

Mitter, J.—I agree.

A. N. A.

Rule discharged.

(3) 1 Ind. Cas. 366; 36 C. 566; 13 C. W. N. 525; 11 C. L. J. 150.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1087 OF 1927.

October 31, 1927.

Present:—Mr. Justice Addison and Mr. Justice Coldstream.

THE DISTRICT BOARD, SIALKOTE,
THROUGH THE SECRETARY—DEFENDANT
—APPELLANT

versus

Khan Bahadur Chaudhri SULTAN
MUHAMMAD KHAN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Punjab District Boards Act (XX of 1883), s. 31—Tax on professions, trades or callings according to income, legality of—Double income-tax—Jurisdiction—Civil Court's power to determine legality of tax.

If the method of assessment of a tax in reality makes the tax one on incomes, it is illegal and *ultra vires* even though it purports to be a tax on persons practising a profession or carrying on a trade or calling. The tax which can be imposed without the sanction of the Governor-General in Council on professions, trades or callings must be one which is not a second tax on the incomes of such persons, i.e., it must be a flat rate imposed by

(2) 73 Ind. Cas. 391; 39 C. L. J. 165; A. I. R. 1923 P. C. 73; 45 M. L. J. 363; 28 C. W. N. 327; 33 M. L. T. 325 (P. C.).

the tax on each profession, trade or calling or rather on all persons practising a particular profession or carrying on a particular trade or calling. [p. 884, col. 2.]

A Civil Court has jurisdiction to determine whether the imposition of a tax is illegal or *ultra vires* and to give relief if it has been levied from persons who for that reason are not liable to pay the same. [p. 885, col. 1.]

Pala Ram v. Notified Area Committee, Kot Adu (1) and *Committee of Notified Area, Una v. Chakar Behari Narain* (2), followed.

Second appeal from the decree of the Senior Subordinate Judge, Sialkote, dated the 18th January, 1927, affirming that of the Additional Subordinate Judge, Fourth Class, Sialkote, dated the 22nd October, 1926.

Mr. Abdul Rashid, for the Appellant.

Lala Badri Das, R. B., and Mr. Jagan Nath Aggarwala, for the Respondents.

JUDGMENT.

Addison, J.—Sixty-two members of the Sialkote Bar sued the District Board of Sialkote for a declaration that a certain tax imposed by that local body was *ultra vires* and illegal, and for an injunction restraining the Board from recovering the tax from them. The trial Court decreed the suit on the ground that the tax, though it purported to be a tax on trades, professions and callings, was in reality a tax on the incomes of persons carrying on trades or following professions or callings and that as an income-tax could not be imposed without the consent of the Governor-General in Council, it was illegal. On appeal the Senior Subordinate Judge held that it was not a tax on incomes but that it was illegal as the class of persons to be taxed was not defined. Against this decision the District Board has preferred this second appeal.

It is clear that under s. 30 of the Punjab District Boards Act a District Board may impose a tax on trades, professions and callings, and the procedure in imposing a tax of this nature is given in s. 31 of the Act. Under s. 31 (2) it is the duty of the Board to publish a notice defining the class of persons, or descriptions of the property proposed to be taxed, the amount or rate of the tax to be imposed, and the system of assessment to be adopted. This is, of course, prior to imposing the tax. When, however, the imposition has been notified, it is enacted by s. 31 (7) that the notification shall be conclusive evidence that the tax has been imposed in accordance with law.

The tax in question was imposed by Punjab Government Notification No. 14672, dated the 23rd May, 1924. This Notification gave the class of persons to be taxed and the rate of the tax, and runs as follows:—

“Under sub-s. (7) of s. 31 of the Punjab District Boards Act, 1883, the Punjab Government (Ministry of Education) are pleased to notify that with the requisite sanction the District Board of Sialkote has directed that, with effect from the 1st June, 1924, the following tax be imposed within the area, exclusive of Notified Areas, subject to its jurisdiction:—

DESCRIPTION OF TAX.

1. Class of persons to be taxed:—

All persons who carry on any trade or follow any profession or calling within the said area.

2. Rate of Tax.

The tax shall be levied according to the following scale on the total annual income derived by each assessee from any such trade, profession or calling, provided that such annual income shall not include that (a) received by way of wound or disability pensions for service in His Majesty's Naval, Military or Air Forces, (b) received on account of wages in kind by agricultural *kamins* for *sep* work done by them, and (c) derived from land subject to local rate or from livestock and agricultural produce owned by persons mainly dependent on agriculture for their livelihood:—

Group.	Annual income.	Amount of Tax payable.
	Rs.	Rs.
1	201—300	2
2	301—400	4
3	401—750	7
4	751—1,000	12
5	1,001—1,500	15
6	1,501—2,000	20
7	2,001 and over	30

The method of assessment was given in a subsequent notification.

It was contended by the learned Counsel who appeared for the appellant that the class of persons to be taxed was sufficiently defined by stating that all persons who carry on any trade or follow any profession or calling were to be taxed. It was further contended by him that in any case the plaintiffs had no cause of action as

they undoubtedly are following a profession within the jurisdiction of the District Board of Sialkote. Lastly, it was contended by him that under sub-s. (7) of s. 31 the Notification must be taken to be conclusive evidence that the tax was imposed in accordance with law.

There is no doubt that sub-s. (2) of s. 31 has reference only to the stage when it is proposed to impose the tax and that at that stage no objection seems to have been taken. The Notification, therefore, must be taken to be conclusive evidence that the tax was imposed in accordance with law. In any case, I would hold that the words of the Notification already quoted sufficiently define the class of persons on whom the tax is imposed. All persons carrying on any trade or following any profession or calling come within the definition and that is as good as to give an exhaustive list of all trades, professions or callings. It may be that this definition may give rise to certain suits on the ground that the persons taxed do not carry on a trade or follow a profession or calling and that they are, therefore, not liable to be taxed. But it is clear that the plaintiffs are liable to be taxed under the Notification. In fact, in nearly all cases this will be evident. I, therefore, hold that the tax is not illegal by reason of the want of definition of the class of persons to be taxed, and I further hold that this objection is not open to the plaintiffs who clearly come within the class defined.

It remains to decide whether the tax, though purporting to be a tax on trades, professions or callings, is in reality an income-tax or not. If it is an income-tax, it is conceded that it cannot be imposed under s. 30 of the Punjab District Boards Act without the consent of the Governor-General in Council. This sanction has not been obtained. The Notification makes it clear that the tax is on the incomes of persons, practising any profession or carrying on any trade or calling within the jurisdiction of the District Board. These incomes are already liable to ordinary income-tax. *Prima facie* the tax under discussion does impose a second tax on the incomes of persons practising professions or carrying on trades or callings. It is argued, however, on behalf of the appellant, that as it is a tax only on persons practising a profession or carrying on a trade or calling, it is legal even

though the method of assessment amounts to imposing a tax on the incomes of those persons. This argument appears to me to be fallacious. A second income-tax cannot be imposed though a tax on professions, trades or callings can be imposed. If the method of assessment in reality makes the tax one on incomes, it is illegal and *ultra vires* even though it purports to be a tax on persons practising a profession or carrying on a trade or calling. The tax which can be imposed without the sanction of the Governor-General in Council, on professions, trades or callings must be one which is not a second tax on the incomes of such persons, i.e., there must be a flat rate imposed by the tax on each profession, trade or calling, or rather on all persons practising a particular profession or carrying on a particular trade or calling. This difficulty seems to have been realised subsequently and I notice that flat rates are given in the case of Punjab Government Notification No. 23447 dated the 16th August, 1926. By this Notification a tax on trades, professions or callings was imposed within the area subject to the jurisdiction of the District Board of Multan.

A tax on animals is another tax which can be imposed by District Boards with the previous sanction of the Local Government only. There are numerous instances of such a tax being imposed and the method adopted is to impose a flat rate on each class of animals. If the present tax, however, is legal, it would also be legal to impose a tax on animals as follows, namely, the tax to be so much on an income of so much and rising or falling in accordance with the incomes of the persons owning the animals. Can it be said that, such a tax is not an income-tax, that is a tax on incomes? In my judgment there is no escape from the conclusions that the tax imposed under Punjab Government Notification No. 14672 dated the 23rd May, 1924, within the area subject to the jurisdiction of the District Board of Sialkote is illegal and *ultra vires* in that it is a second income-tax on persons practising professions or carrying on trades or callings. There is clear authority of this Court [*Pala Ram v. Notified Area Committee, Kot Addu* (1) and *Committee of*

(1) 73 Ind. Cas. 785; 4 Lah. 256; 5 Lah. L. J. 509; A. I. R. 1924 Lah. 147.

Notified Area, Una v. Chatar Behari Narain (2)] that a Civil Court has jurisdiction to determine whether the imposition of a tax is illegal or *ultra vires* and to give relief if it has been levied from persons who for that reason are not liable to pay the same.

In these circumstances I would dismiss this appeal but leave the parties to bear their own costs in it.

Coldstream, J.—I agree.

A. N. A. *Appeal dismissed.*

(2) 44 Ind. Cas. 910; 74 P. W. R. 1918; 74 P. L. R. 1918.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 73 of 1926.

February 11, 1927.

Present.—Sir George Claus Rankin,
Kt., Chief Justice, and Justice Sir

Philip Lindsay Buckland, Kt.

BHUPENDRA NATH BHOSÉ AND
ANOTHER—DEFENDANT—APPELLANTS

versus

GOONENDRA NATH BHOSÉ—

PLAINTIFF—RESPONDENT.

Hindu Law—Stridhan—Gifts before marriage and after marriage from husband, nature of—‘Ajautuka’ and ‘jautuka’, meanings of—Suit for possession of ornaments from step-brothers—Limitation—Cause of action—Limitation Act (IX of 1908), Sch. I, Arts. 49, 120.

Ornaments acquired by a woman partly as presents before her marriage from the husband's grandmother and partly as presents after her marriage from her husband are *ajautuka stridhan*. [p. 886, col. 1.]

Jautuka stridhan is not confined to presents given actually before the nuptial fire but the limits within which such presents become *jautuka stridhan* are somewhat narrow. [*ibid.*]

In 1905, plaintiff's mother died possessed of valuable ornaments. Her husband was in possession of the ornaments till his death in 1909. They remained after his death in the family safe and the step-brothers of the plaintiff who was an infant at the time, carried on the family concerns. The plaintiff attained majority in 1910. In 1919 disputes arose between the parties as to the ornaments and the plaintiff sued for their recovery from his step-brothers in 1920:

Held, (1) that the cause of action for the suit arose only when the plaintiff demanded the ornaments from the defendants, that the proper Article of the Limitation Act applicable to the case was Art. 49, and that the suit was not barred; [p. 888, col. 1.]

(2) that even assuming that Art. 120 applied to the case the suit was within time. [*ibid.*]

Mahomed Riasat Ali v. Hasin Banu (1), distinguished.

Article 49 of Sch. I of the Limitation Act is the ordinary Article applicable to a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. [p. 888, col. 2.]

Appeal against the judgment and decree of Mr. Justice Chotzner, dated the 25th March, 1926.

Messrs. *Langford James* and *S. Bhose*, for the Appellants.

Sir *B. C. Mitter* and Mr. *B. K. Ghose*, for the Respondent.

JUDGMENT.

Rankin, C. J.—In this case the plaintiff Goonendra brought a suit against two defendants originally—his step-brothers Bhupendra and Jnanendra. Jnanendra has since died pending the suit; but I will omit for the sake of simplicity the complications caused by that event. The plaintiff's case is that his father Woopendra Nath Bhosé was married twice, that by his first wife he had two sons, namely, the defendants, and that, after the death of his first wife, he married one Sushila Sundari Dassi and by her he had two children—the elder of the two being a daughter and the younger being the plaintiff. It seems that in the year 1905, Woopendra practically retired from business and his business affairs were managed by Bhupendra and Jnanendra. In the same year, Sushila Sundari died. Woopendra survived her by some four years till 1909, and, in 1910, the plaintiff attained majority. These are the broadest facts of the family history with which we are concerned.

The plaintiff's case is that when his mother Sushila Sundari died in 1905, she died possessed of a good many valuable personal ornaments of which certain descriptions have been given in the course of the evidence. These ornaments, according to the plaintiff, were acquired by his mother in such a way as to be her *ajautuka stridhan* and the plaintiff undertakes to show that they were *ajautuka stridhan* because otherwise, if they were *jautuka stridhan*, they would belong not to the plaintiff but to his sister *Srimati* Saroj Basini Dassi. That is the first point in the case. The defendants, in addition to putting the plaintiff to proof of the existence of the ornaments and the jewellery and of the fact that they were acquired so as to become Sushila Sundari's *ajautuka stridhan*, deny altogether that any such property came at any time to their hands. The learned Judge

has said that they put forward four different inconsistent cases and he has disbelieved the defendants and has believed the plaintiff. It becomes necessary in this case to state as matters of simple fact what the plaintiff's evidence establishes, because a great difficulty has arisen in this case from the fact that legal interpretations have been somewhat rashly put upon facts without sufficiently considering the distinction between the facts themselves and the legal results of certain facts. I am quite satisfied that the evidence adduced by the plaintiff entitled the learned Judge to hold, and that he meant to hold, the following facts:—First of all, the learned Judge has believed the evidence (which is the only evidence upon the point) given by Kusum Kumari Dassi as regards the way in which the plaintiff's mother came to be possessed of the articles in question and as to the fact that these articles came to the hands of the defendants. The lady explains that Sushila Sundari obtained the articles in question in two ways: First, she says they were presents given by the witness herself, Kusum Kumari, before Sushila's marriage to Woopendra and, secondly, she says they were presents which Sushila got from Woopendra after the marriage. Now, as to that, when the Hindu Law is examined, it turns out that the difference between *ajautuka* and *jautuka stridhan* is a matter which requires some little consideration. *Jautuka stridhan* is not entirely confined, it would appear, to presents given actually before the nuptial fire. But the limits within which such presents become *jautuka stridhan* are somewhat narrow. Kusum Kumari the grandmother having given her evidence in the manner I have described for the plaintiff is in no way cross-examined with a view to show that the particular facts to which she is speaking bring the case on a careful examination to a case of *jautuka stridhan*. Her evidence is left exactly as she gives it, a broad statement—gift from herself before the marriage, gift from her husband after the marriage. In my opinion, it either was not in the contemplation of the defendants at the time of the hearing to contest seriously the nature of this *stridhan* or else they felt themselves wholly unable to cope with this lady and cross-examine her so as to throw doubt upon the evidence which she gave. It has to be remembered that the defendants' case

is, that no such ornaments ever came to their hands. So far as I know, they do not admit anywhere that to their own knowledge any such property was in existence at any time. Indeed, their case suffers seriously from the attempt which the defendants made to show that to the best of their knowledge this lady who married a man of some considerable wealth and position had no ornaments at all. In my opinion, therefore, the learned Judge's finding that this was *ajautuka stridhan* should not be disturbed. The only reason why his finding requires to be considered at all is that, in giving his reasons for supposing that the ornaments possessed by this lady were of substantial value, he does say in his judgment that Woopendra would be unlikely to give his bride cheap or insignificant presents. It does not seem to me that the learned Judge's attention there was being directed to the exact legal distinction in Hindu Law which divides *jautuka stridhan* and *ajautuka stridhan* and the fact that he uses the word "bride" does not lead me to suppose that he has come to the conclusion after considering the matter that these presents were given at the exact time of the marriage. In any event, looking to the uncontradicted and simple evidence given in the course of the case, it appears to me that the plaintiff has made out his title by making out that this is property which would come to him and would not go to his sister. I need not say that, in no event, would it come to the defendants.

Now, it is necessary to go again over certain facts in this case in order to deal with the only other contention which has been raised before the Court by Mr. Langford James on behalf of the defendants-appellants, namely, the contention that the plaintiff's case is governed by Art. 120 of the First Schedule to the Limitation Act of 1908, and that, under Art. 120, the plaintiff's case is time-barred because, as I understand the argument, his suit might and could have been brought in 1910, when the plaintiff came of age, and six years from that date would be 1916, whereas the plaintiff was not filed till September, 1920. Here, again, I would try to keep to the facts as distinct from a more or less unsuccessful attempt to interpret the facts. The facts are that before 1905, when Sushila Sundari died, the ornaments in question, according to the plaintiff's evidence,

were kept in her own room and that after she died they were kept in an iron-safe in her husband's room. What else was kept in the iron-safe we do not know. What other purpose the iron-safe was used for we do not know. We are told that Bhupendra—one of the defendants—kept the key; but it is quite true, as Mr. James points out, that, however much the management of the family affairs might be left by the father to the plaintiff's step-brothers, the mere existence of the ornaments in the safe would not have involved any management at all. The facts are that they went on in the safe in the father's room and the first defendant had the key. When Woopendra died in 1909, the facts are that the plaintiff had not yet come of age, that his step-brothers were considerably older than he was, and that naturally enough they not only took Probate of the father's Will but carried on the family concerns as they would have done in ninety-nine cases out of hundred in Hindu families of this particular type. The ornaments were in the safe and they went on in the safe. It appears that when the family had occasion to use them they were used. They were used later on at the time of the plaintiff's marriage. Some other relatives seem to have used them on occasions. There is no reason why they should not be used when suitable occasions arose. There is no suggestion in the plaintiff's evidence or in the defendants' evidence that any claim was made by the elder brothers that these ornaments belonged to them. The nature of the ornaments makes it very improbable that there was much doubt as to their not belonging to the step-brothers. What happened is what one would expect so long as the family was living jointly and without trouble. Of course, in the end, trouble did come. It seems that, in 1919, the finances of the defendants being in an unsatisfactory state, there was a question of selling two of the ornaments. It seems that the plaintiff's consent was asked, the two ornaments were valued for the purpose of sale and the plaintiff in the end refused his assent and they were not sold. There was a partition in 1920 and it is in September, 1920, that the plaintiff brings his suit. Those being the facts the matter begins, as most plaints in this Court do, by getting them thoroughly muddled with the pleadings. There were two attempts to fasten these acts with various legal cate-

gories in order to put the plaintiff's case straight for the purposes of the Limitation Act and the real difficulty in applying the law to the facts consists entirely in the circumstance that instead of saying that when Woopendra died the defendants took possession of whatever was in the house and that the family went amicably on as before, the plaintiff says this: "The management of the estate and affairs of the said Woopendra Nath Bhose was under the control of the defendants who with the knowledge and concurrence of their father took possession of the said ornaments and jewellery for and on behalf of and as trustees for the plaintiff and continued to hold the same as such till his death." That is the travesty of what happened before Woopendra's death. The travesty of what happened after his death is this. The plaintiff goes on to say: "Upon the death of the said Woopendra Nath Bhose, the defendants as executors and trustees appointed under his Will took possession of the estate left by him as such executors and trustees including the plaintiff's share therein and the said jewellery and ornaments continued to be in their possession, care and control as such executors and trustees and are still in their possession and control." The learned Judge has, it is true, found not merely the fact that these defendants being the elder brothers took possession of the house with the iron-safe and whatever were the contents of the iron-safe; but he also says that they took possession as executors and trustees and Mr. Langford James very properly points out that if this has to be regarded accurately then the plaintiff would have a right to bring his suit the moment he attained majority. If these brothers of his were holding the property as executors of Woopendra, then, of course, they were setting up a hostile title to the plaintiff because according to the plaintiff's case Woopendra was never the owner of these goods at all after Sushila. As a matter of verbal criticism, I entirely agree that, if the correct finding is that these people were claiming to hold the property as property which was Woopendra's and not the plaintiff's and which, therefore, had come down to them, they were holding it under a title which was hostile to the plaintiff and the plaintiff would have six years from 1910 in which he would be obliged to bring his suit. It is necessary

therefore, for us to examine the evidence for ourselves and see whether the real facts found do warrant any such conclusion. It is not the effect of the plaintiff's evidence or of any evidence in this case that these defendants ever claimed that these ornaments were ornaments belonging to their father's estate or in which they had a joint interest with the plaintiff as part of their father's estate. As I have already observed, the nature of the ornaments makes it extremely unlikely that these step-brothers would set up any right to the ornaments of a lady who was not their mother at all. There is nothing in the conduct of Woopendra to suggest that he suffered under any impression that the ornaments devolved on him. What has happened is entirely natural and consistent with the plaintiff's case. The ornaments remained after the father's death in the safe when the elder brothers had to carry on the family concerns and the infant lived with them, no question of dispute arising between them. Plaintiff's case is that they were always recognised as belonging to him because everybody knew that they were the ornaments of his mother. In these circumstances, the last thing that is true is to say that they were held by the defendants as executors of Woopendra's estate. So far as I am concerned, I entirely dissent from any such finding because the evidence satisfies me to the contrary. In my opinion, the position is, as the plaintiff's evidence shows, that these goods being there in the safe, the family went on, the elder brothers having no doubt a general direction and control of the family affairs being responsible as natural guardians of the plaintiff and looking after the plaintiff's property. There is no reason to think that any claim or controversy arose until long after the plaintiff attained majority. In the meantime he was living in amity as a member of a joint Hindu household at the old house. The question is whether, in these circumstances, Art. 49 or Art. 120 of the Limitation Act applies and whether, if Art. 120 applies, the suit is time-barred. In my opinion, whichever Article applies the suit is not time-barred but on the facts which I have endeavoured to state, I think the Article applicable is Art. 49. I will deal, first, with the question of the Article applicable. Article 49 has to be read with Art. 48 and having disposed in Art. 48 of all cases of claim for specific

moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, Art. 49 deals with cases of claim for other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same; and it says that the time is to be three years from the date when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful. Article 49 is the ordinary Article to apply in a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. The common case is the case where the demand is made by the plaintiff—the plaintiff having a right to determine the possession of the defendants. Now, it is said that that Article is inapplicable because of the decision of the Privy Council in the case of *Mahomed Riasat Ali v. Hasin Banu* (1) and it is a little important to see what the Privy Council actually held in that case. That was a case where a Muhammadan died leaving a widow and a brother. In the *wajib-ul-arz* of the place where he had his immoveable property there was a statement of the local custom governing such people and the local custom evidenced by that record and by certain other records was that the widow would succeed to the whole of her husband's estate for a life-interest. The man died and his brother went into possession of his effects on the basis that there was no such custom and that the property devolved on him and the suit was brought to establish the widow's right under that custom, first of all, to the immoveable property and then to the cash and other things that the man died possessed of. A controversy arose as regards the moveables whether the claim against the brothers was a claim under Art. 49 or under Art. 120; and it is with reference to a case like that that their Lordships said: "This latter Article," that is Art. 49 "does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person." The case there was that the widow was claiming to use Art. 49 by saying "if I establish my right under the custom then you, the defendant, are a person who has wrongfully taken my

(1) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique and Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.).

property. Their Lordships of the Privy Council say that that is not the way to look at a suit to establish a right to succeed to the property of a deceased. In my judgment, that is not the case at all. The plaintiff's case is not that the defendants wrongfully took his property. His case is that the defendants were in rightful possession of the property, in rightful possession so long as he was a minor, in rightful possession so long as he was living with them and let them look after it but in wrongful possession of it since 1919 or 1920 when he claimed that they should make over the property to him; and I am in no way satisfied that there is any valid reason for holding that the plaintiff's claim in this case should be excluded from Art. 49.

The next question is, however, whether the same principle would not apply under the terms of Art. 120. I think it would. If one asks oneself why the plaintiff should bring a suit in 1911 soon after he attained majority against his step-brothers and what his cause of action in such a suit would be, I think that question, too, must be answered against the present appellants. It is quite true that the plaintiff had a right to determine the lawful possession of his elder brothers who were living jointly with him. He had the right to do that. But it is no part of the policy of the Limitation Act to make people determine the lawful possession of others who are looking after their property or who have their property on deposit. The policy of the Limitation Act is that when once that arrangement is stopped the suit should be brought within a limited time. So far as I know, without making a demand upon the brothers for this property, on the facts which the plaintiff's case discloses, the plaintiff would not have had a cause of action against his step-brothers but had first of all to determine their possession, to do something which would render their possession unlawful and then to bring his suit. In my judgment, under Art. 120 just as under Art. 49 the plaintiff in this case has brought his suit within time. It cannot be too strenuously emphasised that everything depends upon the exact facts in a case like this. If it had been the defendants' case at any stage that they had the property, that they knew it came from a different origin, that they claimed that it had belonged to their father or that two-thirds of it belonged to them, then no

doubt none of the reasons which I have endeavoured to apply to the facts of this case would have been at all applicable.

Upon the facts of this case, it seems to me that the judgment of the learned Judge should be upheld and this appeal should be dismissed with costs.

A cross-objection is argued in this case on behalf of the plaintiff to the effect, first, that the learned Judge on the evidence of Hrishikesh ought to have found that the value of the jewellery proved to have been received by the plaintiff's mother from her husband was more than Rs. 10,000 and also that the learned Judge has forgotten to take any account of the ornaments said to be 107 *tolas* in weight which the lady is said to have got from Kusum Kumari. It appears to my mind as regards the first point that the learned Judge was not satisfied having regard to the nature of the articles in question, that he could safely go by the valuation of the witness Hrishikesh Roy, and, being apparently dissatisfied with that evidence in some respect he has really reminded himself of the duty of the Court which is not to give damages for a single penny more than what is quite certainly proved. The learned Judge has, in so doing, certainly discounted the figure given by the jeweller very heavily. He was dealing with articles with reference to which it is very difficult to form a precise opinion and I do not think it would be right on the part of this Court to interfere with his figure seeing that he was entitled to put a conservative figure upon the matter.

As regards the 107 *tolas* in weight of jewellery which is described by Kusum Kumari, there again the plaintiff is in the unfortunate position that no evidence whatever has been given of the value of these articles. It may be that, if some evidence had been given of the value, it would have been our duty to interfere. But it is very difficult to say that, on this evidence, the learned Judge was obliged to allow the plaintiff any particular figure. The ornaments may have been of standard gold or something containing a great deal of alloy in them or they may have been merely worth the actual weight of the gold they contain or may have been worth more. It is difficult indeed for the Court left as it is without the opinion of a single witness as to the minimum value of such articles to say that the learned Judge was

obliged to put any additional figure upon them and that he was wrong to ignore these articles. I think it may be due to the fact that there was no material upon which he could assess the amount. I do not think that in this case it is right and proper that there should be an enquiry as to the value of these ornaments. In these circumstances the only thing we can do—although I quite agree that the plaintiff has probably got less than the value of the articles—is to dismiss this cross objection with costs.

Buckland, J.—I agree.

A. N. A. *Cross-objection dismissed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 322 OF 1926.

July 28, 1927.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Curgenvin.

SANKARALINGA REDDIAR AND OTHERS

—APPELLANTS

versus

RAMASWAMI REDDIAR AND ANOTHER

—RESPONDENTS.

Letters Patent (Mad.), cl. 15—Order refusing to transfer case, whether judgment—Appealability.

An order of a Single Judge of the High Court refusing to transfer a case from the file of one Subordinate Court to that of another is not a judgment and is not appealable under cl. 15 of the Letters Patent of the Madras High Court.

Letters Patent Appeal against an order of Mr. Justice Jackson, dated the 22nd September, 1926, and passed in C. M. P. No. 3112 of 1926, presented to the High Court for transfer of A. S. No. 297 of 1925 on the file of the District Court of Tinnevely from the file of the said Court to the file of any other Court having jurisdiction.

Mr. S. T. Srinivasagopalachari, for the Appellants.

Mr. K. S. Ramabhadra Aiyar, for the Respondents.

JUDGMENT.—This appeal is against an order of the Hon'ble Mr. Justice Jackson refusing to transfer a case. It has been held (See *Narasa Reddi v. Hajee Tar Muhammad Ayab Sait*, L. P. A. No. 109 of 1927, on the file of the High Court) that such an order is not appealable under cl. 15 of the Letters Patent.

The appeal, therefore, does not lie and is dismissed with costs.

V. N. V.

A. N. A.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 698 OF 1927.

November 23, 1927.

Present:—Mr. Justice Zafar Ali.

CHARANJI LAL—DECREE-HOLDER—

PETITIONER

versus

RAJA RAM AND ANOTHER—JUDGMENT—

DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 47, 115—Stay of execution—Order for security—Appeal—Security bond, acceptance of, without notice to decree-holder, legality of—Practice—Treating appeal as revision.

An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under s. 47 nor is it a decree within the meaning of s. 2, Civil Procedure Code, and is, therefore, not appealable.

Saraswati Barmonya v. Moti Barmonya (1), followed.

A Court should give notice to the decree-holder of the security bond filed by the judgment-debtor and should not accept it without enquiring into the objections of the decree-holder.

An appeal may be treated as an application for revision where no appeal lies.

Petition for revision of the order of the Senior Subordinate Judge, Kullu, dated the 1st September, 1926.

Mr. Faqir Chand, for the Petitioner.

Mr. Gobind Ram Khanna, for the Respondents.

JUDGMENT.—A decree for Rs. 7,466-8-3 and costs of the suit having been passed against Raja Ram and his brother Radha Lal, they filed against that decree an appeal in the High Court and obtained an order of stay of execution on the usual condition of furnishing security. Then they got a security bond executed by four men on an unstamped paper and had it attested by a Naib-Tahsildar. The Executing Court, namely, the Senior Subordinate Judge of Kulu, accepted that bond in the absence of the decree-holder and released the judgment-debtors' property from attachment. When the decree-holder became aware of it he filed objection to the effect that the sureties were men of no substance. But the learned Senior Subordinate Judge rejected this application summarily. The decree-holder has filed an appeal against this order of the Senior Subordinate Judge. Counsel for the judgment-debtors (respondents) raises a preliminary objection that the order is not appealable and relies on *Saraswati Barmonya v. Moti Barmonya* (1). In that case it was held by a Division Bench of the Calcutta High Court that "an order for

Security to stay execution is not an order determining any rights of the parties. It is neither an order under s. 47, nor is it a 'decree' within the meaning of s. 2, cl. (2) of the Civil Procedure Code of 1908. It is, therefore, not appealable." The decree-holder's Counsel cannot urge anything contrary to this ruling and prays that the appeal may be treated as an application in revision. I agree to do so.

The Senior Subordinate Judge ought to have given notice to the decree-holder of the security-bond filed by the judgment-debtors and should not have accepted it without enquiring into the objections of the decree-holder. I, therefore, set aside the order of the Senior Subordinate Judge accepting the security and dismissing the decree-holder's application and direct him to make an enquiry and determine whether the security-bond is in order, and whether the sureties are men of substance. No order as to costs in this Court.

R. L.
A. N. A.

Order set aside.

MADRAS HIGH COURT.

APPEAL SUIT NO. 349 OF 1923.

August 16, 1927.

Present :—Mr. Justice Ramesam and Mr. Justice Cornish.

VADLAMANNATY BALA TRIPURA
SUNDARAMMA *alias* SUNDARAMMA—
DEFENDANT NO. 2—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL REPRESENTED BY THE COLLECTOR
OF KISTNA AND OTHERS—DEFENDANTS
—RESPONDENTS.

Inam—Service inam—Grant to institution or to servant for services in institution—Tests—Expressions "devadayam", "mulla", effect of—Limitation Act (IX of 1908), Sch. I, Art. 14—Suit to set aside resumption of personal service inam on ground of non-performance of services—Limitation.

There is a well understood distinction between a grant to a religious institution such as a temple or a mosque and a grant to some person on condition of his rendering services to a religious institution, such as the *archaka* of a temple. [p. 893, col. 2.]

The word 'devadayam' indicates a grant for religious purposes but does not necessarily connote that the grant is to the religious institution itself. The term is equally applicable to service *inams* connected with religious institutions. [p. 894, col. 1.]

The description of the grantee as "mulla" does not imply that the grant was made to him as representing a mosque. [p. 900, col. 2.]

A suit to set aside the resumption of a personal service *inam* by the Government on the ground of non-performance of services is governed by Art. 14, Limitation Act. [p. 899, col. 1.]

Where Government purports to act under powers reserved to them under the terms of a personal service *inam* grant though they may have acted erroneously in the interpretation of its terms or in finding on facts which justify the resumption, the act is *intra vires* and not *ultra vires* and the act of resumption cannot be regarded as a nullity. [p. 898, col. 1.]

Secretary of State for India v. Gulam Mahaboo Khan (15), doubted and distinguished.

Per Ramesam, J.—As the British Government were dealing favourably with *inams* connected with Hindu and Muhammadan religions, whether grants to temples and mosques, or grants to officials and servants on condition of rendering certain services in such temples and mosques, both were described as "devadayam" and the use of the word is not conclusive in favour of the temple or mosque itself where the question is whether it is a grant to the temple or to a temple servant though it may be some evidence along with other circumstances; but it is of very great weight where the claim of private property is set up. [p. 895, col. 2; p. 896, col. 1.]

Where the grant is made to a person in the capacity of a *muttawalli*, manager, superintendent, *dharma-kartha*, or even servant of the mosque or temple, and where it does not appear that there is some other trustee, it may be regarded as a grant to the temple or mosque itself. [p. 896, col. 1.]

Where it appears that a substantial part of the income goes to the benefit of the institution, as for the erection of a building or for its upkeep and repairs, or such other things the grant may be considered as a grant to the institution itself even though some surplus may be used by the trustees for their own maintenance. [*ibid.*]

Where none of the above *indicia* appears, that is where the grant does not show that it was granted to a temple or mosque, nor describe the grantee in the capacity of trustee, manager, etc., and where it does not appear that any portion of the income that may be considered as substantial has gone to the benefit of the temple or mosque, then in such a case it must be treated as a grant to the grantee named (*persona designata*) and, if services are mentioned, it is a grant of service. [*ibid.*]

Appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in O. S. No. 14 of 1920 (O. S. No. 11 of 1919, District Court, Kistna).

Mr. T. M. Krishnaswami Iyar, for the Appellant.

The Government Pleader and Mr. Ch. Raghava Rao, for the Respondents.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit by two members of the Muhammadan community (1) for a declaration that the resumption of the suit *inam* by the Government and conversion into a *ryotwari* land is not binding on the plaintiffs and other Muhammadan members of the community and (2) for a declaration that the

two mortgages dated 16th March, 1914, which were executed in favour of the 2nd defendant by defendants Nos. 3 to 7 and grandmother of the 8th are invalid and cannot bind the suit property. The 1st defendant is the Secretary of State for India in Council and the 2nd defendant is the mortgagee.

The history of the suit *inam* may now be briefly stated. The earliest document we have got on record is an extract from Oakes Inam Register, Ex. X prepared in 1797. This was a register of *inams* probably prepared with a view to the passing of Regulation XXXI of 1802 but whatever it may be, it describes the suit land merely as an *inam*, fixes a certain amount of *kattubadi* in kind on it and shows that the *inam* was granted by one Mustapha Khollikanudu, probably a representative of the Moghul Sovereigns. The date of the grant was Hijri 1108. The grantee is described as Sheik Ibrahim and the person in enjoyment in 1797 as great-grandson Gulam Husain. The next document on record is Ex. A. This is the *inam* register of the village of Gandram. The suit *inam* is situated in the village of Ibrahimpalem which is a hamlet of Gandram. Column 2 describes the grant as endowment to a religious institution. Column 8 is "*devadayam* granted for the performance of certain rites in the mosque. The ceremonies are duly kept up." Column 9 shows that the annual *kattubadi* was changed to Rs. 32 from 1852. Column 10 describes the *inam* as hereditary. Column 11 shows that the grant was made in Hijri 1137 or A. D. 1724 by Sidni Etiday Kahan of Mahomed Shah Gazhi Padshah. Mahomed Shah is probably the Emperor of Delhi who reigned from 1719 to 1748 and the other person is his local representative. In column 12 there is a list of documents. The first is the *sanad* granted by Etida Khan in Hijri 1137 (A. D. 1724). The 3rd is *sanad* granted by Kuli Khan mentioned in the Oakes Register. The 2nd is another *sanad* in Persian. The others are *dumbalas* and *checknamas*, i. e., orders addressed to village officials. Column 15 refers to the accounts of 1797, i. e., the Oakes Register. Columns 16 to 18 describe the person in enjoyment in 1859 as Haji Sahib of Nagaram, the 5th in descent from the original grantee. Columns 19 and 20 give the detail of his family. Column 21 is the recommendation of the Special Assistant. It says: "This *inam* is an ancient one having been granted

in Hijri 1137 or A. D. 1724 for the purpose of keeping up certain ceremonies in the mosque of Gandram. The original *sanad* was given to Mulla Sheik Ibrahim in whose family the *inam* has been all along been enjoyed and the rites fully performed.....It is recommended that the *inam* be continued for the purpose originally contemplated subject to the payment of the annual *kattubadi* of rupees thirty-two (Rs. 32)." Column 22 is the order of the Inam Commissioner "continued accordingly." In 1874 Haji's son Dada Sahib rented a cowle of the *inam* for a period of 22 years to Mirza Mahomed Taki Sahib. That cowle was transferred to one Thadu Sahib in 1884. In 1886 that cowle right was surrendered by him for a sum of Rs. 1,746. For this and some other items of consideration the *inam* was mortgaged for Rs. 1,926 on 16th July, 1886, to the said Thadu Sahib under Ex. IV. Exhibit IV-a is the surrender of the cowle right. Exhibit V is the deed of mortgage with possession dated 23rd August, 1883, to the same Thadu Sahib. This mortgage right was transferred by Ex. V-a to one Mirza Sahib. It also shows that the title deeds were with a *sowcar*. Exhibits IX-a, IX-b and IX-d are *muchilikas* obtained by Shafi son of Mirza. Exhibit VI is a sub-mortgage by Shafi dated 28th June, 1894, in favour of one V. Venkatramayya, husband of the 2nd defendant. Exhibit IX-c is a *muchilika* taken by him soon after Exhibit IX is another *muchilika* taken by him in 1897. In December 1897 Shafi transferred his mortgage right to the 2nd defendant. It is also mentioned that the *inam patta* remained with the *sowcar*. The sub-mortgage in favour of the 2nd defendant's husband and her right as assignee were apparently consolidated by Ex. VII dated 15th February, 1903. This is also a mortgage with possession. All these documents ranging from 1886 to 1903 described the suit land as ancestral property of Dada Sahib and his sister. Sometime in 1908 the Revenue Officers made enquiries as to whether the service was being done in the mosque. Exhibit III is a statement by the *karnam* before the Tahsildar in November 1908. Exhibit III-a is a statement of Dada Sahib. The Tahsildar's report to the Collector is Ex. II. The Collector reported to the Board of Revenue on 7th April, 1909. The Board of Revenue sanctioned resumption of the *inam* by Ex. C dated 30th April and it is acted upon as shown by the subsequent

correspondences in June, August, September and November, 1909, (*vide* Ex. B). Exhibit XII-a is a petition by Dada Shib requesting that the resumption may be cancelled and that the *inam* may be continued as *inam*. In the same year the mortgagee obtained a decree for possession on the basis of Ex. VII. Exhibits VII-a and VII-b are the decree and judgment. In about August, 1910 the full assessment of Rs. 461-10-1 was collected from Dada Sahib by Government and the suit notice was issued by Dada's Vakil, *vide* Ex. XII. In 1912 some Muhammadan residents of Ulavalapudy and Nagavaram, two neighbouring villages having mosques of their own petitioned to the Board of Revenue for the cancellation of the resumption. The Board referred it, to the Collector, by Ex. F. The Tahsildar's report to the Collector is Ex. D and it was referred to the Divisional Officer. His final report in August is Ex. J. The Board of Revenue called for a fresh report, as to whether there was any District or Taluk Committee to whom the *inam* may be assigned, by Ex. E. There was a report to the Board of Revenue and a further reference (Ex. H). The Board of Revenue finally declines by Ex. G to re-assign the *inam* in March 1913. In March 1914 Ex. VIII was executed by defendants Nos. 3 to 7 representing 7/8ths share for Rs. 13,670 and another mortgage-deed was executed by the grandmother of the 8th defendant representing 1/8th share in the *inam*. The present suit was filed on 3rd April, 1919. The Subordinate Judge decreed the suit. The 2nd defendant has filed this appeal. There is no appeal by the 1st defendant who is, herein, arrayed as a respondent.

The first point arising for consideration is what is the nature of the *inam*. It has been strenuously contended by the appellant that the *inam* was granted to the original grantee as a service *inam*, that is as a grant to him burdened only with the condition of rendering certain services, namely, the performing of certain rites, in a mosque. On the other hand, it has been contended by the respondents Nos. 2 and 3 that the grant was to the mosque itself and that the *inam* belongs to the mosque. Before discussing the documents bearing on this question it will perhaps be convenient to refer to some of the cases cited by both the parties and which may well be a guide in the construction of such grants. These cases show that there is a well understood

distinction between a grant to a religious institution such as a temple or a mosque and a grant to some person on condition of his rendering services to a religious institution, such as the *archaka* of a temple. It may be a nice distinction to find under which class a particular grant falls. An example of such a grant to a servant of the temple is *Matte Sarrayya v. Vepparathi Vydyanatham* (1). The grant there was to a dancing girl of a temple. There the title-deed was given to the dancing girl in contrast to the other title-deeds which were issued to the manager of the temple, and the title is conditional on the fulfilment of the terms of the grant. "So long as the conditions of the grant are fully fulfilled" is the usual language in all the title-deeds of this kind. *Sriranga Chariar v. Pranatharthihara Chariar* (2) was a grant to a person performing the service of *acharyapurusha* in the Tirupathi temple. The title-deed describes the land as '*davadayam*' or '*pagoda service inam*' for the support of the *pagoda* called the service of '*acharyapurusha*' in the suit temple. It was held that the grant was not to the temple but it was a grant to the temple servant on condition of performing the service of *acharyapurusha* in the temple, and, as it did not belong to the temple, there was no trust in respect of which a scheme suit under s. 92 can lie. *Mohamed Husain Saheb v. Mohamed Abdul Rahim Beg Saheb* (3) is the next decision I may refer to. There the holders of the *inam* divided the *inam* land between themselves. The suit was for a declaration that the division was illegal and that the land belonged to the mosque. It was held that the grant was not to the mosque but to certain persons on condition of their rendering services in the mosque, namely, the proper upkeep of the mosque and other services. One of the *inam* registers in that case described the land in column 2 as '*davadayam*'. In column 8 it was said to be for the support of the great mosque at Guntur. In the other *inam* register it was said to be for performing certain services in the mosque. One would say that *prima facie*, where the grant is for the upkeep of the mosque, it was intended that the

(1) 27 Ind. Cas. 163; 1 L. W. 490; 27 M. L. J. 57.

(2) 30 Ind. Cas. 74; 2 L. W. 632; 18 M. L. T. 122; (1915) M. W. N. 531.

(3) 67 Ind. Cas. 492; 15 L. W. 241; (1922) M. W. N. 74; 42 M. L. J. 272; A. I. R. 1922 Mad. 8.

income of the land granted should belong to the mosque, and, so far as one of the items there is concerned, one might perhaps say that the land belonged to the mosque but not to other which was given for service; but the District Judge found that both were treated alike throughout. Spencer, J., who delivered the judgment of this Court also held that they were not grants to the mosque. I agree with his judgment. In *Sikkandar Rowther v. Secretary of State for India* (4) the *inams* are classified as 'devadayam' and the grant was for the support of the mosque. The grantee was described as the mosque itself. The holders of the *inam* were described as trustees. In the *inam* register both the original *inamdar* and the 'present enjoyer' are given as the mosque and the recommendation was that the *inam* should continue as long as the mosque existed. The decision was that the land belonged to the mosque. That case illustrates what one should expect if the grant was to the mosque. No doubt, if all the entries indicate that the grant was for the mosque it would be a very clear case; but if not one of such *indicia* as that in that case is present, and there is a total absence of the indication of the ownership of the mosque, the mere use of the word "devadayam" does not necessarily show that the grant was to the mosque, as the other cases cited by me show. In *Sikkandar Rowther v. Secretary of State for India* (4), Srinivasa Aiyangar, J., says about *devadayam* that, by itself, it is said to be *prima facie* strong proof. It is clear that the word "devadayam" indicates a gift for religious purposes but does not necessarily connote anything more. The reason is clear in that the British Government, when it dealt with *inams* in 1859, appointed an *Inam* Commission for enquiring into the genuineness of the *inams* so that they may be recognised and confirmed or not as the cases require. They dealt with both classes of cases, namely, the grants to temples and mosques and grant to servants on condition of rendering services in temples, and mosques together. From their point of view they were all connected with Hindu or Muhammadan religion and their policy was not to impose quit-rent on them but to recognise and continue the *inams* so long as the conditions of the grants were being fulfilled, that is, in the case of grants to

mosques or temples, as long as the institutions themselves lasted, and, in the case of grants on condition of services, as long as the services continued to be performed. Title-deeds were accordingly issued with the clause "to be held as long as the conditions of the grant were fulfilled." Both being directly or indirectly connected with religion, both classes are indiscriminately described as "devadayam." Therefore, the word "devadayam" does not conclusively show that the grant is a grant to the temple or mosque itself. (*Vide* r. 3 of the *Inam* Rules). In *Mutteyi Srinivasacharyulu v. Dinavahi Pratyanga Rao* (5) it was held that the grant was not to the *archaka* but to the temple itself. In that case the grant was for *nivedyam* and *deeparathna* which are expensive items and expenses were to be met out of the income of the *inam*. The *sanad* was in favour of the *Swamiluvaru* and not in favour of the *archaka*. The *inam* register showed that the grantee was Sri Venkateswara Swami and the title-deed was issued to the manager for the time being of the temple. The *inam* was said to be for the support of the temple. In the face of these unambiguous circumstances the learned Judges held that the conduct of the *archaka* in appropriating the surplus income could have no weight in the matter and reference was made to *Attorney-General v. Master Wardens etc., of the Wax Chandlers' Co.* (6). One *sanad* Ex. D in that case purported to be exclusively for *archaka* service in contrast to the other *sanad* which was for the support of the temple. In *Sashadu Reddi v. Pichi Reddi* (7) Spencer and Devadoss, JJ., held that though the land there was described as 'devadayam' or 'pagoda hand-rigainam' and though the title-deed was granted to the manager for the time being of the *pagoda* and though the latter documents described the *inam* as 'devadayam' the land belonged to the original grantee because the *sanad* stated that he was to enjoy the property and it was a grant to him burdened with an obligation of doing certain services in the temple and all surplus left after the performances of the services belonged to the donee and his heirs. In *Muhammad Esuf Sahib v. Abdul*

(5) 64 Ind. Cas. 816; 30 M. L. T. 101.

(6) (1873) 6 H. L. 1.

(7) 74 Ind. Cas. 35; 16 L. W. 839; A. I. R. 1928 Mad. 163; 32 M. L. T. 89.

(4) 38 Ind. Cas. 200; 5 L. W. 402.

Sathar Sahib (8) the learned Judges before whom the case came up Wallis, O. J., and Spencer, J., deferred. The case then came up before a Bench of three Judges. All the three Judges expressed their opinion on the nature of the *inam*. Ayling, J., says: "In the absence of the *parwana*, we have to look to the record in the *inam* register and to the evidence of user." He then points out that the *inam* was a religious endowment for the establishment and upkeep of a mosque and various services therein. Kumaraswami Sastri, J., points out that the *inam* was for the purpose of erecting a *masjid* and for various other services and says: "It does not appear that it was the intention of the grantor that the trustee should obtain any personal benefit or that he should appropriate any portion of the income of the land..... The persons in possession are described as managers of the *masjid*." He also expressly points out that the words "religious endowment" and "manager of the *masjid*" though they may be good evidence in favour of the institution are not conclusive. With this statement of his I entirely agree. He then says that the matter is put beyond doubt by the words "usage of the institution" as proved by the evidence in this case. In *Dost Muhammad Khan v. Ghulam Ghouse Sahib* (9) Odgers and Jackson, JJ., held that the original grant disclosed no trust and that there was no grant to the mosque and that the services were rendered to the *durga* and mosque out of respect for the founder. They so held in spite of an entry in the *inam* register "for the support of the *durga* and mosque." The case in *Kolandai Mudali v. Sankara Bharadhi* (10) arose under the Pensions Act and it was held that the grant was for the maintenance of a religious endowment although beneficial to the family by whom the endowment was administered. It was the case of a *matam* service *inam* held for the support of the grantee's family and of the *matam*. That case cannot help the respondent. *Sathianaraya Bharati v. Saravanabagi Ammal* (11) was also a case of a *mutt*, namely, Sankara Bharathi *mutt*. One of

the parties was performing *pūjā* or worship in a temple called Sankara Bharathi Swami Koil. It was observed that the evidence did not show that the village was divided subject to the obligation or that any portion of the village was set apart as trust property and the rest as partible property, and that the words "from generation to generation" meant only absolute estate. The last two cases are cases of *mutts*, these *mutts* being somewhat different in their nature from temples and mosques. In *Muhammad Jafar v. Muhammad Ibrahim* (12) it was found that the *inam* was the source from which the expenses of the mosque had been mainly defrayed and, therefore, it was held that it was an *inam* belonging to the mosque. In *Abdulla Sahib v. Hyder Beg Sahib* (13) the grant was for the expenses of lamp oil in the mosque. Wallis, O. J., relied on three circumstances and held that the grant was in favour of the mosque. (1) The grantees were described as servants of the mosque; (2) they were not all one family and it is unlikely that they would hold as tenants-in-common; and (3) all later treatment of the *inams* was as endowment to the mosque itself. In *Mahomed Kadir v. Ghulam Mahomed Ali* (14) the order of the Government in 1882 showed that the *inams* which were endowed to the mosque were to be enjoyed by *muttawallis*. I do not think it useful to refer to the two Bombay cases cited by Mr. Ganapathy Iyer as they merely show that the use of the words "from generation to generation" does not make the grant a private grant.

In A. S. No. 38 of 1920, neither Judge relied on the word "*devadayam*" or made any reference to it. Wallis, O. J., pointed out that the *inam* register shows that the title-deed was to be issued in the name of the *pallivasal* or mosque.

The result of the discussion of the above cases may be thus stated:—

(1) As the British Government were dealing favourably with *inams* connected with Hindu and Muhammadan religions, whether grants to temples and mosques, or grants to officials and servants on condition of rendering certain services in such temples and mosques both were described as "*devadayam*" and the use of the word is not conclusive in favour of the

(8) 49 Ind. Cas. 821; 42 M. 161; 25 M. L. T. 141; 36 M. L. J. 262; (1919) M. W. N. 228.

(9) 102 Ind. Cas. 473; A. I. R. 1927 Mad. 599; 38 M. L. T. 248.

(10) 5 M. 302; 6 Ind. Jur. 463; 2 Ind. Dec. (N. S.) 210.

(11) 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 535.

(12) 24 M. 243.

(13) 51 Ind. Cas. 42; 10 L. W. 135.

(14) 28 Ind. Cas. 934.

temple or mosque itself where the question is whether it is a grant to the temple or to a temple servant though it may be some evidence along with other circumstances; but it is of very great weight where the claim of private property is set up.

(2) Where the grant is made to a person in the capacity of *muttawalli*, manager, superintendent, *dharmakartha*, or even servant of the mosque or temple, and where it does not appear that there is some other trustee, it may be regarded as a grant to the temple or mosque itself.

(3) Where it appears that a substantial part of the income goes to the benefit of the institution, as for the erection of a building or for its upkeep and repairs, or such other things the grant may be considered as a grant to the institution itself even though some surplus may be used by the trustees for their own maintenance.

(4) Where none of the above *indicia* appears, that is where the grant does not show that it was granted to a temple or mosque, nor describe the grantee in the capacity of trustee manager, etc, and where it does not appear that any portion of the income that may be considered as substantial has gone to the benefit of the temple or mosque, then in such a case it must be treated as a grant to the grantee named (*persona designata*) and, if, services are mentioned, it is a grant of service.

In the present case we may ignore the Oakes Register which makes no mention of any mosque and which, therefore, is entirely in favour of the appellant. The *inam* register mentions a mosque but it does not describe the grantee Sheikh Ibrahim as *muttawalli*, superintendent or manager. All that we have got is the word "*mulla*" added to his name. "*Mulla*" is defined in Wilson's Glossary and Maclean's Manual, Vol. III, as a learned man. This obviously is the etymological meaning, being the same as *moulvi* or *moula*, but it has also got the secondary meaning of a village school master or a person in charge of a mosque. Mr. Ganapathy Ayyar could not mention to us any case where the word "*mulla*" is used or considered equivalent to trustee. Even if Sheikh Ibrahim in this case had charge of a mosque of which there is no evidence the language is quite consistent with the grant being made to him as he is a learned man for

his maintenance. It is remarkable that though in column 8 of the *inam* register it was described as for the purpose of certain rites, the nature of these rites was not given and to this day remains vague, indefinite and uncertain. There is some oral evidence in this case that by rites was meant lighting of lamp, feeding of *fakirs* during Mohurram, etc., but as I will later on show the oral evidence is practically worthless. Most of it relates to recent usage, that is after resumption though one or two old persons purport to give evidence for a longer time. The *inam* title-deed which remained with the *sowcar* could not unfortunately be produced by anybody. The Subordinate Judge is wrong in thinking that it must have been taken away by Government from Dada Khan and sent to the Board of Revenue. The heading of column 8 is "if for service to be stated whether the service is continued," and under the column we have got the statement "the ceremonies are duly kept up." This looks as if it is an answer to the heading which requires information—whether the service is continued and as if it implies that the performance of ceremonies is the service. There is nothing in the documents, ignoring the oral evidence as useless, to show that the rites meant benefit to the smallest extent in pecuniary shape to the mosque. For aught we know, the mosque might have been built otherwise than with the funds of the *inam* and did not get pecuniary benefit even of a pie's worth from the income of this *inam*. In column 21 we have got "for the purpose of keeping up certain ceremonies in the mosque," not "for the upkeep of the mosque." Lower down we have "in whose family the *inam* has all along been enjoyed and the rites duly performed." Here again the statement is not that the mosque is being properly kept up but that the family has discharged its obligation by performing the rites in the mosque and are enjoying the lands. Again the *inam* register being thus not clear in favour of the mosque and the title-deed not being available, it is permissible to look at the usage or user. We have got the fact that from 1874 up to 1909 the land was always described as ancestral property and dealt with as private property without any voice and protest being raised by way of the villagers or anybody else. Even when resumption proceedings were started it was only for the purpose

of seeing whether the service was duly performed. Exhibit III, refers to a mosque service *inam*. Exhibit III-a, statement of Dada Saheb, says: "There is a mosque covered with palmyra leaves. It has no door or door frame.....We are performing names there. The Sahibs of Nagavaram and Valavolpodi do not perform names there. We, i.e., the members of our family are performing. Besides, people passing that way perform names.....I am putting light in it. Though there is no door or door frame, light keeps burning." This statement shows that the semblance of a mosque or a bare shadow of it existed as justification for the enjoyment of the *inam* and the so called mosque got no benefit from the *inam*. Exhibit II, Tahsildar's letter, opens by the words "regarding the mosque service *inam* of Gandram." In para. 2 it says "for the purpose of keeping up certain ceremonies in the mosques at Gandram." In para. 3 it says "It is not known what the ceremonies referred to in the *inam* fair register are." After resumption Dada Saheb sent a petition Ex. XII-a. Even in this petition not even the faintest suggestion was made that the *inam* belonged to the mosque itself. On the other hand, the word "service" was used in seven different places. In para. 2 the grant was described as 'service *inam*'. In para. 3 the service was referred to as lighting only. This is repeated in para. 5 "lighting is the only service." Paragraph 6 also refers to lighting service. Paragraph 10 says: "the service relative to which the petitioner has ever been performing without fail." The suit notice, Ex. XII, opens by the words "There is an ancient service *inam* attached to the *masjid*..... The service is only lighting in the *masjid*." It is clear that the feeding of the *fakirs* referred to in the oral evidence is a later concoction. In the petition of the members of the community, Ex. I, they say, 'for the performance of certain rites in the mosque and for illuminating it at the time of festivals.....The usual rites are properly performed in the mosque.....There was no complaint.....about the discontinuance of the services in it." In para. 2 they say: "he never said that the services were not either rendered in the mosque....." In para. 3 they say: "The *inam* was originally granted to perform certain rites and services in a religious

institution. If those rites and services are not properly rendered in the institution a notice should have been given to the leading members of the religion..... He has not been pleased to examine even one of the members of the Muhammadan community, who alone can know about the performance of the services or otherwise in the mosque....." In para. 4 they say: "the usual ceremonies and services are properly performed in it....." Thus even after the resumption persons who were anxious to get the resumption cancelled were still describing it as service *inam*. The Tahsildar who reports in Ex. D in favour of the cancellation of the resumption in 1912 also says that the service is being done. Here I may refer to one document, Ex. B. It is an extract from the B Register of the year 1907. This document purports to reproduce the *inam* register in column 12. The heading of column 12 is not properly printed. The Telugu is "name of 'the present *inamdar*' as entered in the *inam* register," and under it mentions *Dharmakartha Haji Saheb*. The word *dharmakartha* is an obvious and unjustified addition to the *inam* register. A document which is so recent as 1907 is worthless. The Subordinate Judge practically relies upon this document. I think that the *inam* was only a service *inam* granted to Sheik Ibrahim and his descendants in consideration of his learning for doing some nominal rites in a mosque but practically for his maintenance. It was confirmed at the *inam* settlement on condition that the services should be continued and the title-deed must have contained some clauses, as in all such title deeds, "so long as the conditions of the grant are fulfilled." If the services are not properly rendered, the Government have the right to resume. I think the Board rightly resumed it in 1909. After the resumption the Muhammadans of the surrounding villages re-built the mosque which originally had not even a shed but a roof of Palmyra leaves. They put up a tiled roof and began to create officers with technical names in the Muhammadan religion, such as *mouzzin*, *peish inam*, *khalifa*, etc. In the oral evidence we first hear of these names. They are not referred to even in the plaint. The word "*mutlawalli*" was for the first time used in Ex. XII-a and in spite of its use the word 'service' was mentioned in connec-

tion with the *inam*. This village of Ibrahim Palayam in which the mosque is situated became dilapidated. See Ex. D. It is in the midst of wet fields. There is no direct road leading to it but only a foot path. Looking at these facts it is clear that the oral evidence referring to the feeding of *fakirs* is a myth. It is not mentioned whether the *fakirs* were fed in the village or near the site of the mosque. But if lighting is the only service we have nothing to do with the feeding of the *fakirs*. A four-walled structure without any roof or window or door frame was used as the pretence of a mosque all these years to justify the enjoyment of the *inam* by Dada's family. We cannot now say how long back this state of things lasted, but for the last 40 or 50 years it must have been so.

Now, when the Government resumed it in 1909 and actually collected the assessment of Rs. 461-10-1 under protest, the cause of action accrued to Dada Sahib and other holders of the *inam* for cancelling the resumption. In my opinion the period for such a suit is one year under Art. 14. In *Secretary of State for India v. Gulam Mahaboob Khan* (15) their Lordships held that Art. 14 did not apply to that case, as the resumption in that case was made not on the ground that the services were not performed or the mosque was not kept up but on the ground that the endowed lands were alienated which was not one of the grounds on which the *inams* could be resumed. There the *inams* were granted for the maintenance of the mosque itself and, as it was not a service *inam*, unless the mosque itself was not kept up, there was no ground for resuming the *inam*. Mere alienation of the endowed lands was not a proper ground for resumption. That being so, it was held that the resumption was illegal and totally *ultra vires* and Art. 14 did not apply. In the first place, it seems to me that where Government purported to act under powers reserved to them under the terms of the grant though they may have acted erroneously in the interpretation of its terms or in finding on facts which justify the resumption, the act was *intra vires* and not *ultra vires* and the act of resumption cannot be regarded as a nullity. On this ground I doubt the

correctness of that judgment, but assuming that the case was correctly decided that case is clearly distinguishable from the present one where the non-performance of service is the ground on which resumption was made and it is a correct ground under the terms of the grant. But even if Art. 14 is not the proper Article to apply, certainly Art. 120 applies to a suit for a declaration. This is not denied by the Vakil for the respondent though he would try to get over it by postponing the cause of action up to December, 1914, when the *ryotwari patta* was said to have been issued to defendants Nos. 3 to 7. Now I do not see what a *ryotwari patta* has got to do with this business. The *inam* was resumed in 1909. *Ryotwari* assessment was imposed upon it and collected in 1910. The party felt aggrieved by it and gave notice of suit in 1910. If this not a suit for a declaration and for cancellation of the resumption based on the cause of action of 1909 and 1910, I am unable to see what else it would be. The suit being brought more than six years after 1910, is obviously barred by limitation and ought to have been dismissed. Mr. Ganapathi Ayyar argues that so far as the 2nd defendant's mortgages are concerned the cause of action against them dates only from the dates of the mortgages, namely, March 1914 and the suit so far as the second declaration is concerned is not barred. If the plaintiffs submit to the resumption but question the mortgages on grounds peculiar to mortgages only and apart from the resumption, this contention is right and is conceded by the learned Vakil for the appellant. If for instance, we hold that the grant was a grant to the mosque itself and that even after resumption the trust re-attached itself to the land in the hands of defendants Nos. 3 to 7, even though it is converted into a *ryotwari* land on the line of reasoning adopted in *Muhammad Esuf Sahib v. Abdul Sathar Sahib* (8), it may be that the suit for declaration of the mortgage is not barred. We are not to be understood as agreeing with the line of argument adopted in *Muhammad Esuf Sahib v. Abdul Sathar Sahib* (8). We feel some difficulty in applying s. 83 of the Trusts Act to a case where after resumption a service *inam* is re-granted availing himself of his position as trustee. There is also a good deal of force in the observation of Sadasiva Aiyar, J., in *Raja Rajeswara Dorai v. Arunachellam*

(15) 51 Ind. Cas. 366; 42 M. 673; 9 L. W. 587; 37 M. L. J. 71; (1919) M. W. N. 736.

Chettiar (16), where he had held that an obligation in the nature of a constructive trust cannot attach under ss. 85 to 88 of the Trusts Act unless a declaration is obtained to that effect. It might also be said that where no such declaration is obtained, private persons dealing with the original holders on the footing of the grant are *bona fide* vendees or mortgagees as the case may be; and if it were necessary in this case to rely on this line of argument a fresh finding on the question whether the 2nd defendant was a *bona fide* mortgagee for consideration would have to be called for. But it is unnecessary to follow this line of reasoning. We hold that the suit *inam* was only a service *inam* and did not belong to the mosque. The services were put an end to by the resumption and there is nothing to re-attach to it after the grant of the *ryotwari patta* to defendants Nos. 3 to 7. The 2nd defendant merely claims as a mortgagee from them and stands in their shoes to the extent of defending her right as mortgagee. She claims through them the mortgage in question not on some ground peculiar to it but as an interest derived from the defendants Nos. 3 to 8 on the footing that they hold the *inam* as private property. The 2nd defendant, therefore, defends her mortgage on the ground that the resumption was valid and put an end to obligations of service. The cause of action for any suit for declaration even as against the mortgagee must, therefore, date from 1914 and, therefore, the suit is equally barred as against the 2nd defendant.

There is another ground on which the mortgages in favour of the 2nd defendant must be at least partially upheld. They were in possession of the suit *inam* for more than 12 years up to 1914 though, no doubt, it was interrupted after the decree in 1909. She has thereby prescribed and obtained by prescription the interest of the usufructuary mortgagee for the principal sum of Rs. 2,935 9 4 and interest thereon (*vide* Ex. VII) but not for the other amount mentioned in Ex. VII. This is conceded by the respondent, but we are also holding that the mortgages are fully valid on the ground that the resumption was perfectly valid and converted the property into an ordinary *ryotwari* property.

In the result the appeal is allowed and the plaintiff suit dismissed with costs throughout as against the 2nd defendant. As the Government have not appealed it is unnecessary to award them any costs in either Court. But the decree against them is vacated as the grounds of our judgment are common to the Government, and the appellant.

The injunction against the 2nd defendant restraining her from executing her mortgage decrees, if any, will be dissolved.

Cornish, J.—I have come to the same conclusion. The substantial question in this appeal is whether the suit lands are the subject of a personal service *inam*, or whether, as the respondents have succeeded in asserting in the lower Court, these lands are the endowment of a local mosque. The original grant is not forthcoming, so the question has to be determined by the construction of the documents produced—Ex. X, being the extract from Mr. Oakes Inam Register dated A. D. 1797; Ex. A the extract from the Inam Commissioner's Register dated 1859; and Ex. B the extract from the Permanent Register of Inams in the Kistna District prepared in 1907. Exhibit X describes the grantee as "Sheikh Ibrahim"; states that the person then in enjoyment was Gulam Hussain, who was, we are told, the great-grandson of the original grantee Shaik Ibrahim; and particularises the property as "*inam*." In Ex. A under the heading in column 2 "general class to which the *inam* belongs" it is stated "Endowment to a religious institution." In column 8 under the heading "Description of *inam*, if for service it is to be stated whether the service is continued", appears this statement, "*devadayim* granted for the performance of certain rites in the mosque." In column 10 the tenure is described as "Hereditary." In column 13 the "name of the original grantee" is given as "Mulla Sheikh Ibrahim." In the column requiring particulars of the present owner, his name is given as Nagarajam Haji Sahib, and in column 20 appear particulars of his family. Then in column 21 it is stated "This *inam* is an ancient one having been granted in Hijri 1137 or A. D. 1724 for the purpose of keeping up certain ceremonies in the mosque at Gandram. The original *sanad* was given to Mulla Shiekh Ibrahim, in whose family the *inam* has been all along enjoyed and the rites duly performed."

(16) 19 Ind. Cas. 596; 38 M. 321 at p. 334; (913) M. W. N. 453; 13 M. L. T. 469; 24 M. L. J. 592.

In Ex. B the prefix "*dharmakartha*" has been added to the name of the then *inamdar*. No explanation is given for the insertion of this word, and as the document is of so recent date, I do not think that it can be taken into serious consideration.

Now, I think it may be taken as established by the cases cited in the argument, and reviewed in my brother's judgment, that, where it appears that the grant was intended primarily for the benefit of the grantee, and only incidentally for the benefit of the religious institution with which the grantee may be associated, the grant may be construed as conferring on the grantee a personal service tenure. On the other hand, it may appear from the terms of the grant, as well as from the purpose for which the grant is made, that the grantee was intended to take the benefit in trust for the religious institution. In the present case the grant is to an individual for the declared purpose of performing rites and ceremonies in a mosque. On the face of it, a grant of this sort must, I think, be deemed to be personal to the grantee, subject to the condition of performing such rites and ceremonies in the mosque as he may think necessary or proper.

But it has been contended that the description of the *inam* as "*devadayam*" should be taken as showing that the grant was made to the mosque. The meaning of this word has been discussed in *Muham-mad Jafar v. Muhammad Ibrahim* (12), *Sikkandar Rowther v. Secretary of State for India* (4) and *Pir Pacha Saheb v. Moham-mad Rahimuddin Sahib* (17). These cases certainly support the view that the use of the word "*devadayam*" is evidence that the property so described constitutes a public endowment, but they establish nothing more. Indeed, the judgments in those cases show that in the particular instances the description of the property as "*devadayam*" was treated as conclusive because there was no other evidence, either documentary or oral, to displace the *prima facie* application of the word. Moreover, there is the authority of *Seshadu Reddi v. Pichi Reddi* (7), that the word "*devadayam*" is also appropriate to describe a service *inam*. I think, therefore, that the word "*devadayam*" must be taken as being equally applicable to en-

dowments and to service *inams* connected with religious institutions.

It has also been suggested that description of the original grantee as "*mulla*" in Ex. A indicates that the grant was made to him on behalf of the mosque. "*Mulla*," according to Wilson's Glossary, may mean a learned man or a village school master in charge of a mosque. It may be remarked that in the earliest of the documents produced, Ex. X, the grantee is not given the title of "*mulla*". However, that may be, I do not think any special significance attaches to this word. Whether the grant was made because the original grantee was a learned man or a pious man is simply a matter of conjecture. But the description of the grantee as "*mulla*" does not imply that the grant was made to him as representing the mosque. In my opinion on the construction of Exs. X and A, the grant was of an ordinary service *inam*.

Then is there any evidence of user or are there any other circumstances of the case which suggest that this view is erroneous? Previous to 1874 there is no evidence one way or the other on the subject. But from that date begins a series of alienations of the *inam* lands by Dada Sahib, the then representative of the original grantee. I do not attach much importance to these transactions because they appear to be equally consistent with the position of the alienor being a trustee for the mosque as with the lands being simply the subject of a service tenure. Of greater significance are the incidents which attended the Government's resumption of the *inam*. Enquiry was made sometime in 1908 by the Tahsildar whether the services were being performed. In the course of that enquiry a statement was taken from Dada Sahib (Ex. III-a) in which he stated that he was performing services in the mosque and that he would put a tiled roof on the mosque and fit it with doors and door frames. The Tahsildar reported on 10th December, 1908, (Ex. II) that the services had been discontinued for a long period and that the mosque building was in a neglected condition; but he recommended that the *inamdar* be given six months wherein to build a substantial mosque and to revive the services. The Board of Revenue by order dated 30th April, 1909, (Ex. C) sanctioned the resumption of the *inam*. On 12th August, 1909, Dada Sahib petitioned (Ex. XII-a) the Collector of Kistna for a cancellation of the resump-

(17) 77 Ind. Cas. 777; 19 L. W. 174; 46 M. L. J. 245; (1924) M. W. N. 217; A. I. R. 1924 Mad. 491; 31 M. L. J. 347.

tion order, and this was followed on 18th August, 1910, (Ex. XII) by a notice from Dada Saheb's Vakil complaining that "the resumption was most unjustly brought about owing to the inimical attitude of the village *karnam*" to his client, and threatening legal proceedings if no redress was given. This notice stated that "in accordance with the resumption" *seri* assessment had been collected from Dada Saheb to the extent of Rs. 461-10-1, and paid under protest. On 27th February, 1912, four Muhammadan inhabitants of Ulavalpoodi and Nagavaram, one of whom was P. W. No. 2 in the suit under appeal, petitioned the Board of Revenue (Ex. I) to cancel the resumption of the grant. The burden of all these statements and petitions was that the services had been performed by the *inamdars*, and that the *inam* had been resumed upon the insufficient and biased report of the Tahsildar. In not one of these documents is there a trace of a claim that the *inam* lands were the property of the mosque. It is not till the respondents, purporting to represent the Muhammadan community in the neighbourhood, launched their suit in 1919, six years after the Board of Revenue had on 28th March, 1913, finally resolved (Ex. G) that the resumption must stand, that we find, as we do in para. 4 of the plaint, a definite claim to the *inam* lands as the property of the mosque. The respondents' claim was palpably an afterthought. There remains the question of limitation. Dada Saheb's cause of action to set aside the resumption arose, at latest, when the Government collected *seri* assessment from him. A suit by him became barred under Art. 14, Limitation Act, long before the present respondents brought their suit, and as they could not succeed without setting aside the resumption they can stand in no better position than Dada Saheb. If the resumption could be held to be a nullity on the ground that the act of resumption was *ultra vires*, there would be the authority of *Secretary of State for India v. Gulam Mahaboo Khan* (15) for holding that Art. 14 had no application. I share the doubt of my brother about the correctness of that decision, for it appears to me difficult to regard the act of an officer of Government in his official capacity any the less an act to which Art. 14 applies because the Court may subsequently hold the official act to be *ultra vires*. It is not, however, necessary to pursue this matter as we hold that in this

case the *inam* was resumable by the Government for non-performance of the services attached to it.

It follows that the appeal must be allowed and the plaintiffs' suit dismissed.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 35
OF 1926.

November 14, 1927.

Present:—Mr. Justice Addison and
Mr. Justice Coldstream.

SANT SINGH—PLAINTIFF—PETITIONER
versus

MUBARAK SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—
Punjab Courts Act (VI of 1918), s. 44—Revision—
Erroneous decision in law, whether ground for
revision.

Where a Court has jurisdiction to determine a question it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision either in fact or in law; nor is the fact that in coming to the decision it relied upon the principles of an Act which was not in force in the Province a ground for interference in revision. [p. 902, col. 2.]

Amir Hassan Khan v. Sheo Baksh Singh (2),
Malkarjun v. Narhari (3) and *Rajwant Prasad Pande v. Ram Ratan Gir* (4), followed.

Petition for revision of a decree of the Senior Subordinate Judge, Rawalpindi, dated the 2nd April, 1926, reversing that of the Subordinate Judge, Fourth Class, Rawalpindi, dated the 12th November, 1925.

Mr. Gobind Ram Khanna, for the Petitioner.

Mr. Parkash Chunder for Mr. Shamair Chand, for the Respondents.

JUDGMENT.

Addison, J.—Defendant No. 3 gave Rs. 300 to defendant No. 1 for payment to defendant No. 2. This was in 1919. Defendant No. 1 did not pay the amount and defendant No. 3 orally assigned the debt to plaintiff who sued for the amount with interest. The Appellate Court applied the principles of the Transfer of Property Act, which is not in force in the Punjab and held that the oral assignment of the debt was invalid. Against its decree dismissing the suit this revision has been preferred. The learned Judge who admitted the petition doubted whether interference was warranted by the terms of s. 115 of the

Civil Procedure Code, but since a similar case, *Teja Singh v. Firm Kalyan Das Chet Ram* (1) had been reported he admitted the petition and directed it to be heard by a Division Bench.

It was held in *Teja Singh v. Firm Kalyan Das Chet Ram* (1) that although the equitable principles underlying the Transfer of Property Act are followed in the Punjab, the Act itself with its technicalities does not apply and an oral assignment of a debt for consideration is consequently not invalid. There was practically no discussion of the question whether the order could be revised under s. 115 of the Civil Procedure Code. All that was said by the learned Judge in Chambers was that the Subordinate Judge, committed an irregularity in relying on that Act to dismiss on a purely technical point a claim which he otherwise held to be just and equitable.

Most of the cases cited before us had reference to the refusal of jurisdiction or the assumption of jurisdiction by a Court. These fall within sub-cl. (a) and (b) of s. 115. It was admitted that, if a revision lay in the present case, this would be by virtue of sub-cl. (c) and not sub-cl. (a) or (b). It has, therefore, to be decided whether the Appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity. It was further admitted that where a Court has jurisdiction to determine a question it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision either in fact or in law; but it argued that the Appellate Court acted illegally in the exercise of its jurisdiction in relying upon the principles of an Act which was not in force in the Punjab.

The leading case on the subject is *Amir Hassan Khan v. Sheo Baksh Singh* (2). This was a decision under sub-cl. (c). Their Lordships of the Privy Council said: "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, acted illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them (namely, whether the suit was barred as *res judicata*) and they did decide it. Whether they decided it rightly or wrongly,

they had jurisdiction to decide the case; and, even if they decided, wrongly, they did not exercise their jurisdiction illegally or with material irregularity." It is clear from this decision that erroneous decisions in law or fact do not come within the purview of s. 115 of the Civil Procedure Code. Another decision of their Lordships is *Malharjun v. Narhari* (3) where it was said: "It (the lower Court) made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right." The latter decision was approved by their Lordships of the Privy Council in *Rajwant Prasad Pande v. Ram Ratan Gir* (4).

There are decisions of the various High Courts on this question which appear to be difficult to reconcile. No useful purpose will be served by referring to them, as the leading authorities of the Privy Council are set out above.

There are numerous decisions of this Court in which different principles of the Transfer of Property Act have been applied although the Act is not in force in the Punjab. The Appellate Court in the present case has distinctly stated that the Act was not in force, but it proceeded to apply the principles of ss. 130 and 131 of the Transfer of Property Act as other principles had been followed in the Punjab. The only question is whether in doing so it acted illegally or with material irregularity in the exercise of its jurisdiction. I do not think so. The Appellate Court was the final authority to decide the question before it and it had jurisdiction to decide it. This is not a case where the Appellate Court deliberately refused to follow a decision of this Court for *Teja Singh v. Firm Kalyan Das Chet Ram* (1) had not been decided when it gave the decision. It had jurisdiction to decide the question whether the oral assignment of the debt was invalid and, if it erroneously decided it, it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. It had jurisdiction to decide wrong as well as right and its decision cannot be challenged in revision.

(1) 91 Ind. Cas. 778; 6 Lah. 487; A. I. R. 1925 Lah. 575; 7 Lah. L. J. 427.

(2) 11 C. 6; 11 I. A. 237; 4 Sar. P. O. J. 559; Rafique & Jackson's P. O. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(3) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 7 Sar. P. C. J. 739 (P. C.).

(4) 30 Ind. Cas. 849; 37 A. 485; 13 A. L. J. 937; 20 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 754; 20 C. W. N. 35; (1915) M. W. N. 736; 23 C. L. J. 55; 42 I. A. 171 (P. C.).

In my judgment, therefore, no revision lies and I would dismiss the petition with costs.

Coldstream, J.—I agree.

B. L. *Petition dismissed.*

ODDH CHIEF COURT.

FIRST CIVIL APPEAL NO. 62 OF 1927.

December 14, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

TIRBHUWAN DAT alias PYAREY LAL
AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SOMESHAH DAT—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 28—Suit to cancel deed of gift—Dismissal of suit without deciding necessary question of fact—Remand—Limitation Act (IX of 1908), Sch. I, Art. 91—Limitation—Accrual of cause of action.

Where a trial Court dismissed a suit to cancel a deed of gift as time-barred under Art. 91 of the Limitation Act without considering the question when the facts entitling the plaintiff to have the instrument cancelled became known to him.

Held, that the decision must be obliterated and the trial Court directed to decide the issue. [p. 904, col. 1.]

First appeal against a decree of the Sub-Judge, Sitapur, dated the 14th March, 1927.

Messrs. Niamat Ullah, Salig Ram and Narayan Lal, for the Appellants.

Messrs. A. P. Sen, S. C. Das and K. P. Trivedi, for the Respondent.

JUDGMENT.—The plaintiffs-appellants filed the suit out of which this appeal arises in the Court of the Subordinate Judge, Sitapur, on the following allegations. It was alleged in the plaint that Tirbhuwan Dat, who was one of the plaintiffs, and Someshar Dat the defendant were the sons of Ram Bilas Shukla and that they had succeeded together to certain property. In 1912 Tirbhuwan Dat instituted a suit against Someshar Dat for partition and obtained a decree on the 14th November, 1913. The main allegations then follow. It is alleged that Tirbhuwan Dat has no knowledge of the Urdu character and that he has only sufficient knowledge of the Nagri character to be able to sign his name in Nagri. The plaint continues that on the 15th May, 1914, Tirbhuwan Dat executed a registered deed. This re-

gistered deed was admittedly in the Urdu character, and was admittedly signed by Tirbhuwan Dat in Nagri. The allegation is that Tirbhuwan Dat understood that by this deed he was giving his brother Someshar Dat authority to manage his share of the property on his behalf. There follow various allegations as to the manner in which Tirbhuwan Dat was kept in ignorance of what he had actually committed himself to, and finally there comes an allegation that in September, 1923, Tirbhuwan Dat came to know that the deed in question was actually a deed of gift which purported to transfer the whole of his property to Someshar Dat. He sued for possession of the property. The plaint asks for relief by possession of the property in question. It was dated the 12th May, 1926. There were extensive pleadings in the suit and a very large number of issues were framed. No oral evidence was recorded. Certain documents were put in. The learned trial Judge determined two preliminary issues:—

Is the suit barred by time as alleged?

Is the suit as laid not maintainable?

He found that Tirbhuwan Dat had only the right at the best to treat the deed of the 15th May, 1914, as voidable and that inasmuch as he had not instituted a suit to set it aside within the period allowed by Art. 91, Sch. I, Act IX of 1908, the suit was time-barred. He dismissed it accordingly. The plaintiffs file the present appeal. We are unable to concur with the learned trial Judge. We are of opinion that his proceedings have been vitiated by misunderstanding of Art. 91. Assuming for the sake of argument that Tirbhuwan Dat's remedy at the best was to avoid the deed of the 15th of May, 1914, the learned trial Judge had not the materials before him upon which he could possibly decide as to whether the suit was time-barred or not. He should have observed that the time from which the period begins to run in a suit to cancel an instrument is from the date when the facts entitling the plaintiff to have the instrument cancelled become known to him. On the allegations in the plaint the facts entitling the plaintiff to have the instrument cancelled did not become known to Tirbhuwan Dat till September, 1923. It was impossible for the learned trial Judge to determine whether those allegations were or were not correct until he had heard evidence. He did not

hear evidence. He satisfied himself with examining the contents of certain documents which were quite insufficient for his decision upon the point, and arrived at a conclusion without hearing any evidence. He may or may not have been misled by the action of the parties to the suit. That fact is immaterial. We have not sufficient materials upon which we can decide the matter and for that reason we do not propose to determine this appeal upon its merits. As the case stands we can in no way maintain or reverse the decision on these two issues. The only course that we can take is to obliterate that decision and treat the case as though the decision did not exist. The trial Court has disposed of the suit on two preliminary points. We are reversing the decree on appeal although we are neither maintaining nor reversing the decision. We are obliterating the decision and reversing the decree. The case must thus be held to be one which falls under O. XLI, r. 23; but in any circumstances if that rule is not sufficient to justify our action we would be justified under the provisions of s. 151. Our order is as follows. The judgment of the trial Judge shall be considered of no effect. The case will go back to him for re-trial from the beginning. The issues shall remain as they are. Such of the documentary evidence as is on the record shall remain on the record. The suit will be re-admitted under its original number. The evidence will be heard out and the suit will be tried *de novo*. The costs incurred up to the present will follow the result. This decision will be treated for the purposes of our Court as a decision under O. XLI, r. 23 of the First Schedule of the Code of Civil Procedure.

G. H.

*Case remanded.***MADRAS HIGH COURT.**

ORIGINAL SIDE APPEAL No. 100 OF 1926.

August 3, 1927.

Present:—Sir William Watkins Phillips, Kt., Officiating Chief Justice, and Mr. Justice Ananthakrishna Ayyar.
K CHENCHUVENKATANAGIAH CHETTY AND CO. AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

M. PADMANATHAN CHETTY AND OTHERS

—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 264—Dissolution of partnership—Notice—New customers, whether entitled to plead want of notice.

Provided a person had knowledge of a partnership, he would not be affected by the dissolution of that partnership in his dealings with the firm unless he had adequate notice of the same as provided in s. 264 of the Contract Act. The expression 'persons dealing with the firm' in s. 264 is not confined to persons who had dealings with the firm prior to dissolution but extends to all persons having dealings, including those dealing for the first time after the dissolution of the partnership. [p. 905, col. 2.]

Jagat Chandra Bhattacharyya v. Gunny Hajee Ahmed (2), followed.

Bichhia Lal v. Munshi Ram (4), dissented from.

Appeal from the judgment of Mr. Justice Beasley, dated the 24th September, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. S. No. 352 of 1924.

Mr. A. Suryanarayanaiah, for the Appellants.

JUDGMENT.—The only question that has been tried in this suit is whether the 2nd defendant was a partner in the firm of B. P. Sriramulu Chetty & Co. a firm with which the plaintiffs had dealings. Three persons were made defendants with an allegation that they were the partners of B. P. Sriramulu Chetty & Co. Defendants Nos. 1 and 3 admitted partnership and also their liability, but the 2nd defendant contended that he was not a partner in the firm. At the trial it has been found that the 2nd defendant was a partner till 31st March, 1921, and the respondent (2nd defendant) does not appear to impeach that finding here. The plaint transactions took place in June, 1921. The plaintiffs (appellants) now contend that, although the 2nd defendant may not have been a partner of the defendant's firm in June, 1921, yet, inasmuch as he was a partner in that firm up to 31st March, and no notice was given either to customers or to the general public of the dissolution of partnership, the 2nd defendant is liable under s. 264 of th

Contract Act for the transactions carried on shortly after he actually left the partnership. Section 264 is as follows:—

"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution."

This section has been considered in various cases the first of which is *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (1) and there it was held that, when a partner ceased to be a partner in a firm and no notice of such cessation was given to old customers, he was still liable for acts done by the remaining partners. The question which was mainly considered in that case was what form of notice was requisite in order that such liability should cease. A similar view was taken in a recent Calcutta case, *Jagat Chandra Bhattacharyya v. Gunny Hajee Ahmed* (2) where it was further held that s. 264 referred not only to persons dealing with the firm prior to dissolution but to all persons dealing with that firm. The law in England is similar, and we may refer to *Parkins v. Carruthers* (3). There is one Court in India which seems to take a different view, and that is the Lahore High Court. In *Bichhia Lal v. Munshi Ram* (4) it was held that s. 264 did not include persons dealing with a firm for the first time after the dissolution of partnership. That case is based on prior decisions of the Punjab Chief Court and of the Sind Judicial Commissioner's Court. It also relies on a case in *Giovani Gorio & Co. v. Vallabh Das Kalianji* (5), as another authority. Undoubtedly, in that case Beaman, J., does say that the expression "persons dealing with a firm" in s. 264 of the Indian Contract Act means "persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced." The learned Judge was considering a case in which an old customer of a firm was concerned and, although he distinctly says that s. 264 refers to such old

customers, he has not considered the converse case of whether s. 264 definitely excludes new customers, and the arguments in his judgment set forth good reasons for treating old and new customers alike. The Calcutta High Court is distinctly of opinion that it includes new customers. In *Mahadeva Iyer v. Ramakrishna Reddiar* (6), Odgers, J., observes that s. 264 of the Contract Act is clear that, in the absence of such notice, persons dealing with the firm are entitled to assume that the partnership still continues; but the question of this distinction between the old and new customers was not considered. With all respect we agree with the view taken by the Calcutta High Court for the reasons therein given and also because it is clearly in accordance with the English Law on the subject; we must hold that, provided a person had knowledge of a partnership, he would not be affected by the dissolution of that partnership in his dealings with the firm unless he had adequate notice of the same as provided in s. 264 of the Contract Act. In this view and on the learned Judge's finding that the 2nd defendant was a partner up to the 31st March, 1921, we must hold that he is liable to the plaintiffs' claim equally with the other defendants.

The appeal is, therefore, allowed with costs and the lower Court's decree will be modified accordingly.

V. N. V.

Appeal allowed.

(6) 92 Ind. Cas. 653; 50 M. L. J. 67; 23 L. W. 199; A. I. R. 1926 Mad. 114; (1925) M. W. N. 707.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2436 OF 1923.

November 24, 1927.

Present:—Mr. Justice Broadway and Mr. Justice Jai Lal.

PIRA AND OTHERS—VENDOORS, Nawab MAULA DAD KHAN AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

FATTA—PLAINTIFF AND NAMAN—DEFENDANT—EXERCUTANT—RESPONDENTS.

Custom—Alienation—Ancestral land—Chela Sials of Mauza Chela, District Jhang—Sonless proprietor—Power to alienate ancestral land—Breaking of tribal bond, effect of.

(1) 8 C. 678; 11 C. L. R. 225; 4 Ind. Dec. (N. S.) 437.

(2) 91 Ind. Cas. 824; 50 C. W. N. 11; A. I. R. 1926 Cal. 271; 53 C. 214.

(3) (1800) 170 E. R. 604; 3 Esp. 248; 6 R. R. 823.

(4) 68 Ind. Cas. 932; A. I. R. 1922 Lah. 466.

(5) 30 Ind. Cas. 864; 17 Bom. L. R. 762.

Among Chela Sials of *Mauza Chela* in the Jhang District a sonless proprietor is not allowed to alienate his ancestral property except for necessity. [p. 907, col. 1.]

Where a tribal bond has been broken the presumption of a restricted right of alienation must be deemed to have been rebutted. [p. 906, col. 2.]

Land situated in a village founded by and entirely owned by the common ancestor of the plaintiff and the alienor is 'ancestral' land. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Jhang, dated the 9th July, 1923.

Messrs. *Muhammad Munir, Anant Ram and Shiv Charan Das*, for Mr. *Jagan Nath Aggarwal*, for the Appellants.

JUDGMENT.

Broadway, J.—One Naman a Chela of *Mauza Chela* in the District of Jhang on the 11th of March, 1921, mortgaged 114 *kanals* 7 *marlas* of land to Khan Bahadur Nawab Maula Dad Khan, Honorary Magistrate, and one Hidayat. The mortgage was not to be redeemed for 30 years and the charge on the property was to the extent of Rs. 1,000.

On the 30th of March, 1921, Naman executed a sale-deed by which he sold the same land, that had been mortgaged to Lohla, Walli, Pathana and Ghulam Husain for Rs. 3,500. The vendees undertook to redeem the mortgage when it became redeemable, that is, after 30 years. On the 2nd of May, 1922, one Fatta, a first cousin of Naman, instituted a suit against the mortgagees and vendees, challenging both the mortgage and the sale on the ground that the property mortgaged and sold was ancestral, that both the sale and mortgage had been without consideration and for no necessity and praying for a declaration to the effect that the sale and mortgage would not affect his reversionary rights on the death of Nawan. The alienees joined, in contesting the suit. They denied that the property was ancestral, pleaded full consideration and valid necessity and also urged that inasmuch as the tribal bond in this village had been broken Naman had an unrestricted right to alienate his property.

The trial Court held that the property was ancestral, that the tribal bond had indeed been broken, nevertheless, on the evidence Naman was governed by custom and that he being a sonless proprietor his right to alienate was restricted. On the question of consideration it was found that only Rs. 600 of the mort-

gage consideration appeared to have passed and there was no necessity for that or any other amount. The plaintiff was accordingly granted a decree.

Against this decree the mortgagees and vendees have preferred this joint appeal and Mr. Muhammad Munir has taken us through the relevant portions of the record with meticulous care. It has been urged that the evidence on the record did not warrant the conclusion that the property was ancestral; further, that inasmuch as it had been found that the tribal bond had been broken, the unrestricted right to alienate should have been recognised. Finally, it was urged that at least Rs. 600 out of the Rs. 1,000 which formed the consideration for the mortgage should have been allowed as being for necessity on the ground that it at any rate was a previous debt.

Now the evidence with regard to the ancestral nature of the property appears to me to be conclusive. The history of the village shows that it was founded by one Chela and that the village was called after his name. It is true that the case was not very well-handled in the Court below by the various Counsel concerned with the result that it became necessary to examine the *Kanungo* more than once. Taking his evidence as a whole, as Mr. Muhammad Munir says we ought to do, the impression left on my mind is that according to the revenue-papers Chela is undoubtedly the ancestor of the plaintiff Fatta and the alienor Naman and as Chela owned the entire village I see no reason to differ from the conclusion arrived at by the Senior Subordinate Judge that the property in suit is ancestral *qua* the plaintiff.

Next it was urged that as the tribal bond had been broken the presumption of a restricted right to alienate had been rebutted. That appears to have been fully recognised by the learned Senior Subordinate Judge who has clearly come to his conclusion in this part of the case on the evidence led by the plaintiff. A large number of sales and mortgages nearly 300 in all appear to have been effected within the last 35 years and it is these sales and mortgages which account to a large extent for the heterogeneous state of the village. The learned Senior Subordinate Judge points out in his judgment that none of these sales and mort-

gages were shown to have been effected by sonless proprietors in the presence of any collaterals. I have asked Mr. Muhammad Munir to select out of the long list of alienations one which could be said to have been effected by a sonless proprietor but Mr. Muhammad Munir very frankly and very properly admitted that it was impossible for him to do so. On the other hand, the plaintiff has led oral evidence consisting of members of the same tribe, and, in some instances, family, who agree in asserting that they, Chelas and Sials, in this village are governed by the ordinary custom prevailing in the Province and that a sonless proprietor can only alienate his property for necessity. After an examination of this evidence which includes two instances proved up to this Court in 1900 and 1917 I find myself in agreement with the learned Senior Subordinate Judge and hold that these Chela Sials are not allowed to alienate their ancestral property except for necessity. It should, of course, be understood that I am confining my finding to sonless proprietors.

As to the question of the allowance of Rs. 600 it appears that Rs. 600 were claimed by Lohla to whom this amount was to be paid by the Nawab Sahib when he executed the mortgage. Curiously enough, it is this very Lohla who is one of the vendees when the sale of deed was executed 20 days later. Having regard to all these circumstances, I am afraid I must agree with the learned Senior Subordinate Judge in thinking that the whole of this transaction, mortgage and sale included, is a highly suspicious one. Lohla's debt, in my opinion, cannot be traced as a just antecedent debt, and as it has not been proved to be separately for necessity, I do not think we can interfere with the decision of the Court below. I would, therefore, dismiss this appeal, but, as there has been no representation on the other side, without costs.

Jai Lal, J.—I agree.

R. L.

Appeal dismissed.

ODDH CHIEF COURT.

SECOND RENT APPEAL No. 38 OF 1927,

December 13, 1927.

Present :—Mr. Justice Pullan.

BAIJ NATH UPADHIYA—PLAINTIFF—
APPELLANT

versus

GHAZI KHAN AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 127—Suit for rent—Defendant in possession of land—Duty of landlord to prove that defendant's possession is without title.

A landlord has no right to sue a person in possession of land for a reasonable rent under s. 127 of the Oudh Rent Act, unless he can show that the defendant is retaining possession without being entitled to such possession.

Appeal against a judgment of the District Judge, Fyzabad, dated the 10th August, 1927, upholding that of the Assistant Collector, First Class, dated the 14th May, 1927.

Messrs. R. D. Sinha and G. C. Sinha, for the Appellant.

Mr. Naim Ullah, for the Respondents.

JUDGMENT.—This is a second appeal from an order of the learned District Judge of Fyzabad. The plaintiff sued under s. 127 of the Oudh Rent Act read with s. 108, cl. (2) of the same Act to recover a reasonable rent in respect of a certain plot. Section 127 provides that a person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant. In order to bring a suit under this section the landlord must show first that the defendant is retaining possession of the land without being entitled to such possession and secondly that he himself has the option of ejecting him as a trespasser. There have been conflicting decisions both of this Court and of the Revenue Courts as to the circumstances under which a suit under s. 127 can be brought but there is no decision to which I have been referred which meets the present case. In this case there are two decisions of the year 1883, one by an Assistant Collector and one by a Civil Court between these parties as to this land. In both cases it was held that the present defendants had a title in the land. It is not necessary to state here what their title is but it was then stated to be that of mortgagees. From that time till this they have continued in possession and only once that is in 1895 has any dispute arisen. At that time there were settlement proceedings and this land

was entered as being in the tenancy of the defendants *bila tasfia*. An application was made to amend this entry but apparently was not pressed and no order was passed. The entry, therefore, remains. But that is not sufficient cause for the plaintiff to plead that the title acknowledged in the year 1883 has ceased to have effect, still less that these are persons whom he, as landlord, can eject as trespassers. In my opinion the suit was rightly dismissed by the Courts below and I dismiss this appeal with costs.

G. H.

*Appeal dismissed.***LAHORE HIGH COURT,**

SECOND CIVIL APPEAL No. 1332 OF 1927.

November 17, 1927.

Present:—Mr. Justice Zafar Ali.HAMIR SINGH AND OTHERS—DEFENDANTS—
APPELLANTS*versus*SUNDAR SINGH—PLAINTIFF, BELI AND
ANOTHER—DEFENDANTS—RESPONDENTS.*Pre-emption—Suit by reversioner for declaration
challenging alienation—Compromise of suit—Alienee
re-selling land to reversioner—Suit for pre-emption by
heir of alienee, whether competent.*

Two sonless proprietors sold certain lands. Their collaterals instituted suits for declaration that the sales effected by the vendors were inoperative against their reversionary rights. After framing of issues but before evidence these suits were compromised. In pursuance of these compromises the vendees re-sold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. Two suits for pre-emption were instituted, one by a son of one of the original vendees and the other by a collateral of another vendee:

Held, that the suits for pre-emption were not competent inasmuch as besides the money that the reversioners had agreed to pay there was an additional consideration for the sales, namely, the withdrawal of the suits, and this part of the consideration was incapable of valuation in money. [p. 909, col. 1.]

Second appeal from a decree of the District Judge, Hoshiarpore, dated the 7th January, 1927, affirming that of the Subordinate Judge, Fourth Class, Una, District Hoshiarpore, dated the 25th June, 1926.

Mr. N. C. Pandit, for the Appellants.

Mr. H. C. Kumar, for the Respondents.

JUDGMENT.—The three Second Appeals Nos. 1332, 1333 and 1334 of 1927 arise out of two identical pre-emption suits, and the only question involved in all of them is whether the sales on which the

suits were based gave the plaintiff a right of pre-emption; and if they did, what was the consideration for each sale and could it be paid. The plaintiff succeeded in both the Courts below. The facts that need be stated to determine the above questions are as follows:—

Two sonless proprietors named Nikka and Naraina having sold certain lands individually by three separate deeds, their collaterals, Hamira and others, instituted the two suits, one against each vendor and his vendee or vendees for a declaration that the sale or sales effected by him would be inoperative as against their reversionary rights. After issues had been framed but before evidence, these suits were compromised. The vendees re-sold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. The deeds of sale as well as of mortgage were executed and registered together, and the suits were then withdrawn.

One of the pre-emptors is a son of one of the original vendees and one is a collateral of another.

Now, there can be no manner of doubt that the transactions as evidenced by the registered sale-deeds were sales, but at the same time it is clear that the sales were effected in pursuance of a compromise based on the principle of give and take. The reversioners gave up their claim as put forward in their plaints and the original vendees gave up the lands. As the reversioners had not got the purchase money to pay up at once, they left the lands in mortgage with the vendees for that money. If instead of executing sale-deeds the parties had executed a deed of compromise embodying the same terms, a decree would have followed on that compromise and that would not have given rise to a claim for pre-emption. The deeds, however, give effect to the terms settled for compromising the suits and were executed as a matter of fact to create evidence of that compromise.

Even if it were decided that the transactions were sales pure and simple, then the question is what was the consideration for each sale. It was not only the money which the reversioners contracted to pay, but also the abandonment of their rights to secure which they had instituted the suits. It is obvious that the vendees one and all would not have agreed to re-sell

the lands to the reversioners if they had not been apprehensive of the results of the litigation. Thus the reversioners got the lands not as ordinary purchasers, nor in pursuance of a bargain in open market but as reversioners. It follows, therefore, that besides the money that they agreed to pay there was the additional consideration for the sales that the suits were withdrawn. This additional consideration cannot be valued in money, but the pre-emptors must pay the whole of the consideration before they can get the lands. As they cannot possibly do this, they cannot succeed in their suits. They cannot deprive the reversioners of what the latter have got as such.

For all these reasons I am of opinion that the suits for pre-emption must fail.

Before concluding the judgment a preliminary objection raised by the respondents' Counsel must be noted. This was that the appeal was barred by time because according to the office note it was returned to the appellants' Counsel to be re-filed within a week but it was actually re-filed long after the expiration of that week. Along with the memorandum of appeal in each case copy of the judgment of the trial Court was attached, but the office wanted that copy of the detailed judgment of the trial Court, which was filed in one case, should also be filed in the other case. It was not necessary for purposes of the appeal to file that copy but the appellants' Counsel obtained an additional copy of that judgment and it was for that reason that the re-filing of the appeal was delayed. The appeal did not become barred by time on account of that delay.

On the merits I accept the appeals and reversing the orders of the Courts below dismiss the plaintiff's suits with costs throughout.

R. L.

*Appeals accepted.***LAHORE HIGH COURT.**

FIRST CIVIL APPEAL No. 2917 OF 1925.

December 5, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Bhide.

Messrs. KIRPA RAM-BRIJ LAL—

OBJECTORS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR, AMRITSAR—RESPONDENT.

Land acquisition—Acquisition injuriously affecting income of claimants—Damages—Award—Onus of proving that award is wrong—Claimant's right to interest on compensation money.

The onus of proving that an award made by a land acquisition officer is wrong is on the claimant. [p. 910, col. 1.]

A claimant is entitled to interest on compensation money from the date on which the property acquired is taken possession of by the Collector. [p. 910, col. 2.]

In determining the amount of compensation to be awarded for property acquired under the Land Acquisition Act, the Court must take into consideration the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his earnings. [p. 910, col. 1.]

First appeal from an order of the District Judge, Amritsar, dated the 17th August, 1925.

Lala Badri Das, R. B.; Messrs. Hem Raj and Nawal Kishore, for the Appellants.

Mr. C. H. Carden Noad and Mr. Jagan Nath Bhandari, for the Respondent.

JUDGMENT.—On the 19th of April, 1920, a notification was issued by the Local Government declaring that a house known as Sant Ram's bungalow, with the compound attached thereto, situate at Amritsar, was required for a public purpose; and on the 31st of October, 1920, the Collector took possession of the house. It was not, however, until the 4th of February, 1921, that possession of the land attached to the house was taken by the Collector.

It appears that Messrs. Kirpa Ram-Brij Lal were in occupation of one-half of the estate on a lease of twenty years, and that they had erected an Ice Factory on a portion of the land which formed part of the estate. The Collector has awarded them Rs. 25,000 as the price of the Factory building, and Rs. 3,000 on account of the cost of the removal and re-erection of the machinery. On a reference to the District Judge the compensation was enhanced by Rs. 800, the amount of the rent which the lessees had paid to their landlord for the

period during which they could not occupy the premises on account of compulsory acquisition.

The claimants are dissatisfied with the award of the District Judge, and the first contention urged on their behalf in this appeal is that the price of the building awarded by the District Judge is inadequate and that they are entitled to Rs 29,570 the price ascertained by the Municipal Engineer. The Municipal Engineer has not, however, been produced as a witness, and the Municipal Overseer, upon whose evidence reliance has been placed by the appellants, has not furnished any particulars upon which the price estimated by the Municipal Engineer was founded. The onus clearly rested upon the claimants to satisfy the Court that the award made by the Collector was wrong, and this onus they have wholly failed to discharge. The learned Counsel for the appellants has invited our attention to a remark in the order of reference made by Mirza Aslam Beg on behalf of the Collector which is to the effect that the amount estimated by the Municipal Engineer may be accepted. The learned Government Advocate challenges the authority of the Revenue Officer to make any such admission on behalf of the Local Government, and there can be no doubt that s. 19 of the Land Acquisition Act, which prescribes the particulars to be mentioned in the order of reference does not empower him to express any opinion at variance with the award made by the Collector.

Nor do we think that the appellants have succeeded in showing that they are entitled to Rs. 10,000 on account of compensation for the loss of income. It is to be remembered that they removed the machinery of the Ice Factory in the winter months when the Factory was not working, and sold it to a firm of Dera Ismail Khan for a price which is not shown to be inadequate. It is true that, in determining the amount of compensation to be awarded for the property acquired under the Land Acquisition Act, the Court is required to take into consideration the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his earnings. There is, however, no evidence on the record to show that the earnings were injuriously affected by reason of the acquisition, or that Rs. 10,000 represented the loss sustained by them.

There is no reliable evidence to show that the claimants could not find any other place in the whole of Amritsar where they could erect an Ice Factory, and we may, therefore, assume that they sold the machinery because they did not wish to carry on the business of manufacturing ice.

The only other point, which has been urged on behalf of the appellants, is that they were entitled to interest on the amount of compensation from the date on which the Collector took possession of the premises up to the date on which compensation was paid or deposited. Now, as stated above, it was on the 31st of October, 1920, that the Collector took possession of the house in which the office of the Ice Factory was situate, and that, though the appellants were not dispossessed of the land until the 4th of February, 1921, there can be no doubt that they could not transact any business thereafter the 31st October, 1920. Mr. Badri Das for the appellants states, and his statement has not been challenged by the learned Government Advocate, that the compensation was paid to his clients on the 11th of May, 1921. It is conceded on behalf of the Collector that under s. 34 of the Land Acquisition Act the claimants are entitled to interest and we accordingly accept the appeal so far as to direct that the Collector shall pay, in addition to Rs. 32,550, the amount awarded by the District Judge by way of compensation, interest on that sum at six per cent. per annum from the 1st of November, 1920, to the 11th of May, 1927. We leave the parties to bear their own costs in this Court.

R. L.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 116 OF 1925.

July 4, 1927.

Present:—Mr. Justice Sen.

PADARATH PATHAK—APPELLANT

versus

JAGDEO PATHAK AND ANOTHER

—RESPONDENTS.

Landlord and tenant—Lease to karta of joint family—Karta throwing profits into family chest—Tenancy, whether becomes assets of joint family—Hindu Law—Partition—Separation of one co-parcener—No presumption that others remain joint.

Where a zemindar grants a lease of a land to a *persona designata* who is also the *karta* of a joint Hindu family, the tenancy does not become the assets of the joint family merely because the latter throws the profits derived from the leasehold into the common family chest, inasmuch as a tenancy is a creature of contract and it is not open to a lessee by his acts

to impose upon the *zemindar* the other members of his family as co-tenants of the leasehold property. [p. 912, col. 2.]

There is no presumption that when one co-parcener separates from the others the latter remain joint. [p. 911, col. 2.]

Second appeal against the decree of the Subordinate Judge, Jaunpur.

Mr. A. Sanyal, for the Appellant.

Mr. A. P. Pande, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit for possession of plots Nos. 1021/7, 8, 9 and 10, and for Rs. 20 as mesne profits for 1329 and 1330 *Faslis*. Plaintiff and defendants are brothers. According to the plaintiff he separated from the family 30 or 35 years ago. After separation he obtained a lease from the Raja of Jaunpur of the land in dispute, and remained in exclusive possession of the land in suit, sometime towards the close of 1921, or the beginning of 1922, the Raja of Jaunpur sued the plaintiff for ejectment. The defendants were no parties to this suit. A compromise was arrived at on the 31st of January, 1922, and a fresh lease was granted to the plaintiff for a term of seven years from 1329 to 1335 *Faslis* on an enhanced rent. In July 1922 the defendants took forcible possession of the land and sowed paddy crop. Hence the suit for possession and damages.

The defendants deny that the plaintiff separated from the family 30 or 35 years ago. They allege that the separation took place about the year 1914 or 1915, that the original lease was acquired from the Raja of Jaunpur about the year 1908 when the plaintiff was a member of a joint family with the defendants and was indeed the *karta* of the family, that the lease was taken for the benefit of the joint family, and the profits of the leasehold property were always thrown into the common chest, that notwithstanding separation the defendants remained in possession of portions of the property in dispute in this way that plot No. 1021/8 was allotted to the share of the plaintiff, and the other plots fell to the share of the defendants, that the defendants contributed towards the costs of the ejectment suit against the plaintiff and that the compromise was made and the second lease obtained not for the benefit of the plaintiff alone but of the parties to the present claim, that the defendants were the principal tenants of plots Nos. 1021/7, 8, 9 and 10, that they were in adverse possession of the said plots for more

than 12 years and, therefore, the plaintiff's claim was time-barred.

The Munsif decreed the plaintiff's suit. He found that the family was not joint either at the time of the acquisition of the first or the second lease. It is not clear what the exact findings are on questions of fact arising from the pleadings. Possibly he intended to find that the defendants were not in adverse possession. Possibly he intended to base the judgment upon the fact that the defendants having had no community of interest with the plaintiff at the time of the acquisition of the two leases, these could not enure for the benefit of the defendants. The judgment of the Munsif is rather confused and the findings have not been set forth with clearness and precision. The lower Appellate Court reversed the decision of the Munsif and dismissed the plaintiff's suit.

The facts which can be gathered from the judgments of the two Courts are that Sadanand Pathak, the father of the parties to the suit, had seven sons, of whom three sons separated about 25 years ago, but four of them remained in commensality. These four sons were Padarath plaintiff, Salig and Jagardeo defendants; and a fourth man called Kashi, who was no party to the suit. This fact was admitted by the defendant Salig (*vide* the judgment of the Munsif).

There can be no doubt that the plaintiff's story that he separated from his brother 30 or 35 years ago was not true. The partition took place 25 years back when three of the brothers separated. There is no presumption that when one co-parcener separated from the others the latter remain united. There is no presumption, therefore, that the parties to the suit still constituted members of a joint family along with Kashi after the separation of the three brothers. The defendants have neither alleged nor proved any re-union.

The lower Appellate Court found that the separation took place between the parties some 10 years ago, and that before that they were joint and formed a joint Hindu family. This finding evidently proceeds upon an error of law and is clearly opposed to the decision of the Privy Council in *Bala Bai v. Rukhmabai* (1). The learned Judge next finds that the plaintiff was the leading member of the joint family, and, therefore, the first lease was obtained in his name alone

(1) 30 O. 735; 7 O. W. N. 642; 5 Bom. L. R. 469; 30 I. A. 130; 8 S. P. C. J. 470 (P. O.).

but was intended to be for the benefit of the joint family. The land formed part of a tank. It was re-claimed by all the members of the family by their labour and joint effort, and that all the members of the family remained in possession of the property and continued in possession even after separation. The *zemindar* brought the suit for ejectment against the plaintiff alone, because his name figured as lessee of the land. The defendants remained in possession of the property both before and after separation. After separation plaintiff's possession was restricted to plot No. 1021/8. The defendants remained in possession of the three plots for more than 12 years, and the plaintiff's claim is, therefore, time-barred. The compromise cannot affect the rights of the defendants.

If the finding of the lower Appellate Court that the family separated some 10 years ago be accepted, it would follow that at the time of the first lease the family was joint and the lease was acquired during the subsistence of the joint family. It does not follow as a matter of law that the lease obtained by the *karta* of the joint family is really a lease for all the members of the joint family. It would be a question of some importance. Did the *zemindar* accept a designated person for his tenant, or did he accept the joint family represented by the said person as his tenant? Neither of the Courts below has approached the matter from this point of view. This omission, however, does not seriously affect the trial of the case. The first lease was for seven years and it spent its force upon the expiry of the fixed period. The *zemindar* instituted the suit for ejectment and in the course of the said suit a compromise was made with the plaintiff alone at a time when the family was admittedly separate and a new lease was granted to the plaintiff at an enhanced rent. This was in the year 1922. The *zemindar* did not and could not execute a lease in favour of Padarath plaintiff for the benefit of a joint family, because there was no joint family on the date of the compromise and the execution of the second lease.

The second lease was granted in 1922. The present suit was instituted on the 5th of November, 1923. The rights of the lessee under the first lease expired as soon as the term of the said lease had run out. If the defendants remained in possession adversely to the plaintiff from the date of the execution of the second lease right up to the date

of the institution of the suit, the time was not long enough to defeat the plaintiff's claim on the ground of limitation, and the lower Appellate Court was clearly wrong in holding that the plaintiff's claim was time-barred.

It can never be seriously disputed that a Hindu joint family as such may be the tenant of a holding in its corporate capacity. But where the *zemindar* grants the lease of a land to a *persona designata*, who is also the *karta* of a joint Hindu family, and the latter throws the profits derived from the leasehold into the common chest, the tenancy does not become the assets of the joint family [*Kallu v. Sital* (2)]. This is because a tenancy is a creature of contract and it was not open to a lessee by his acts to impose upon the *zemindar* the other members of his family as co tenants of the leasehold property.

In the present case on the date of the execution of the second lease, Padarath Pathak, plaintiff, was not joint with defendants Nos. 1 and 2. The lease was taken in the name of plaintiff alone. It has not been proved that the *zemindar* ever recognised the defendants as co-tenants with the plaintiff. It follows that the defendants are not entitled to claim the benefit of the lease. If the plaintiff allowed the defendants to remain in possession in specific portions of the holding, the defendants did not become the sub-tenants of the plaintiff. There was no agreement to pay rent, and no sub-tenancy has either been pleaded or proved. The possession, therefore, of the defendants was by leave and license of the plaintiff. The plaintiff, therefore, was not entitled to claim mesne profits from the defendants.

As the plaintiff came to Court with a number of false allegations, as a mark of censure I would deprive him of his costs throughout. Holding, therefore, that the plaintiff was entitled to the holding comprising the plots, in suit, I decree the plaintiff's claim for possession of plots Nos. 1021/7, 9 and 10; I dismiss his claim as to point No. 1024/8, it having been found by the lower Appellate Court that the plaintiff is already in possession of this plot. I dismiss plaintiff's claim for mesne profits. The parties are to bear their costs throughout, and the decrees of the Courts below be modified to the extent indicated above.

A. N. A. Decrees modified.

(2) 44 Ind. Cas. 717; 40 A. 314; 16 A. L. J. 225.

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Fallow land—Possession follows title.

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Though the Vizagapatam Agency Rules do not provide for an appeal from an order refusing to set aside an order dismissing a suit for default, the agent has power under s. 55 of the Agency Rules, to set aside an order of a special assistant refusing to set aside the dismissal of a suit for default, where the latter has not exercised a judicial discretion in the matter. **M VADDIRAJU VENKATA JEGGA RAO V. PILLAI RANGASAYAKULU**, 39 M. L. T. 458; A. I. R. 1928 Mad. 169

Agra Pre-emption Act (XI of 1922), ss. 1 (3), 3—*Customary right of pre-emption in Municipal area, whether abrogated.*

The Agra Pre-emption Act of 1922 has not abolished the customary right of pre-emption in Municipal areas to which the Act is not applicable. **A BOHRA SRI RAM V. JWALA SHANKER SAHAI**, 25 A. L. J. 839 192

s. 4, cls. (1), (2), (3)—*Applicability of Act to sale-deeds executed before Act came into force—Wajib-ul-arz—Contract of pre-emption for fixed period, effect of—Partition of mahal subsequent to wajib-ul-arz—Proprietor's right to pre-emption, whether confined to each new mahal—Death of pre-emptor—Right of heir to continue suit.*

Clauses (1), (2) and (3) of s. 4 of the Agra Pre-emption Act, 1922, are not applicable to a sale-deed executed before the coming into force of the Act.

A contract for pre-emption for a fixed period of settlement would last during that period only and will not bind the representatives of the parties for all time to come.

Where a village which was a single *mahal* at the time of the preparation of the *wajib-ul-arz* is subsequently partitioned, the right of the proprietors to pre-emption under the *wajib-ul-arz* must, in the absence of evidence to the contrary, be confined to each of the *mahals* newly formed and the proprietors of one *mahal* cannot claim a right of pre-emption in respect of shares in other *mahals*.

The heir of a person entitled to pre-emption, who becomes a co-sharer by succession to the latter, is entitled to continue a suit for pre-emption instituted by the latter even though such heir was not a co-sharer when the sale-deed was executed or when the suit was filed.

Quere.—Whether a suit for pre-emption can be maintained by the heir of a deceased pre-emptor unless the heir himself has a preferential right as against the vendee. **A UMRAO SINGH V. MOHAN KUNWAR**, A. I. R. 1927 All. 699; 25 A. L. J. 1095

Agra Tenancy Act (II of 1901), ss. 58, 79—

Landlord entering upon tenant's land—No forcible or unlawful ejectment—Tenant's right to treat landlord as sub-tenant—Suit for ejectment under s. 58, maintainability of.

Where a landlord without forcibly or unlawfully ejecting his tenant enters upon the tenant's land, the tenant is entitled to treat him as a sub-tenant and sue for his ejectment under s. 58 of the Agra Tenancy Act. Section 79 of the Act applies only where the landlord ejects the tenant forcibly or unlawfully.

A GANGA NARAIN V. MANIK LAL, L. R. 8 A. 295 Rev.; A. I. R. 1927 All. 727; I. L. T. 40 All. 45

s. 79. See AGRA TENANCY ACT, 1901, ss. 58; 307

Alluvion and diluvion—Re-appearance of land in situ—Ownership—Adverse possession, effect of.

Land belonging to village S became submerged but re-appeared as an accretion to the lands of village M on the opposite of the river and since its re-appearance remained in the possession of the owners of village M for a period of over 30 years before the river again began to change its course and threw out the land on the side of village S. In a suit for possession by the owners of village S against the owners of village M:

Held, that the plaintiffs had lost their rights and were not entitled to recover possession from the defendants. **O BHAGWAN BAKSH SINGH V. BEJALPAL SINGH**, 4 O. W. N. 1008; A. I. R. 1927 Oudh 519

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Appeal to Privy Council.—*Jurisdiction of High Court to order appellant to put guardian ad litem of minor respondent in possession of funds after admission of appeal—Practice of Calcutta High Court.*

A High Court has no power, after an appeal to the Privy Council has been finally admitted and the record has been despatched to England to make an order directing the appellant to put the guardian ad litem of the minor respondents in funds to have the appeal conducted on their behalf.

Although it is in accordance with the practice of the Calcutta High Court that in default of any more suitable next friend or guardian the Deputy Registrar should be appointed for the purpose of the proceedings in the High Court for obtaining leave to appeal and so forth, upon the final admission of the appeal the Deputy Registrar ceases to act any further as guardian for the minors.

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Arbitration.—*Reference to arbitration containing implied agreement dispensing with evidence—Omission by arbitrator to give notice, whether renders award void.*

The conduct of the proceedings of arbitrators depends upon the order of reference to arbitration.

If in an order of reference there is an implied agreement that further evidence is not to be put forward by the parties and that the parties have sufficiently and completely stated their case, an award passed on the reference cannot be held to be invalid merely because the arbitrators did not give notice that they were prepared to receive evidence. *M YERRA VENKATA REDDI v. KRISHNA REDDI*, A. I. R. 1927 Mad. 1010 331

Arbitration Act (IX of 1899), s. 19.—*Contract note referring to agreement containing submission clause—Signatory of such contract note, whether party to submission—Threat of legal proceedings by defendant prior to suit, effect of—Readiness and willingness to refer, what is—"At the time the proceedings commence" and "taking any steps in proceedings", meanings of—Intimation to Court of intended application for stay, if amounts to taking step.*

Where a contract note contained a printed clause at the end to the following effect: "Subject to the terms of our printed agreement which you have read and accepted. Even if you have not signed the agreement you shall be bound by the terms, and this printed agreement contained a submission clause:

Held, that there was a valid and subsisting submission to refer the disputes between the parties to arbitration even though the said printed agreement which contained the submission clause had not been signed or read by the executant of the contract.

The time with reference to which the readiness and willingness to refer disputes to arbitration within the meaning of s. 19 of the Arbitration Act is to be determined is the time when the other party brings a suit and the applicant for stay is

Arbitration Act—concl'd.

called upon to appear and answer and though he has previously threatened legal proceedings, he has a *locus penitentie* till the time comes for him to appear and answer the summons in a suit brought against him.

An intimation to the Court that the defendant wants to apply for stay of the suit brought against him under s. 19, Arbitration Act, is not taking any steps in the proceedings so as to debar such party from applying for stay. *S KHEMCHAND RAMDAS v. UDHAVDAS VARANDMAL* 565

Arms Act (XI of 1878), ss. 4, 19 (e).—*Clasp knife whether 'arms'—Tests—Definition of arms, whether exhaustive.*

The definition of 'arms' in s. 4 of the Arms Act is not exhaustive and there could be arms beyond the list of weapons mentioned in the said definition.

It cannot be laid down as a hard and fast rule that a clasp knife does not fall within the definition of 'arms'.

The purpose for which an implement is primarily intended regulates whether it should be deemed to be 'arms'.

Where a knife had a blade 5½ inches long with a pointed end; was fitted to a long handle and turned over into the handle:

Held, that the knife fell within the definition of arms inasmuch as the primary purpose of such an instrument can only be for stabbing. *R. EMPEROR v. NGA LU GALE*, 5 R. 710; 29 Cr. L. J. 115; A. I. R. 1928 Rang. 49 707

s. 22.—*'Delivery', meaning of—Delivery of arm for merely carrying it to licensed-holder, whether offence.*

Delivery into possession contemplated by s. 22 of the Arms Act is such a delivery as to give the person into whose possession arm is delivered control over the arm and authority to use it as an arm.

The licensed-holder of a gun can permit another person who is not so licensed to carry his gun.

A repairer of a gun who, under the directions of its licensed-holder, delivers it after repair to a person who is not licensed, for the purpose of merely carrying it to the licensed-holder is not, therefore, guilty of an offence under s. 22 of the Arms Act. *A MANZUR HUSAIN v. EMPEROR*, L. R. 8 A. 166 Cr.; 29 Cr. L. J. 97; 8 A. I. Cr. R. 560; A. I. R. 1928 All. 53; 26 A. L. J. 162 689

Award. See C. P. O., 1903, s. 115 93

Benami sale. See PRE-EMPTION 539

Bengal Patni Taluks Regulation (VIII of 1819), s. 11.—*Sale of patni—Occupancy raiyat, whether liable to be ejected by purchaser—'Khudkasht raiyat', definition of—Tenant of jungle land living in contiguous village, whether khudkasht raiyat.*

Persons in occupation who have acquired occupancy rights under the tenancy law are not liable to be ejected by a purchaser in a sale under the Bengal Patni Taluks Regulation, VIII of 1819, even though they are not *khudkasht raiyats*.

Tenure-holders cannot under the provisions of law acquire a right of occupancy as *raiya*s with regard to lands which they had themselves cultivated within their own tenure.

A *khudkasht raiyat* is a resident and hereditary cultivator in contradistinction to a *paikash*t raiyat or a migratory tenant.

Bengal Patni Regulation—concl'd.

Tenants of waste and uninhabitable jungle lands which do not form part of any village cannot be held to be not *khudkasht raiyats* merely because they reside only in contiguous villages of the *patni*. *C* RASH BEHARI MANDAL *v.* HEMANTA KUMAR GHOSE, 54 C. 788; A. I. R. 1928 Cal. 52 71

Bengal Tenancy Act (VIII of 1885), ss. 30 (b), 153—Enhancement of rent—Rise of price of staple food crops—Land not used for raising such crops—Rent, whether could be enhanced—Question of right to enhance—Second appeal.

No enhancement of rent can be claimed on the ground of rise in the price of staple food crops, in respect of land which is used, with the acquiescence of the landlord, in such a way that food crops cannot be raised thereon.

In a suit for enhancement of rent, the plea that no enhancement could be decreed in respect of that portion of the land which is covered by trees and buildings, is a question relating to the right to enhance on which a second appeal lies. *PAT JEO NATH JHA v. BISHAMBHAR DAS*, 8 P. L. T. 495 422

s. 50—Enhancement of rent—Increase in area, proof of—Duty of landlord to show area at inception of tenancy—Confirmatory *kabuliyats*, value of—Purchase of holding by landlord and re-settlement with same tenant—Transfer of tenancy—Tenancy, whether continues.

In a suit for enhancement of rent a landlord cannot succeed in showing that there has been an increase in area by merely proving that the area under cultivation is in excess of that which is mentioned in a confirmatory *kabuliyat*; he must show what the area was at the inception of the tenancy.

Where a landlord purchases a holding at a rent sale and re-settles the land with the same tenant, the continuance of the old tenancy is broken and the presumption under s. 50 of the Bengal Tenancy Act does not apply.

A new tenancy is created when a tenant sells or transfers a portion of his holding and the landlord recognises the transferee, and the presumption under s. 50 of the Bengal Tenancy Act, similarly, ceases to apply. *C* RAMANATH BHATTACHARJEE *v.* JAGANNATH MONDAL 136

s. 74—Abwabs—'Actual rent' and 'malguzari', meanings of.

The object of the whole series of enactments from the Regulations of 1791 to the Bengal Tenancy Act of 1885 was to prevent exactions from tenants beyond the rent specified in their *patta*, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom.

It must depend on the circumstances of each particular case whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The words *actual rent* in the above section of the Bengal Tenancy Act cannot be taken to mean either a *fair and equitable rent* or rent at customary or *Pargana* rates.

The word '*malguzari*' cannot be rendered as rent, much less as *actual rent*. It ordinarily means revenue. *Quære*—Whether the words *actual rent* in s. 74, Bengal Tenancy Act, 1885, are equivalent to the *gaut jama* of the old Regulations.

Bengal Tenancy Act—concl'd.

Long use or custom cannot validate *abwabs* as an addition to the rent. *P* C CHATTAR KUMARI DEVI *v.* W. W. BROUCKE, A. I. R. 1927 P. O. 250; 8 P. L. T. 813; I. L. T. 40 Pat. 1; 47 O. L. J. 90; 32 O. W. N. 260; 26 A. L. J. 19; 54 I. A. 432; 54 M. L. J. 293 P. O. 571

s. 105 (1)—Application for settlement of fair rent—Impleading of parties after two months from date of publication of Record of Rights, legality of—Application against some of co-tenants—Remand for impleading all, propriety of.

It is not necessary for the landlord or the tenant in making an application under s. 105 (1) of the Bengal Tenancy Act to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought. An application under the section which is filed within two months of the final publication of the Record of Rights is not, therefore, barred even though a person interested in the tenancy is added only after the expiry of two months.

But where a landlord fights out the matter in the presence of one only of several co-tenants and his application is ultimately dismissed on the ground that such an application must be brought against all the joint tenants, it is not right to remand the case in order that the other joint tenants may also be impleaded as parties.

The heirs of a deceased recorded tenant can be impleaded as parties to such an application even after the expiry of two months from the date of the final publication of the Record of Rights. *C* SIBA KUMARI DEVI *v.* DOSHI GHOSAIN, 46 O. L. J. 555; A. I. R. 1928 Cal. 116 836

s. 111—Defendant raising question of status—S. 111, applicability of.

Section 111 of the Bengal Tenancy Act does not mean that in any case in which the defendant-tenant chooses to raise a question as to status the landlord is prevented from taking action under the ordinary law in the Civil Court. *C* KSHEMANANDA KUMAR *v.* RASHMAYA HALDAR, 32 O. W. N. 132 875

s. 153. See BENGAL TENANCY ACT, 1885, ss. 30 (b), 153 422

s. 173 (3)—Civil Procedure Code (Act V of 1908), s. 47—Rent sale set aside—Auction-purchaser, appeal by, whether competent.

No appeal lies at the instance of an auction-purchaser whose sale has been set aside under s. 173, cl. (3) of the Bengal Tenancy Act.

No appeal is allowed against an order under s. 173, cl. (3), Bengal Tenancy Act, by any provision of the Act itself and this section is not included in the list of orders made appealable as such by the Code of Civil Procedure. The only way in which an order under s. 173, cl. (3), Bengal Tenancy Act, may be regarded as an appealable one is by treating it as one made under s. 47 of the Civil Procedure Code and thus satisfying the definition of a "decree" under that Code and being thus appealable as such. *C* TAMIRANNESSA BIBI *v.* KACHHIMAN BEWA, 32 O. W. N. 98 561

Benar Land Revenue Code, 1896, ss. 78 (8), 79 (2)—Annual tenant—Notice of enhancement of rent by certificated holder only, validity of—

Issue of such notice, whether bars action for ejectment.

A notice of enhancement given to an annual

Benar Land Revenue Code—conold.

tenant by a certificated holder and manager of a Jagir village is not invalid simply because some of his co-sharers do not agree that such a notice should be given.

The mere issue of a notice of enhancement does not bar an action for ejectment if that remedy is otherwise legally open to the landlord especially when the tenant after receiving the notice of enhancement not only refuses to pay the enhanced rent but contests the landlord's title. *N DEWARI KONBI v. AMRULLASHA*, 10 N. L. J. 253; A. I. R. 1928 Nag. 81

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Bihar and Orissa Food Adulteration Act (II of 1919), ss. 3 (1), 14 (2)—‘Labelled’, ‘sealed’, meanings of—Sale of sealed tins—Power of Inspector to demand smaller quantities out of open tins—Adulteration of article—Conviction of accused, legality of—Prejudice.

A Sanitary Inspector went to the accused's shop and found 15 tins of mustard oil exposed for sale. He demanded and got 2½ *chhataks* of oil and found that the oil was highly adulterated. The accused was prosecuted for an offence under s. 3 (1) of the Bihar and Orissa Food Adulteration Act of 1919. The accused pleaded that he had purchased the tins in a sealed condition and used to sell them in the same condition:

Held, that the procedure adopted by the Inspector in not taking a full tin of oil in its unopened condition was illegal and seriously prejudicial to the accused in view of the provisions of cl. (2) of s. 14 of the Act, and that the accused could not under the circumstances be convicted under s. 3 (1) of the Act.

The word ‘labelled’ in s. 14 (2) of the Act denotes a written slip of paper or a metal or any other thing fixed or attached to articles of manufacture for the purpose of describing them or specifying their quality, etc. or the name of the maker. Neither the word ‘labelled’ nor the word ‘sealed’ necessarily means that the article should contain the name of the manufacturer. All that is required is that it must be distinctive from which the maker or manufacturer or the firm could be easily traced. *PAT EMPEROR v. SHIB DAS MAHWARI*, 29 Cr. L. J. 75

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Bill of lading. See *CONTRACT ACT*, 1872, ss. 39, 94 107

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Bill of Lading Act (IX of 1856), s. 1—Contract Act (IX of 1872), ss. 151, 152—Bill of Lading—Protection clause—Consignee, whether bound.

A consignee claiming goods under a Bill of Lading is bound by the terms in the Bill protecting the Shipping Company from loss in respect to those goods. It is not necessary that he should have expressly authorised the consignor to accept the terms in the Bill of Lading.

The Contract Act does not apply to carriage by sea, excluding inland navigation.

It is competent to a shipowner to protect himself by express contract from liability for the negligence of himself or his servants. *B BOMBAY STEAM NAVIGATION CO. LTD. v. VASUDEV BABURAO KUMAR*, 29 Bom. L. R. 1551; A. I. R. 1928 Bom. 5

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Bombay District Police Act (IV of 1890), s. 61 (c). See *CR. P. C.*, 1898, ss. 236, 403

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Bombay Government Rules, rr. 9, 10. See *CR. P. C.*, 1898, s. 21

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Bombay Land Revenue Code (Act V of 1879), ss. 3 (2), 66, 148—Use of agricultural land for

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building—Fine, whether leviable with reference to whole area—‘Building site’, meaning of—‘Adjacent’, construction of—Section 148, whether applicable.

The penalty leviable under s. 68 of the Bombay Land Revenue Code where a portion of land assessed or held for purposes of agriculture is used without the permission of the Collector for building purposes, is not to be levied with reference to the whole plot but only with reference to the area actually used for building purposes and it would be a question of fact in each case what area has been used for non-agricultural purposes.

What portion of an area falls within the term ‘building site’ is a question of fact depending upon the circumstances of each case.

The word ‘adjacent’ in the definition of the term ‘building site’ in s. 3, cl. (9) of the Bombay Land Revenue Code must be construed with reasonable limitations.

Section 148 of the Bombay Land Revenue Code is not applicable to fines levied under the provisions of s. 56 of the Code. *B SECRETARY OF STATE FOR INDIA, v. ABDUL HUSEN DOSAJI GODWALA*, 29 Bom. L. R. 1350; A. I. R. 1927 Bom. 601

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Bombay Local Boards Act (VI of 1923), ss. 35

(2) (b), 27—*Election of new President—Notice of meeting—Circulation of notice by post, sufficiency of—Wrongful dissolution of meeting—Right of members to elect new Chairman—Members retiring before meeting actually breaks, rights of—Decision of Chairman, finality of.*

Although it is the duty of a Chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it, he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another Chairman for that object.

Where a Chairman wrongfully dissolves a meeting, members who proceed to leave the meeting before it has really broken up and the Chairman has left the chair, do so at their peril and the remaining members are entitled to proceed with the meeting and elect a new Chairman.

The decisions of a Chairman are not necessarily final, and if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding.

‘Circulation’ of notice of a meeting under s. 35 (2) (b) of the Bombay Local Boards Act may be effected by service through post. It is not necessary that a person should be sent round to serve notice personally on every member.

Where a meeting has been properly convened and notices have been properly given, it is not left to the absolute and final discretion of a Chairman to decide whether in law the meeting has been properly convened or not. *B GOPAL NARAYAN KULKARNI v. SANMUKHAPPA NINGAPPA ANGADI*, 29 Bom. L. R. 1325; A. I. R. 1927 Bom. 603

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Bombay Regulation II of 1827—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), ss. 106, 130—Revision.

Bombay Regulation—concl'd.

The very wide powers of revision of the Bombay High Court under Bombay Regulation II of 1827 have been saved in spite of the repeal of the Regulation, by ss. 106 and 130 of the Government of India Act. But they should be exercised only in special cases. **B BOMBAY STEAM NAVIGATION CO., LTD. v. VASUDDEV BABURAO KAMAT**, 29 Bom. L. R. 1551; A. I. R. 1928 Bom. 5 **470**

Bona fide purchaser, position of. See VENDOR AND PURCHASER **519**

Burden of proof—Acceptance of onus in trial Court—Objection at late stage, maintainability of.

A party who accepts the onus on the issues as framed and allows the trial to proceed on that basis cannot be permitted at a subsequent stage of the case to contend that the onus was wrongly thrown upon him. **P C SECRETARY OF STATE FOR INDIA v. GIRJABAI**, 29 Bom. L. R. 1503; 53 M. L. J. 431; A. I. R. 1927 P. C. 238; 39 M. L. T. 463; 46 C. L. J. 420; 51 B. 957; 26 A. L. J. 32; 27 L. W. 124; 54 I. A. 359; 32 C. W. N. 329 1

Whole evidence adduced—Question of onus, whether material.

When the whole evidence is in, the question of onus of proof is merely academical. **PAT MAHADEO LAL MARWARI v. DALIP NARAYAN SINGH**, I. L. T. 40 Pat. 16 **243**

Burmese Buddhist Law—Buddhist monk—Purchasing and selling of property, legality of—Suit to enforce purchase—Contract Act (IX of 1872), s. 23.

A Buddhist monk cannot engage in any transaction in which silver is used and he cannot engage in buying or selling.

Where a Buddhist monk who had borrowed Rs. 100 and purchased a house brought a suit to recover possession of the house:

Held, that the transaction was one forbidden by the personal law of the plaintiff and was, therefore, void under s. 23 of the Contract Act and that the plaintiff was not entitled to recover the house. **R U TEZA v. MA E GRYWE**, 5 R. 626; A. I. R. 1928 Rang 3; I. L. T. 40 Rang. 10 **201**

Husband and wife—Desertion—Divorce—Forfeiture of husband's property—'Virgin couple', meaning of.

Under the Burmese Buddhist Law although desertion by husband is a ground for adjudging divorce, it does not cause forfeiture to the wife of the whole of the property of the husband joint or separate.

But in view of the general rules of the Burmese Buddhist Law as regards the interest which the wife obtains in the husband's property at the time of the marriage the Court may award a reasonable share of the husband's property to the wife on her divorce.

[The meaning of 'virgin spouse' considered but not decided.] **P C MAUNG PO NYUN v. MA SAW TIN**, 46 C. L. J. 406; 53 M. L. J. 425; A. I. R. 1927 P. C. 234; 39 M. L. T. 492; 6 Bur. L. J. 231; 32 C. W. N. 173; 5 R. 841; 54 I. A. 403 P. C. **17**

Calcutta Insolvency Rules, r. 5. See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 6 (2) (c), 8 (1) **326**

C. P. Land Revenue Act (II of 1917), ss. 151, 152—Pre-emption, claim to, enforceability of, in execution proceedings.

A claim to pre-emption under s. 151 of the C. P. Land Revenue Act is enforceable in execution proceedings and not by a separate suit. **N GOVINDA v. MURLIDHAR**, 23 N. L. R. 141; 10 N. L. J. 228; A. I. R. 1928 Nag. 48 **170**

C. P. Land Revenue Act—concl'd.

s. 188 (2) (a) (c)—Co-sharer holding sir in severalty—Sale of share—Lambardar's right to recover rent

A co-proprietor selling his share to a third party and by becoming an occupancy tenant of sir land held by him in severalty is the tenant of his vendee, and is, therefore, liable to pay rent to the vendee and not to the lambardar.

The Land Revenue Act makes the lambardar the landlord only in respect of such land, as the body of the proprietors, whom he represents, is the landlord of **N BARI BAHU v. GANESH SINGH**, 10 N. L. J. 167; 23 N. L. R. 160; A. I. R. 1928 Nag. 39 **429**

C. P. Municipalities Act (II of 1922), s. 83 (2)—

Haisiyat-tax—Assessment—Matters to be considered—Exclusion of income-tax, insurance premia and house rent.

The question of liability mentioned in s. 83 (2) of the C. P. Municipalities Act is not the question of the amount fixed in respect of the liability but of a person's liability to pay the tax at all.

According to the rules of Drug Municipality in assessing a person to haisiyat tax, his relative tax paying capacity, i.e., the circumstances, social position and the size of his family, must be considered.

Income-tax paid by an assessee must be wholly excluded from his gross income. Exclusions on account of insurance premia and house rent are matters within the discretion of the Committee in the first instance or in appeal by the Deputy Commissioner or other officer entitled to hear it under law, to be decided on the facts of each case. **N MOHAMMAD HAMID v. MUNICIPAL COMMITTEE, DRUG**, 23 N. L. R. 161; A. I. R. 1928 Nag. 71 **397**

C. P. Tenancy Act (I of 1920), s. 62—Acquisition of portion of holding by Government—Omission of tenant to apply for reduction of rent—Tenant, whether liable for full rent.

Failure on the part of a tenant, a portion of whose holding has been acquired under the Land Acquisition Act, to apply under s. 62 of the C. P. Tenancy Act for reduction of rent is not a ground for passing a decree against him for the whole rent especially where it is admitted that the whole rent is not, in reality, leviable from him in view of the diminution of the holding. **N SADASHEO RAMJI BENDU v. GOPALA PATIL** **665**

Chit fund—Security bond. See TRANSFER OF PROPERTY ACT, 1882, s. 100 **508**

Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47—House and homestead forming part of raiyati holding whether saleable.

The house and homestead of an insolvent in which he holds a raiyati-interest cannot be sold in insolvency proceedings in view of the provisions of s. 47 of the Chota Nagpur Tenancy Act. **PAT KAMAKHYA NARAIN SINGH v. RAMSARAN LAL**, 8 P. L. T. 669; A. I. R. 1927 Pat. 353 **298**

ss. 139, 213, 214, 258—Suit to set aside decree and sale for fraud, whether maintainable.

The jurisdiction of a Civil Court to entertain a suit for setting aside an execution sale for fraud in publishing or conducting a sale is barred under s. 258 of the Chota Nagpur Tenancy Act.

Section 258 of the Chota Nagpur Tenancy Act contemplates that a decree passed under s. 139 can be questioned in a suit on the ground of fraud in

Chota Nagpur Tenancy Act—concl'd.

obtaining the decree. **PAT GOSAIN DAS BAISHNAB v. GOPAL SINGH**, 8 P. L. T. 688; A. I. R. 1927 Pat. 382

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— **s. 208—Sale under rent-decree—Rights of purchaser.**

A sale under s. 208 of the Chota Nagpur Tenancy Act can only pass the interest of the judgment-debtor in the tenancy in respect of which the rent decree is passed. **PAT DWARIKA NATH KARMAKAR v. JASODA DEVI**

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— **ss. 213, 214. See CHOTA NAGPUR TENANCY ACT, 1908, ss. 139, 213, 214, 258**

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Civil Procedure Code (Act V of 1908), ss. 2, 47,

115—Stay of execution—Order for security—Appeal—Security bond, acceptance of, without notice to decree-holder, legality of.

An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under s. 47 nor is it a decree within the meaning of s. 2. Civil Procedure Code, and is, therefore, not appealable.

A Court should give notice to the decree-holder of the security bond filed by the judgment-debtor and should not accept it without enquiring into the objections of the decree-holder. **L. CHARANJI LAL v. RAJA RAM**

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— **s. 10—Suit for dissolution of partnership—Pendency of appeal—Second suit for recovery of money received by defendant, trial of, whether should be stayed.**

A suit for dissolution of partnership was dismissed by a Sub-Court on the ground that there was no partnership till a particular time. Pending an appeal to the District Court the plaintiff sued in the District Munsif's Court to recover certain sums of money as having been received by the defendant which ought to be paid to him. On an application by the defendant for stay of trial of the suit in the Munsif's Court pending the disposal of the appeal in the District Court:

Held, that there was no possibility of a conflict of decrees, as the main questions in the two suits were different and that there was no necessity for stay of the second suit. **M. MANIYAM GODI NARAPPA NAIDU v. PAPUDESU NARAYANASWAMI NAIDU**

661

— **s. 11—Suit for building on basis of sale-deed—Title found against—Subsequent suit for site of building on same title—Res judicata.**

The plaintiff who had purchased a house and the site of a house under a sale-deed sued for possession of the materials of the house. His title was denied by the defendant and the question was decided against him. He subsequently sued for possession of the house site on the basis of the same sale-deed:

Held, that the subsequent suit was barred by *res judicata* inasmuch as the plaintiff was bound by the decision on the question of title in the previous suit. **N. PAIKU v. KAMALJI**

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— **s. 16—Suit for mesne profits of immoveable property situate outside British India, whether triable in British India—Tests—Jurisdiction of Courts.**

Though the Civil Procedure Code does not forbid the institution of a suit in British India even if it involves an adjudication regarding plaintiff's title to

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immoveable property outside British India, yet under general principles of law Courts in British India should refuse to entertain suits in which an estate in land in a foreign country or a right annexed to such an estate is claimed.

This principle does not apply to suits for mesne profits where no question of title is involved and the decree can effectually be enforced by the personal obedience of the defendant within the jurisdiction of the trial Court. **N. YADEO GHIRNIKAR v. KRISHNAJI DORLE**, 23 N. L. R. 170; 10 N. L. J. 232; A. I. R. 1928 Nag. 56

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— **s. 22—Transfer of suit—Principles—Right of plaintiff to choose forum—Delay in making application, effect of—Time taken to revoke leave, whether can be excused.**

On an application by the defendant for transfer of a suit under s. 22, Civil Procedure Code, to another Court, considerations of convenience should not outweigh the cardinal principle that it is the right of the plaintiff as *arbiter lites* to choose his own forum.

In a suit by an endorsee of a pro-note in the Small Cause Court, Madras, with leave of Court, the time taken by the defendant in proceedings to revoke the leave cannot be taken into account in considering whether a subsequent application by the defendant to transfer the suit to the file of some other Court on the ground of convenience was made "at the earliest possible opportunity." **M. PRATAP SIMHA RAJA SAHEB v. SRINIVASA GOPALACHARIAR**, (1927) M. W. N. 607; 39 M. L. T. 401; A. I. R. 1928 Mad. 15

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— **ss. 22, 23, 151—Transfer of case—Plaintiff's right to choose forum—Grounds for transfer.**

The plaintiff has a right to choose the forum for his action and a very strong case must be made out by the defendant before the plaintiff can be deprived of that right. In deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered but the plaintiff's convenience should also be borne in mind. **L. RUOHI RAM v. SARAB NARAIN SHAH**

869

— **s. 34 (2)—Future interest, disallowance of—Duty of Court to state reasons.**

A Judge is not relieved of the necessity of giving reasons for disallowing interest *pendente lite* by s. 34 (2) of the Civil Procedure Code, and in normal cases it is highly desirable that a Judge should give his reasons for disallowing such interest.

The sole object of enacting the section is to prevent a separate suit being brought for future interest when the connected judgment and decree are silent on the point. **N. MOHAMMAD ABDUL SATTAR v. UMRAOBI**

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— **s. 39—Execution of decree—Transmission of decree—Ministerial act—Power of Court transmitting decree to add legal representatives and leave question of limitation to be decided by executing Court.**

An order in execution which determines the question of the right of a judgment-debtor to have the decision of the Court on the contentions raised by him is appealable.

An order transmitting a decree for execution to another Court is a ministerial act and could rightly be made *ex parte*. The transmitting Court has also power to allow execution against the legal repre-

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representatives of a judgment-debtor and transfer the decree for execution without giving any notice to them leaving them to raise the objections on the score of limitation in that Court; and the mere fact that notice was given and objections were raised cannot affect the power of the Court to act in the same way. *R NACHIMAI ACHI v. SUBRAMONIAN CHETTY*, 6 Bur. L. J. 225; 5 R. 775; A. I. R. 1928 Rang. 40 857

s. 47.

See *BENGAL TENANCY ACT*, 1885, s. 173 (3) 561

See *CIVIL PROCEDURE CODE*, 1908, ss. 2, 47, 115 890

See *MALABAR LAW* 230

s. 47--Decree declaring charge in favour of defendant--Charge, whether can be enforced in execution--Separate suit, maintainability of.

A mere declaration in a decree that the property in respect of which a decree is given to the plaintiff is subject to a charge for a named sum in favour of the defendant by itself would not entitle the parties to work out their mortgage rights in execution.

In a suit for partition by a Hindu co-parcener, to which a purchaser of one of the items in execution of a money decree was a party the Court passed a decree directing that the property should be divided into 3 shares subject to the payment by the plaintiff of a sum of money which the aliened defendant had paid to discharge a binding mortgage on the property. The purchaser resisted delivery of possession except on payment of the amount for which the charge was declared. Thereupon the plaintiff brought a suit for possession on payment of the amount:

Held, that the suit for possession was not barred by s. 47, Civil Procedure Code. *M SUPPAYAN PILLAI v. LAKSHMANA PATTAR* 507

s. 47--Execution of decrees--Objection by transferee of judgment-debtor--Appeal, competency of.

Where the objectors to the execution of a decree are transferees of the rights of the judgment-debtors, they are entitled to appeal as representatives of the judgment-debtors from the order disposing of their objection even though they were no parties to the suit in which the decree was passed. *L GANESHILAL v. SHEO SINGH-Nihal Singh*, 9 Lah. L. J. 566 826

s. 47--Limitation Act (IX of 1908), Sch. I, Arts. 166, 181--Decree providing for sale of properties in particular order--Sale contrary to direction--Application to set aside sale--Limitation.
An application to set aside an execution sale on the ground that it was held in contravention of a direction in the decree that the properties should be sold in a certain order, falls under s. 47 of the Civil Procedure Code and is governed by Art. 166 of Sch. I of the Limitation Act and not by Art. 181. *M AMMAKUTTI ACHI v. DORAISWAMI IYER*, A. I. R. 1928 Mad. 140 242

s. 47--Plaint--Matter determinable in execution proceedings and not by regular suit--Duty of Court to return plaint to be presented to Execution Court.

Where a matter which ought to have been laid in execution proceedings under s. 47, Civil Procedure Code, is brought up in a regular suit and the plaintiff asks the plaint to be treated as a proceeding under s. 47, Civil Procedure Code, the plaint ought to be returned for being presented as an application in execution proceedings in a proper

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Court. *O TALUKDAR KHAN v. KHAIRULNISSA*, 4 O. W. N. 1045; A. I. R. 1928 Oudh 38 133

s. 60 (c)--House of agriculturist--Exemption from attachment--Burden of proof--Agriculturist, definition of--Zemindars, whether agriculturists--Presumption.

A person whose main source of income is *zemindari* land and who does not himself carry on cultivation is not an 'agriculturist' within the meaning of s. 60 (c) of the Code of Civil Procedure.

The party who alleges himself to be an agriculturist must prove that he earns his livelihood wholly or principally by agriculture, or that he ordinarily engages personally in agricultural labour.

An agriculturist whose house is protected from attachment and sale by s. 60 (c) of the Code must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation to a certain extent may be carried on by most *zemindars* but their houses cannot on that account be designated as agriculturists' houses.

Even if a person is both an agriculturist and a *zemindar*, the burden of proving that a house in dispute is strictly of the nature contemplated by s. 60 (c) of the Code is on the person who alleges it.

There is no presumption that a *zemindar* is an agriculturist. The presumption is just the other way and a *zemindar* must be taken to be a *zemindar* unless his main source of income is proved to be from cultivation. *A BACHAN SINGH v. BHAIKA SINGH*, L. R. 8 A. 229 Rev.; A. I. R. 1927 All. 601 49

s. 60 (1) (c)--'Agriculturist', meaning of--Agriculturists of Punjab by virtue of special notification, whether within the term.

The term 'agriculturist' as used in s. 60, Civil Procedure Code, means a person whose main source of income is actual cultivation or tillage of land and the protection afforded by s. 60 (1) (c) does not necessarily extend to persons who are merely agriculturists by virtue of notifications issued by the Local Government under some special Act, e. g., the Punjab Alienation of Land Act. *L ABDULLAH v. ANJUMAN DEHI OF MOUZA BARIAR* 45

s. 73--Rateable distribution--Money paid by defendant to avoid attachment before judgment--Attachment by other creditors, effect of--Plaintiff's right to entire amount.

Where money is paid to the credit of a suit or earmarked for a suit, the money belongs to the plaintiff in the event of his success and cannot pass to the general creditors of the person who pays it in or to any persons who claim under him.

A instituted a suit against B and applied for attachment before judgment of an amount due to B. The order of attachment was issued in a wrong form containing neither an order to furnish security nor a direction to pay the money into Court. B, however, paid the money into Court and did not contest the suit. Various creditors of B attached this money in Court before A obtained his decree, and the amount was rateably distributed:

Held, that the money having been paid towards satisfaction of A's claim in order to avoid an attachment before judgment, A was entitled to have it paid out to him on an application without taking out execution of his decree and the other attaching credi-

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for were not entitled to rateable distribution. **R MANGANAL PARBHURAM v. AZIZ HAJEE KARIM, A. I. R. 1927 Rang. 278; 5 R. 753** 77

— **s. 73, 115—Order under s. 73—Revision—Interference.**

The High Court will not interfere in revision with an order for rateable distribution under s. 73 of the Civil Procedure Code unless it is obviously wrong. **M ALAGANAN CHETTIAR v. RAMANATHAN CHETTIAR, (1927) M. W. N. 795; A. I. R. 1927 Mad. 1030** 208

— **s. 73, O. XXI, r. 52—Partnership action—Assets, distribution of—Procedure—Charging orders, validity of—Rateable distribution.**

In the case of a partnership the liability of the partners is unlimited. It cannot be restricted to the partnership assets and there is no reason why in a suit for dissolution of partnership, creditors of the firm should be compelled to await the result of a partnership account between the partners before they are allowed to obtain satisfaction of their decree out of the partnership assets.

In a suit for dissolution of partnership all the liabilities of the partnership should be first paid off in full, the costs of all parties should next be paid off in full and the balance of the assets, if any, should be divided between the partners.

Where notices under O. XXI, r. 52 of the Civil Procedure Code, are served on the Receiver in a partnership action and in pursuance of a garnishee or other order of the Court he pays in the amount in respect of any such notice into the Sheriff's office, all execution creditors whose attachments are registered in the Negative Book of the Prothonotary before the realization of the assets by the Sheriff would be entitled to *pro rata* distribution. In case the property in the custody Court has been attached at the instance of different Courts the custody Court would seek to satisfy such attachments not *pro rata*, but in order of time, sending the moneys to the first attaching Court first, the balance to the second and so on.

There is no warrant in the Code of Civil Procedure for the practice introduced in the Bombay High Court of making charging orders at the instance of creditors in a partnership action. The charging orders obtained in these proceedings are not equivalent to notices under O. XXI, r. 52 of the Civil Procedure Code. In such cases the provisions of O. XXI, r. 52, should be given effect to. **B NENSUKHGAVRI v. RAJABALLY MULLA ABDUL KADAR, 29 Bom. L. R. 689; A. I. R. 1927 Bom. 405** 184

— **s. 92—Sanction by Collector of suit for certain reliefs—Institution of suit with additional prayers—Suit, whether bad.**

Certain worshippers applied for and obtained the sanction of the Collector under s. 92, Civil Procedure Code, for the institution of a suit against a trustee for a scheme and for certain specified reliefs. The plaint when filed included a prayer for rendering of accounts for which sanction had not been given but the said prayer was subsequently withdrawn.

Held, that the suit was not bad *in toto* though the extra relief not covered by the sanction could not be granted.

The reliefs mentioned in s. 92 of the Civil Procedure Code are not mutually exclusive and a suit is not bad merely because some additional reliefs which are incidental to the main relief for which sanction

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has been granted are also included in the plaint. **M DEVI RAMANUJACHARYULU v. ALAPATI SRIRAMULU, (1927) M. W. N. 759; 26 L. W. 581; A. I. R. 1927 Mad. 1033** 134

— **s. 92—Scheme—Provision for liberty to apply for directions or alterations, whether ultra vires.**

In a scheme settled by the Court under s. 92 of the Civil Procedure Code the reservation by the Court to a person or persons of liberty to apply for a relief which will come within s. 92 of the Code is *ultra vires*; but if such reservation does not offend, in this way or against any other provision of law it may be useful or advisable for carrying out the provisions of the scheme already framed and would be *intra vires*. **M VEERARAGHAVACHARIAR v. ADVOCATE-GENERAL OF MADRAS, (1927) M. W. N. 816; 39 M. L. T. 422; 26 L. W. 728; A. I. R. 1927 Mad. 1073; 53 M. L. J. 792** 665

— **s. 92—Scheme suit—Sanction obtained from Advocate-General suppressing prior refusal by Collector, effect of—Small temple in management of archakas—No proof of mismanagement or misappropriation—Scheme, whether necessary.**

The mere fact that a suit is filed for a scheme on an *ex parte* sanction by the Advocate-General is not by itself a ground for a scheme being framed. Where an application was made to the Collector for sanction to file a suit under s. 92, Civil Procedure Code and sanction was refused by the Collector but the plaintiffs without bringing this fact to the notice of the Advocate-General obtained an *ex parte* sanction:

Held, that this would not affect the right of the plaintiffs to sue though it might be taken into account in considering the *bona fides* of the petitioners.

A Court is not bound to frame a scheme for management where there is no proof of mismanagement or misappropriation by the persons managing the trust and it is not in the interests of the endowment that any scheme should be framed for its management. **M GURUNADHAN YOGI v. RAGHAVAYYA** 375

— **s. 92—Suit for possession by trustee against trespasser—Sanction, whether necessary.**

Section 92 of the Civil Procedure Code has reference to those cases, and those cases alone, where there is an allegation of breach of any express or constructive trust created for public or charitable purposes or where the direction of the trust is deemed necessary for the administration of any such trust. It has no application to suits where the plaintiff claims possession of an endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser. **A GANGA CHARAN v. RAM CHANDRA, 25 A. L. J. 902; A. I. R. 1928 All 33** 389

— **s. 99. See CONTRACT ACT, 1872, s. 251** 516

— **s. 100—Second appeal—Failure to raise presumption of fact, whether ground for interference.—Presumption of fact and mere inference, distinction between—Deeds—Presumption of voluntary execution—Evidence Act (I of 1872), s. 114.**

There is a presumption of fact that a document signed by a person was voluntarily signed by him, and failure of the lower Court to invoke a presumption of fact of this kind is a ground for second appeal. **Per Ashworth, J.—The distinction between a mere**

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inference and: a presumption of fact is that a presumption of fact is an inference drawn under s. 114 of the Evidence Act. A presumption of fact would also include anything that in English Law would rank as a presumption of law. *A SITA RAM v. NANKU*, 25 A. L. J. 833; A. I. R. 1928 All. 16; I. L. T. 40 All. 22

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— **s. 100, O. XXVI, r. 10**—*Irregular report of Commissioner—Both sides relying upon report in trial Court—Appellate Court's power to discard report—Defect of procedure—Second appeal—Interference.*

Where both sides proceeded in the trial Court to rely on the evidence of witnesses taken before the Court as well as before a Commissioner, it is not open to the Appellate Court to discard the evidence taken before the Commissioner on the ground that the Commissioner's report does not strictly comply with the requirements of O. XXVI, r. 10 of the Civil Procedure Code.

A defect of procedure which has materially affected the merits of a case is a ground for interference under s. 100 of the Civil Procedure Code. *C SAILENDRA NATH MAHATA v. SATISH CHANDTA BHATTACHARJEE*, 46 C. L. J. 558; A. I. R. 1928 Cal. 136

841

— **s. 109—Appeal to Privy Council—Redemption decree—Extension of time by Appellate Court—Appellate decree, whether one of reversal.**

A decree of a High Court affirming a decree for redemption passed by a lower Court does not cease to be a decree of affirmance simply because a new date for redemption was fixed by the High Court and interest at the bond rate was made to run from the expiry of the date fixed by the lower Court till the date fixed by the High Court. *P MAHADEO LAL MARWARI v. DALIP NARAYAN SINGH*, I. L. T. 40 Pat. 16

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— **ss. 109, 110—Duty of High Court to determine whether point of law is substantial.**

In dealing with an application for leave to appeal to the Privy Council although it is no part of the duty of the High Court to prejudge the case on the merits, yet at the same time it is the duty of the High Court under the provisions of s. 110 of the Civil Procedure Code to determine where a point of law arises for discussion on appeal to His Majesty in Council whether there is any substance in that point. In order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty in Council. *P HIRA BIBI v. LACHMI NARAYAN*

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— **ss. 109, 110—Riparian owners, dispute between, as to right to water—Question of mixed law and fact—Valuation of claim for appeal to Privy Council—Principles.**

As a rule the majority of cases between riparian owners as to the right to water in a channel give rise to questions of law or at all events to mixed questions of law and fact.

The second paragraph of s. 110 of the Civil Procedure Code relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount and that part of the section was introduced to cover claims relating to property of considerable value where the actual value of the relief claimed can only with difficulty be assessed, for instance, in cases where an injunction is sought regarding dealings

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with certain valuable property or in a case where the rights of irrigation are sought by one side and denied by the other in the case of a village of very considerable area. *PAT DHULHIN SHYAM SUNDER KURR v. BIBI QASIMAN*

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— **s. 110**—*“Substantial question of law,” meaning of—Findings based on inferences, whether involve substantial question of law.*

The term “substantial question of law” in s. 110 of the Civil Procedure Code merely means a question of substantial importance as between the parties to the case. It does not imply a substantial question of law of general importance.

A finding of fact does not necessarily involve a question of law merely because it is based to some extent on inferences drawn from other facts. *N RAMLAL LODHI v. INDRAJ SINGH*, 23 N. L. R. 156; A. I. R. 1928 Nag. 76

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— **s. 110**—*“Substantial question of law,” whether covers question between parties.*

The phrase “substantial question of law” in s. 110 of the Civil Procedure Code means a substantial question of law as between the parties to the proceedings and not merely one of general importance. *N V. N. DATAR v. S. L. MAHAJAN*

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— **s. 115.** See O. P. C., 1908, ss. 2, 47, 115

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— **s. 115.** See O. P. C., 1908, ss. 73, 115

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— **s. 115.** See O. P. C., 1908, O. XXI, r. 89

568

— **s. 115—Interlocutory order—Revision—Powers of interference**

A High Court may interfere in revision against an interlocutory order where matters of principle or jurisdiction are involved. *N RAMCHANDRARAO v. MAYARAM*

57

— **s. 115—Madras District Municipalities Act (V of 1920)—Rules for conduct of Elections, rr. 14, 15, 17—Interpretation of rules by Election Court—Interference by High Court.**

Where an election Judge acting under the Madras District Municipalities Act, by interpreting rr. 14, 15 and 17 of the Rules for the conduct of elections, found that certain ballot papers had been improperly rejected by the returning officer:

Held, that the High Court would not interfere in revision even if the finding of the Judge that the ballot papers were improperly rejected was wrong inasmuch as he had jurisdiction to interpret the rules. *M KOPPULA SUBBIAH v. THAMMANA MANIKKAM*, 39 M. L. T. 654; A. I. R. 1928 Mad. 199

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— **s. 115—Punjab Courts Act (VI of 1918), s. 44—Revision—Erroneous decision in law, whether ground for revision.**

Where a Court has jurisdiction to determine a question it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision either in fact or in law; nor is the fact that in coming to the decision it relied upon the principles of an Act which was not in force in the Province a ground for interference in revision. *L SANT SINGH v. MUBARAK SINGH*, 29 P. L. R. 42; 10 Lah. L. J. 51

901

— **s. 115—Real point in case not decided—Revision.**

The failure on the part of a Court to take notice of the real point in the case and to give a decision on it is a material irregularity justifying interference

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in revision. *L. SECRETARY OF STATE FOR INDIA v. SHEIKH HAJI BAKHA FAZAL DIN*, I. L. T. 40 Lah. 20

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— s. 115—Revision—Error of law—Interference.

Section 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. *C NAWAB BAHADUR OF MURSHIDABAD v. BHUPENDRA NARAIN SINHA*, 46 C. L. J. 527

851

— s. 115—Valid partial award—Refusal of Court to pass decree—Revision—Interference—'Jurisdiction', meaning of—Revision of interlocutory order.

Certain arbitrators who were authorised to make separate awards from time to time in a partition suit, refused to act after making an award as to some of the matters in dispute and the Court refused to pass a decree on the basis of the award on the ground that the award was partial. One of the parties applied to the High Court for revision of this order:

Held, per *Cuming, J. (Roy, J., dissenting)*.—That the High Court had no jurisdiction to interfere under s. 115, Civil Procedure Code, inasmuch as the lower Court had not in any way refused to exercise its jurisdiction or acted illegally or with material irregularity in the exercise of its jurisdiction, even though it might have committed an error of law or fact; and that the High Court should not interfere in any case as the order was only an interlocutory one.

Per *Roy, J.*—Inasmuch as there had been an effective award, the Subordinate Judge had no jurisdiction to deal with the properties concerned, and the case was a fit one for interference in revision.

A High Court has power to interfere in revision with interlocutory orders where great hardship may otherwise result to the parties. *C ASIM KRISHNA DEB v. SAILESH CHANDRA GHOSH*

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— s. 115, O. XXIII, r. 1—Permission to withdraw suit—No reasons given—Material irregularity—Revision.

For a Court to invoke O. XXIII, r. 1, Civil Procedure Code, without giving any reason amounts to a material irregularity in exercising jurisdiction and its order can be set aside in revision. *A KAMTA SINGH v. BHAGWANDAS*, 25 A. L. J. 943; A. I. R. 1928 All. 98

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— s. 115, O. XXVI, rr. 1, 4, 6, 8—Order allowing party to be examined on commission—Revision—Interference with discretion—Evidence on commission, whether should necessarily go in—Procedure where party is able to attend Court on day of hearing—Defendant pleading counter-claim—Examination on commission.

Where a Court is satisfied under r. 1 of O. XXVI of the Civil Procedure Code that a person is sick and unable to attend Court, and has exercised its discretion as to whether in those circumstances a Commission should issue and has issued a Commission, that discretion cannot be revised under s. 115 of the Code even if the judgment of the lower Court is not satisfactory.

The mere fact that a commission has been ordered for the examination of a witness is no reason whatever for any one to look at it unless it is found that at

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the time of the hearing, sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way.

Order XXVI, r. 8 of the Civil Procedure Code is as much a rule of procedure in the *Moffusil* as anywhere else.

Even although a person's defence consists of an equitable counter-claim it is just that he should be examined on Commission if he is too ill to attend in Court to give his evidence. *C PHANINDRA KRISHNA DUTT v. PROMATHA NATH MALIA*, 32 O. W. N. 128

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— s. 141, O. XXXVIII, rr. 5, 6—Winding up of Company—Attachment before judgment by Liquidation Court, validity of—Attachment before judgment of property in another District—Procedure for attachment before judgment—Defendant likely to dispose of property, whether ground for attachment.

Proceedings under the Companies Act are proceedings in a Court of civil jurisdiction within the meaning of s. 141, Civil Procedure Code, and a Liquidation Court has, therefore, in a proper case power to make an order of attachment before judgment in accordance with the provisions of O. XXXVIII, r. 5, Civil Procedure Code.

Under the Civil Procedure Code as amended in 1908 the jurisdiction of Courts to act under O. XXXVIII, rr. 5 and 6 has been very much extended and a Court can now attach before judgment property situate beyond its local limits.

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary that in exercising these powers Courts should strictly adhere to the procedure laid down in the Code. Before an order of attachment of property before judgment is passed the Court should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he has appeared and failed to furnish security or show cause, that the Court can pass an order under O. XXXVIII, r. 6 of the Code attaching his property.

The provisions of O. XXXVIII, r. 5 of the Code can only be invoked if the Court is satisfied that the respondent is about to dispose of the whole or any part of his property. A vague and an indefinite allegation that he is likely to dispose of his property is wholly insufficient to justify an order for attachment of property before judgment. *L. KANSHI RAM v. HINDUSTAN NATIONAL BANK, LTD*

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— s. 151. See CIVIL PROCEDURE CODE, 1908, ss 22, 23, 151

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— s. 151, O. IX, r. 13, O. XLI, r. 23—Ex parte decree—Appeal—Cause for non-appearance—Remand—Inherent powers.

When a suit has been decided *ex parte* the remedy by way of appeal from the *ex parte* decree as well as the remedy by way of application under O. IX, r. 13 of the Civil Procedure Code are both open to the person against whom the decision was passed.

As a broad proposition it is not correct to say that in a case in which an *ex parte* decree has been

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passed and the aggrieved party has not availed of the remedy by way of an application under O. IX, r. 13, Civil Procedure Code; he is precluded from raising the question of propriety of the refusal to adjourn his case in the appeal which he prefers from the *ex parte* decree itself.

An Appellate Court has general powers of remand under s. 151, Civil Procedure Code, and its powers are not restricted to the cases specified in O. XLI, r. 23 of the Code. *C. GNANENDRA MOHAN BHADURY v. PRAFULLANANDA GOSWAMI*, 32 O. W. N. 101 542

s. 151, O. XLI, r. 23—*Suit to cancel deed of gift—Dismissal of suit without deciding necessary question of fact—Remand—Limitation Act (IX of 1908), Sch. I, Art. 91—Limitation—Accrual of cause of action.*

Where a trial Court dismissed a suit to cancel a deed of gift as time-barred under Art. 91 of the Limitation Act without considering the question when the facts entitling the plaintiff to have the instrument cancelled became known to him:

Held, that the decision must be obliterated and the trial Court directed to decide the issue. *O. TIRBHUVAN DAT v. SOMESHAH DAT* 903

s. 151, O. XLI, rr. 23, 25—*Remand under s. 151, when permissible—Nature of remand, determination of—Order for refund of Court-fee, presumption from—Case not decided on preliminary point—Remand, legality of.*

A remand is permissible under s. 151, Civil Procedure Code, but recourse should be had to this section only in very exceptional cases.

A remand cannot be construed to be one under s. 151, Civil Procedure Code, simply because the Court has failed to express that the remand is under r. 23 or r. 25 of O. XLI of the Civil Procedure Code.

Where a remand order is accompanied by an order for refund of Court-fee, the remand should be considered to be one under r. 23, O. XLI, Civil Procedure Code.

Where a suit has not been disposed of by the trial Court on a preliminary point but has been decreed after recording and considering the evidence produced by both the parties, a remand under O. XLI, r. 23, Civil Procedure Code, is incompetent. *L. SAHIBI v. MOHAMMAD SARWAR KHAN*, 9 Lah. L. J. 543; A. I. R. 1928 Lah. 116 842

s. 151, scope of—*Ex parte decree against minor without appointing guardian—Decree declared void—Power of Court to restore suit.*

Where an *ex parte* decree obtained against a minor without appointing a guardian is declared void at the instance of the minor, the Court which passed the decree has inherent power to restore the suit to the file and to proceed with its trial from the beginning.

Where there are direct provisions of the law by which justice can be attained and injustice avoided, s. 151, Civil Procedure Code, naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice. *N. SHRIBALABH BRAHMAN v. GULAB MALI* 575

O. I, r. 3, O. XXXIV, r. 1—*Mortgage suit—Person claiming paramount title already party in another capacity—Question of title bound up with other questions—Adjudication of title, legality of—Amendment.*

To a mortgage suit a person claiming an adverse

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or paramount title is not ordinarily a necessary or proper party; but this rule is not absolute or inflexible, and in certain circumstances, it may not only be proper, but even desirable to implead him as a party.

The object of O. XXXIV, r. 1, Civil Procedure Code is to define the scope of a mortgage suit as such, that is of a mortgage suit pure and simple but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and, if it may be joined, in what circumstances.

Where in a suit to enforce an equitable mortgage by one defendant by deposit of title-deeds standing in the name of another defendant, it was alleged that the deposit was made on behalf of both, but that other person denied such right and authority to deposit, and the plaintiff thereupon applied to amend the plaint so as to include the allegation that the properties belonged to the defendant who deposited the title-deeds and were purchased by him *benami* in the name of the other defendant:

Held, that, inasmuch as the alleged *benamidar* had already been impleaded as a party to the suit, and since the question of ownership as a question of fact was bound up with the other questions in the case, the issue relating to the title of the alleged *benamidar* should be allowed to be raised and the amendment prayed for permitted. *M. DURAISAMI IYENGAR v. VARADARAJULU NAIDU*, 53 M. L. J. 647; 39 M. L. T. 459; A. I. R. 1928 Mad. 2 838

O. I, r. 11—*'Person', meaning of—Conduct of suit, whether can be given to person not party to suit.*

The word 'person' in O. I, r. 11 of the Civil Procedure Code means a party to the suit, and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of the rule. *C. TARAPADA GHOSH v. BAGALA SUNDARI BASU*, 46 O. L. J. 530; A. I. R. 1928 Cal. 143 854

O. VI, r. 17—*Amendment of plaint—Discretion of trial Court—Interference in appeal—Duty of plaintiff to include whole claim—Omission to include part of claim—Amendment at late stage—Good cause.*

Order VI, r. 17 of the Civil Procedure Code allows a wide discretion to the Court in permitting an amendment, but the discretion is with the Court, and when that discretion has been exercised on materials which have been admitted legally and for judicial reasons it should not be lightly interfered with in appeal.

It is the duty of a plaintiff to frame his plaint properly before he brings it into Court. It is for him to see that it includes the whole of the claim which he is entitled to make in respect of the cause of action unless he wishes to relinquish some portion of the claim, and where he has omitted to do so the Court will not at a late stage permit an amendment of the plaint so as to include the omitted claim also, unless very good cause is shown for the previous omission. *O. TULSHIPAT RAM v. KAMAKHYA DAT RAM*, 4 O. W. N. 1219; A. I. R. 1928 Oudh 135 823

O. VII, r. 11. See COURT FEES ACT, 1870, ss. 12, 28 817

O. IX, r. 9—*Application for restoration of*

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suit—Court's duty to give opportunity to applicant to adduce evidence

An application for restoration of a suit dismissed in default should not be dismissed *in limine* without giving an opportunity to the applicant to substantiate his allegations in the application by evidence, even though there is reason to suspect that the application is not made *bona fide*. *L. AMIR CHAND v. NAUNIT RAM*

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— O. IX, r. 13. See C. P. C., 1908, s. 151 542

— O. IX, r. 13—*Ex parte* decree on Original Side of High Court—R. 13 whether applicable—Power of High Court to restore on terms where there is no 'sufficient cause'—*Ex parte* decree against two defendants—One defendant not properly served—Restoration against all defendants, when proper.

Although it has been the practice on the Original Side of the Calcutta High Court to follow the analogy of O. IX, r. 13 of the Code of Civil Procedure on general principles of justice, and, as a rule, a case decided *ex parte* will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court, yet the exact words of O. IX, r. 13 are not to be applied on the footing that they are directly applicable and are exhaustive, and it is open to the High Court in its discretion to restore a suit upon proper terms even though there is an element of negligence on the party applying for restoration.

In a suit for damages for defamation on the Original Side of the High Court against the Printer and the Editor of a newspaper the summons was served on the Printer but not on the Editor. The Printer requested the Manager to undertake the defence and the latter agreed to do so. On the day of hearing neither of the defendants appeared and an *ex parte* decree was passed. The Editor applied for restoration of the suit and the Printer prayed that the decree may be set aside as against him also. The application of the Printer was dismissed on the ground that there was no 'sufficient cause' for his non-appearance and that the case did not fall within the proviso to O. IX, r. 13, Civil Procedure Code. On appeal:

Held, that the decree must be set aside as a whole even as against the Printer and that the High Court had power to do so. *C. S. N. BANERJEE v. HUSEYN SHAHIED SUHRAWARDY*, 32 C. W. N. 10 91

— O. XIII, r. 1—Documentary evidence—Production after first hearing—Duty of Court to exercise discretion

Order XIII, r. 1 of the Civil Procedure Code does not exclude the discretion of the Court to receive any documentary evidence which ought to have been produced at the first hearing, at any subsequent stage. *PAT DURGA PRASAD THAKUR v. BASAWAN PANDEY* 272

— O. XXI, r. 1. See COMPROMISE DECREE 502

— O. XXI, r. 6—Small Cause decree by Munsif—Application for execution against immoveables—Formal order of transfer to regular side, whether necessary—Rejection of application—Appeal.

An application for execution of a decree passed by a Munsif in the exercise of his Small Cause powers, was made to the Munsif with an affidavit addressed to him as a Small Cause Court Judge and containing a prayer that execution may be levied against immoveable properties after the issue of a certificate. The Munsif, without passing a formal order of

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transfer dismissed the application on the ground of limitation:

Held, that the provisions about transfer and those of O. XXI, r. 6, Civil Procedure Code, were in effect complied with, that the order of the Munsif must be deemed to have been passed by him in his capacity as a Munsif and not as a Judge of a Small Cause Court, and that the order of dismissal was, consequently appealable. *C. DASARATHI GHOSH v. KARTICK CH. GHOSH*, 31 C. W. N. 1052; A. I. R. 1927 Cal. 782 146

— O. XXI, r. 16—Assignment of decree—Subsequent attachment and execution of decree by third party—Assignee's rights, whether affected—Failure to get assignment recognised by Court, effect of—Trust in favour of assignee.

A person who attaches and executes a decree for money after it has been assigned by the decree-holder to a third person does not acquire any beneficial interest in the amounts realised in execution but holds the same as a trustee for the assignee of the decree.

The assignment of a decree operates from the date of the assignment and does not depend for its validity upon any recognition by the Court. *R. CO-OPERATIVE TOWN BANK v. RAMAN CHETTIAR*, 6 Bur. L. J. 221; 5 R. 595; A. I. R. 1928 Rang. 25 853

— O. XXI, r. 16—Assignment of personal decree—Want of registration, effect of.

The assignment of a personal decree does not require registration under O. XXI, r. 16, Civil Procedure Code. *M. ADIVIKRISHNAYYA v. THUMMALAPALLY SRIRAMULU*, A. I. R. 1928 Mad. 142 485

— O. XXI, r. 16—Decree, assignment of, when comes into effect.

An assignment of a decree made by an instrument in writing takes effect from the date of such instrument and not from the date when it is recognized by the Court on application made to it under O. XXI, r. 16, Civil Procedure Code. *S. NICHOLALSING MAHTAB-SING v. VISHENJI GOVERDHANDAS*, A. I. R. 1928 Sind. 71 54

— O. XXI, r. 40—Judgment-debtor under arrest—Grounds for release—'Furnishing security', meaning of.

A judgment-debtor who is arrested and brought before the Court cannot be released under O. XXI, r. 40, Civil Procedure Code, unless the Court is satisfied on proper evidence that he is unable from poverty or other sufficient cause to pay the decree debt.

A Court cannot, therefore, release a judgment-debtor under arrest on the mere statement of his Vakil at the bar that he is possessed of much landed property.

'Furnishing security' in O. XXI, r. 40 (3) of the Civil Procedure Code means furnishing proper security and not any illusory security. *C. DHARANT MOHAN RAY v. KSHITIPATI RAY*, 54 C. 782; A. I. R. 1928 Cal. 62 66

— O. XXI, r. 52. See C. P. C., 1908, s. 73 184

— O. XXI, r. 52—Partnership action—Receiver, appointment of—Execution of decree against partnership—Charging order—Priority.

It has been the recent practice of the Bombay High Court for a Chamber Judge to make a charging order whenever execution is sought against assets in the hands of a Receiver appointed by the Court in a partnership action.

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The creditor who obtains such a charging order is entitled to rank in priority to all other creditors who have not obtained charging orders or who are not otherwise attaching creditors. *B KESSERBAI v. KAKU VALLABHDAS RAVJI*, 29 Bom. L. R. 665; A. I. R. 1927 Bom. 394 113

— O. XXI, rr. 57, 66—*Sale proclamation—Omission to mention income, effect of—Execution petition "closed"—Attachment, whether terminates.* The omission to specify in a sale proclamation the income of the properties proclaimed for sale does not necessarily render the proclamation defective.

Under O. XXI, r. 57, Civil Procedure Code, an attachment of properties made in execution of a decree terminates only on the dismissal of the execution application by reason of the default of the decree-holder.

Where a decree-holder omitted to mention the existence of an encumbrance in an application for sale and the Court 'closed' the petition directing that the petitioner may file a fresh petition containing such information:

Held, that the petition could not be held to have been dismissed and that the attachment did not, therefore, terminate under O. XXI, r. 57, Civil Procedure Code. *M VELUSWAMI NAICKEN v. BALASUBRAMANIA CHETTIAR* 138

— O. XXI, r. 58. See MALAEAR LAW 230

— O. XXI, r. 58, whether applicable to proceedings in execution of rent-decree. See MADRAS ESTATES LAND ACT, 1908, ss. 125, 192 663

— O. XXI, r. 63—*Specific Relief Act (I of 1877), s. 42—Suit for mere declaration by person who has not preferred claim or objection, whether maintainable.*

A person who has failed to make a claim or objection under O. XXI, r. 58 of the Civil Procedure Code is not entitled to sue for a mere declaration under O. XXI, r. 63 of the Code, where he is able to seek further relief. *R U PO THEIN v. O. A. O. K. R. M. FIRM*, 5 R. 699; A. I. R. 1928 Rang. 31 368

— O. XXI, r. 66. See C. P. C., 1908, O. XXI, rr. 57, 66 138

— O. XXI, r. 66—*Sale proclamation, omission in, to state value of property, whether material irregularity.*

When the decree-holder and the judgment-debtor differ materially as to the probable value of the property, it is open to the Court in settling the terms of a sale proclamation to omit to state the value of the property. Such an omission is not a material irregularity under O. XXI, r. 66, Civil Procedure Code. *M S. K. VERRASWAMI PILLAI v. KALYANASUNDARAM MUDALIAR*, A. I. R. 1927 Mad. 1009 201

— O. XXI, rr. 84, 89—*Application for setting aside sale—No express prayer to set aside sale—Application, whether valid—Sale, when complete—Bid accepted and 25 per cent. deposit made on subsequent date—Limitation, whether runs from date of sale or date of acceptance of bid—Limitation Act (IX of 1908), Sch. I, Art. 166.*

The absence of an express prayer to set aside the sale does not render an application under O. XXI, r. 89 of the Civil Procedure Code incompetent.

An execution sale is not complete until the bid is accepted and the deposit of 25 per cent is made. The limitation of 30 days for setting aside the sale, therefore, begins to run from the date of

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the acceptance of bid and deposit of 25 per cent. and not from the date when the sale was actually held. *N RONYA v. BALIRAM* 333

— O. XXI, r. 89—*Auction-sale—Application to set aside sale—Deposit not made within 30 days—Order, whether open to revision—Provisions of O. XXI, r. 89, construction of.*

The provisions of O. XXI, r. 89, Civil Procedure Code, are to be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor, and an auction-sale cannot be set aside under the section unless the necessary amount is deposited within thirty days from the date of the sale.

If a Court accepts a deposit and sets aside a sale, even though the applicant did not conform strictly to the provisions of O. XXI, r. 89, it exercises a jurisdiction which is not vested in it by law and its order is liable to be set aside in revision under s. 115 of the Civil Procedure Code. *N SADASHEO KARTATKAR v. NARAYAN* 568

— O. XXI, r. 89—*Non-transferable holding—Sale for arrears of rent—Purchase by landlord—Purchaser of part of holding, whether entitled to deposit money and avoid sale.*

The purchaser of a part of a non-transferable holding is entitled to have a sale of the holding for arrears of rent set aside on making a deposit under O. XXI, r. 89 of the Code of Civil Procedure, even though the holding has been purchased by the landlord himself. *C RE FAZOO MIA v. SUL'AN AHMED CHOWDHURY*, 31 C. W. N. 1050; A. J. R. 1927 Cal. 817 143

— O. XXI, rr. 97, 98—*Obstruction to delivery of possession to decree-holder—Court's power to order possession on Bailiff's report complaining obstruction—Notice to obstructor, necessity of.*

A Court has no jurisdiction to pass an order under O. XXI, r. 93, Civil Procedure Code, directing the decree-holder to be put in possession of property upon the report of a Bailiff complaining of obstruction, without giving notice to the party against whom the complaint is made to appear and answer the same. *L BARKAT ALI v. FATTU* 491

— O. XXII, rr. 3, 4—*Death of plaintiff or defendant after preliminary decree—Abatement—Rules 3 and 4, applicability of.*

There can be no abatement of a suit under O. XXI, rr. 3 and 4, Civil Procedure Code, after a preliminary decree has been passed.

There can be no question of the surviving of a cause of action in a suit when a judgment has been pronounced in respect of that cause of action. By the effect of the judgment the decree takes the place of the cause of action either by affirming it or by rejecting it. *O KALU RAM v. GAYA DIN*, 4 O. W. N. 1002 332

— O. XXIII, r. 1. See C. P. C., 1908, s. 115 431

— O. XXIII, r. 3. See RELIGIOUS ENDOWMENT 646

— O. XXVI, rr. 1, 4, 6, 8. See C. P. C., 1908, s. 115 880

— O. XXVI, r. 10. See C. P. P., 1908, s. 100 841

— O. XXXII, rr. 10, 11—*Appeal—Minor respondent—Death of guardian—Fresh guardian not appointed—Appeal, whether abates—Procedure.*

Where the guardian of one of the minor respondents

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to an appeal during the pendency of the appeal and the appeal was disposed of without any steps being taken to appoint another guardian:

Held, that there was no abatement, but that the decree could not stand as it was made in the absence of a guardian of one of the minor respondents and must, consequently, be vacated and the parties restored to the position in which they were at the time when the appeal was still pending. **PAT JAGER NATH v. EAST INDIAN RAILWAY Co**, A. I. R. 1928 Pat. 168 540

— O. XXXIV, r. 1. See C. P. C., 1908, O. I, r. 3 838

— O. XXXIV, r. 1—*Mortgage—Suit for sale—Defendant, whether bound to raise question of paramount title.*

In a mortgagee's suit for sale, the defendant is not bound to raise a question relating to paramount title. **M In re MUSUMURIVENKATANARAYANA**, A. I. R. 1927 Mad. 945 574

— O. XXXIV, rr. 5, 6—*Mortgage suit—Appeal from preliminary decree after passing of final decree, whether maintainable—Preliminary decree, nature of—Amendment of memorandum so as to make it appeal against final decree, legality of.*

A Court has power to amend a memorandum of appeal against a preliminary decree in a mortgage suit so as to make it an appeal both against the final decree as well as against the preliminary decree.

Obiter.—Under the present Civil Procedure Code an appeal may be preferred from a preliminary decree in a mortgage suit even after the passing of the final decree.

A preliminary decree is now an independent decree which is not absorbed by the final decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. **C MADHU SUDAN KUNDU v. CHHALIMADDIN AHAMMAD**, A. I. R. 1928 Cal. 167 128

— O. XXXIV, r. 6—*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Compromise decree in mortgage suit—Composite decree—Final decree, whether necessary—Application for final decree, whether step-in-aid of execution.*

A compromise decree in a mortgage suit provided that the mortgaged properties may be sold if the decree amount was not paid within a certain time and that, if the proceeds of the sale were insufficient, the judgment-debtor was to be personally liable to pay the balance to the decree-holder. After obtaining this decree, thinking that a final decree was necessary in the case, the decree-holder applied on three occasions, for obtaining a final decree. On each of these occasions, his application was dismissed. He then applied for execution of the original decree:

Held, (1) that the decree was a composite one and though it was irregular and was not strictly warranted by the provisions of O. XXXIV of the Civil Procedure Code it was executable;

(2) that the decree in question being a compromise decree and the parties having agreed that the decretal amount should be realised in a particular way, the Court had full jurisdiction to carry out the intentions of the parties whatever was the nature of the decree;

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(3) that though an application for final decree is not an application for execution, yet the three prior applications were steps-in-aid of execution inasmuch as the plaintiff was asking the Court to make an order which was thought necessary, before taking out actual execution of the decree and the ultimate object of the petitions was to hasten the actual realisation of the decree amount. **M PARAMBATH PARKUM v. CHATHOTH PARKUM**, A. I. R. 1928 Mad. 38 395

— O. XXXVII—*Defence not involving question of fact—Summary judgment, legality of.*

A High Court can pass a summary judgment on a promissory note where there is no triable issue dependent on facts to be investigated but there is only a question of law which does not involve the taking of evidence. **C SHYAM SUNDAR CHAKRAVARTY v. TITAGHAR PAPER MILLS Co. LTD.**, 46 O. L. J. 166; 32 C. W. N. 125; A. I. R. 1928 Cal. 123 848

— O. XXXVIII, r. 1—*Attachment before judgment of property of minor defendant, without guardian, legality of.*

A conditional order which simply prevents the property involved in a suit against a minor from being alienated pending the disposal of an application for the appointment of a guardian cannot be said to be invalid merely because the guardian proposed subsequently comes and states he is unwilling to act. **M BATCHU PERRAJU v. BACHU VENKATARATNAM**, A. I. R. 1928 Mad. 1 142

— O. XXXVIII, r. 5—*Attachment before judgment—Defendants promising to file petition undertaking not to transfer—Failure to file petition, whether sufficient ground to order attachment.*

A mortgagee applied for attachment before judgment alleging that the defendants were trying to execute certain transfers of their properties in order to avoid payment and to delay and defraud him. The defendants appeared and undertook to file a petition giving an undertaking not to transfer any property before the disposal of the suit. The said petition not having been filed, the Subordinate Judge at once made an order of attachment before judgment:

Held, that before making an order for attachment before judgment the Court had to consider whether the plaintiff had made out a sufficient case according to law in order to entitle him to get an order for attachment of the other properties of the defendants before judgment, and that the order for attachment made on the mere ground that the defendants had failed to file the petition was illegal. **PAT RAM-KHELAWAN SINGH v. SINGHESHWAR PRASAD SINGH** 532

— O. XXXVIII, rr. 5, 6. See C. P. C., 1908, s. 141 808

— O. XXXVIII, r. 10—*Attachment before judgment, effect of, on rights prior to attachment.*

Where an agreement for sale has been entered into before an attachment before judgment is effected, the attachment cannot affect the purchaser's right to a conveyance under that agreement. **PAT DEOKI-NANDAN SINGH v. JAWAD HUSSAIN** 356

— O. XXXIX, r. 1. See MUHAMMADAN LAW 523

— O. XL, r. 1—*Appointment of Receiver pending suit.*

On an application for the appointment of a Receiver pending the suit, the essential point for the Court to consider is whether the plaintiff has shown

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prima facie that he has a strong case and a good title to the property. **M MUHAMMAD QASIM RAVUTHAR v. NAGARAJA MOOPAGAR** 167

O. XLI, r. 4—*Appeal by one of several defendants—Reversal of decree in favour of all, legality of.*

In an appeal by one of several defendants, the Appellate Court cannot reverse the decree in favour of them all where the appealing defendant does not purport to appeal on behalf of all and his defence is different from that of the others. **L AMIR CHAND v. KAHAN DAS** 875

O. XLI, r. 4—*Plaintiff's right to appeal for benefit of all.*

Order XLI, r. 4, Civil Procedure Code, authorises one of the plaintiffs to an action in which other co-plaintiffs are also interested to appeal for the benefit of the latter only if they are made parties to the appeal. **L SARU KHAN v. JAN MUHAMMAD, A. I. R. 1928 Lah. 43; I. L. T. 40 Lah. 17** 313

O. XLI, r. 5—*Appeal—Application for stay of delivery dismissed as premature on respondent's objection—Respondent taking out execution by surprise—Overreaching of Court—Appellate Court's power to order re-delivery.*

The appellant applied for stay of delivery of possession pending the disposal of the appeal. The respondent contended that the application was premature as he had taken no steps for delivery of possession, and the application for stay was consequently rejected. The respondent straightway applied for execution and took delivery of possession.

Held, that there was something in the nature of an overreaching of the Court on the part of the respondent and the delivery of possession could not be allowed to stand. **PAT NARAYAN SAHU v. THAKURJI RAMJI, 8 P. L. T. 712; A. I. R. 1928 Pat. 49** 194

O. XLI, r. 8. See C. P. C., 1908, s. 115 57

O. XLI, r. 23.

See C. P. C., 1908, s. 151 542, 903

O. XLI, rr. 23, 25. See C. P. C., 1908, s. 151 842

O. XLI, r. 28—*Defective trial by shutting out relevant evidence—Power of Appellate Court to call for revised findings after taking such evidence.*

Where the trial of a case is defective by reason of relevant evidence having been shut out or by refusal of an adjournment which should have been granted to enable a party to adduce all the evidence or for any other reason, the Appellate Court can ask the lower Court to take the evidence so shut out or to give the party, who had not the opportunity to adduce all his evidence, an opportunity to adduce evidence, and to record a finding on the evidence so taken. The mere fact that the Appellate Court has not set aside the decree of the lower Court, does not in any way take away the jurisdiction it has to set aside the judgment and direct the lower Court to take evidence and record fresh findings. **M NARAYANASWAMI IYER v. VEDAMBAL AMMAL, 39 M. L. T. 399; A. I. R. 1927 Mad. 1065** 498

O. XLVII, r. 1—*Omission to cite decision of High Court, whether ground for review of judgment—Error apparent on the face of the record, meaning of.*

The mere omission on the part of a Judge to consider a decision, however regrettable and how-

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ever wrong, cannot possibly be regarded as constituting an error apparent on the face of the record affording a proper and sufficient ground for granting review of a judgment.

The power of Court to grant review is circumscribed and limited by r. 1 of O. XLVII, Civil Procedure Code. It is only when new material is overlooked by excusable misfortunes, mistake or error apparent on the face of the record that a review can generally be granted and the expression 'other sufficient reason' following in the rule must be construed *ejusdem generis* and the sufficiency required must be of a kind analogous to the two matters already specified in the rule. **M OPPORTI PADHI v. PALLA UJJULA, A. I. R. 1927 Mad. 998** 514

O. XLVII, r. 1—*Review—Omission to argue point of law fully—No ground for review.*

An application for review on a point of law cannot be maintained on the ground that that point of law was not fully argued. **R U PO THIRIN v. O. A. O. K. R. M. FIRM, 5 R. 699; A. I. R. 1928 Rang. 34** 368

O. XLVII, rr. 4, 7—*Appeal against decree passed on review—Party aggrieved whether confined to grounds mentioned in r. 7 Right to go into merits.*

Although when a review is granted, and the case is re-opened for consideration, it is open to the party aggrieved to appeal against that order only on grounds which fall under O. XLVII, r. 7, Civil Procedure Code, yet when that stage has passed and on re-hearing, a fresh decree is passed and the final decree or order is appealed against, the Court is not confined to the grounds mentioned in r. 7 but has full power to go into the whole case on the merits and see whether on the evidence the decree passed on review is proper.

Per Ramesam, J.—An appeal against an order granting a review can be filed only on the grounds mentioned in O. XLVII, r. 7. If an appeal is filed against the final judgment and decree after the review, even then if one of the grounds of appeal is that the order granting the review was an erroneous order, it should be attacked only on the same grounds and no other. But this does not mean that the judgment after review cannot be attacked on the merits, while submitting to the order granting the review. **M GOVINDA CHETTY v. RANGAMMAL, (1927) M. W. N. 411** 172

Sch. II, cl. 1—*Reference to arbitration—Compromise agreement.*

The words 'arbitration and reference to arbitration' are used in common parlance. The Code of Civil Procedure uses the same expressions but lays down certain forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed, there cannot be said to be any valid reference to arbitration.

In a suit by the plaintiff for possession, alleging that defendants Nos. 4 and 5 had sold half of certain plots to him but had subsequently colluded with defendants Nos. 1 to 3 the other co-sharers and allowed the latter to take possession, a compromise petition was filed under which the whole lands in the village were to be divided between the plaintiff and his co-sharers on the one hand and the defendants Nos. 1 to 3 on the other proportionately to the admitted shares they had therein on reference to the last Settlement Survey. A gentleman was

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appointed as arbitrator to equalise possession as far as possible and it was agreed that after the said arbitrator had made the proposed division, the plaintiff would withdraw from the suit and the defendants would withdraw the allegations they had made with respect to the plaintiff's purchase :

Held, that this was not an application for an order of reference to arbitration within cl. 1 of Sch. II of the Civil Procedure Code. **C D WARKA NATH CHAKRABARTI CHOWDHURY v. ATUL CHANDRA CHAKRABARTI CHOWDHURY**, 46 C. L. J. 353; A. I. R. 1928 Cal. 103. 509

Sch. III—Property under management of Collector—Mortgage by proprietor, validity of—Property not under Collector's management, whether affected.

The incompetency of a mortgage during the period of Collector's management extends only to the property of which the Collector has expressly assumed management. **N NAGO v. TARACHAND** 14

Commissioner, status of. See CR. P. C., 1898, s. 105 (a) 109

Company—Attachment before judgment by Liquidation Court, validity of. See C. P. C., 1908, s. 141 808

Failure of Company to pay debt—Bona fide dispute—Winding-up of Company.

The mere failure on the part of a Company to comply with a demand for payment from one of its creditors does not entitle the creditor to come before the Court and ask as a matter of right for winding-up of the Company.

Where there is a *bona fide* dispute as to the Company's liability to pay a debt, the creditor must be referred to a suit and cannot be allowed to force payment of the debt by invoking the assistance of the provisions of the Companies Act. **M P R. DORAISWAMI AYYAR v. COIMBATORE MASWARA SAHAYA NIDHI, LTD.**, 423

Companies Act (VII of 1913), s. 164—'Court', meaning of—District Judge's powers, extent of.

Under s. 164, Companies Act, the District Judge is for the purpose of winding-up a Company deemed to be the "Court" within the meaning of the Act and has for the purposes of such winding-up all the jurisdiction and powers of the High Court. **L KANSHI RAM v. HINDUSTAN NATIONAL BANK, LTD.** 808

ss. 228, 229, 230—Presidency Towns Insolvency Act (III of 1909), s. 49—Winding-up of company—Crown debts, whether entitled to priority—Prerogative of Crown—Construction of Statute.

The Crown has a right, in the winding-up of a Company under the Companies Act, to the payment of its debts in priority to all the other creditors of the Company.

Section 229 of the Companies Act read with s. 228 of the Act makes the provisions of s. 49 of the Presidency Towns Insolvency Act applicable in the case of insolvent Companies.

Wherever a Statute has dealt with the powers of a Crown under its prerogative, the prerogative must be taken to be merged in the Statute and the powers previously within the prerogative can be exercised only in the manner and subject to the limitations contained in the Statute. **B MOTOR EMPORIUM COMPANY v. N. H. MOOS**, 29 Bom. L. R. 1446; A. I. R. 1927 Bom. 27

Companies tax. See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 92 334

Complaint. See CR. P. C., 1898, s. 476-B 711

Compromise decree—Provision for payment of lesser sum to decree-holder if paid within fixed time—Closing of Court before expiry of time fixed—Payment into Court on re-opening day, whether compliance with terms of decree—Time, whether of the essence.

By the terms of a compromise decree, the appellant was to pay to the respondent a certain sum of money in two months from a specified date. In default, the whole amount claimed in the suit was to be paid with interest and costs. Before the expiry of the two months the Court closed :

Held, that since the party had the option of paying either to the decree holder or into the Court, a deposit of the amount into Court on the re-opening day, though beyond the period of the two months specified in the decree, was a sufficient compliance with the terms of the decree.

Where a person agrees to accept a lesser sum than is due to him in consideration of payment within a fixed period, time is of the essence of the contract. **M CHINNA NADAN v. ARUMUGAM CHETTI** 502

Construction of documents. See MADRAS ESTATES LAND ACT, 1908, s. 6 505

Construction of Statutes. See COMPANIES ACT, 1913, ss. 228, 229, 230 27

Contract—Breach by one party entitling the other to cancel contract—Notice of cancellation, absence of—Breach, whether condoned.

When a party to a contract is entitled to cancel it by reason of the breach by the other, notice of cancellation should be given to the other party. If no notice is given, it must be deemed that the breach has been condoned and that the contract is allowed to continue. **M KALLASANADA SARMA v. PRESIDENT, DISTRICT BOARD, TANJORE**, A. I. R. 1928 Mad. 211. 815

Contract Act (IX of 1872), s. 16—Undue influence—Execution of mortgage by minor just come of age in favour of creditor of maternal uncle—Maternal uncle and nephew in position of fiduciary relationship—Mortgagee taking with knowledge of facts—Mortgage, whether liable to be set aside.

Where a person seeks to set aside a document executed by him to another on the ground of undue influence if there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an advantage—where this alone is established and nothing further—the Court gives relief to the party conferring the benefit, unless the other party shows that he did not avail himself of the confidence which subsisted between the parties. The burden is, therefore, upon him and, if he does not discharge the burden, the plaintiff succeeds.

When there is a third party involved, the position is not dissimilar. If it is shown that such third party was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence; that is to say, the Court gives relief to the plaintiff without demanding proof of fraud or imposition, or any specific act of undue influence. It is enough that the third party was aware of the existence of the confidential relation and the Court does not insist on proof that he was further aware of the actual exercise of undue influence.

In such cases the third party is affected not by reason of any active participation in, but by bare knowledge of, undue influence exercised in fact or

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by the mere knowledge of the situation of the parties which in law gave rise to a presumption of undue influence.

It is not special relations arising from certain situations only such as, parent and child, or guardian and ward, that are jealously watched by the Court; on the other hand, the principle on which equity gives relief is extended and applied to, all the variety of relations in which dominion may be exercised by one person over another. Similarly the Court does not fetter its discretion by a fictitious regard to the age of the person aggrieved. The law looks at the substance of the thing and it is essential that the relationship should have ceased not merely in name but in fact.

When a stranger takes a gift from a person tainted with the undue influence of another person to whom he stands in a fiduciary position, with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit.

Where a person 20 years old executed a mortgage of almost the whole of his property in favour of a creditor of his maternal uncle for no personal benefit to himself and it was found that the uncle and nephew stood in the position of trustee and *cestui que trust*, that the nephew had no independent advice and was not directed to seek the disinterested opinion of his mother and paternal uncle who were alive and yielded to the importunities of the uncle who was in a position of financial bankruptcy and whom he wished to oblige, and the creditor was aware of these circumstances:

Held, that the transaction was vitiated by undue influence and liable to be set aside by the nephew. *M NARAYANDOSS BALAKRISHNADOSS v. BACHRAJ CHORDIA*, 39 M. L. T. 353; 53 M. L. J. 842; A. I. R. 1928 Mad. 6 315

— s. 23. See BURMESE BUDDHIST LAW 201

— s. 23—Bond providing for payment of interest by work—Very low wages—No provision for re-payment of loan—Legality of contract—Slavery bond.

Where a bond executed by a servant in favour of his master provided for the payment of interest in the shape of work, but the work was to be paid at a certain definite rate which was very low and the work included that of the executant as well as that of his wife and no provision was made for the re-payment of the loan:

Held, that the bond was a slavery bond and was, therefore, not enforceable. *M RAMA SASTRIAR v. PAKKIRI AMBALAKARAN* 850

— s. 23—Income Tax Act (XI of 1922), s. 8—Partnership between license-holders of toddy shops with persons not so licensed, legality of—Liability of all persons to assessment to income-tax.

Where four persons bid and obtained some toddy shops on lease and the profits from the said shops were shared between seven persons, and all the seven assisted in the working and financing of the shop:

Held, that the partnership was not illegal and did not offend the Abkari Rules, inasmuch as there was no case of the license-holders either selling, transferring or sub-renting the shops which they had taken on lease, and that it was, therefore, competent in such a case to the Income-tax Commissioner to assess under s. 3 of the Income Tax Act all the members of the partnership on the combined profits of the four shops. *M COMMISSIONER OF INCOME*

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TAX v. MOHIDEEN SAHIB OF BELLARY, 26 L. W. 655; 53 M. L. J. 719; A. I. R. 1927 Mad. 1052; (1927) M. W. N. 874; 39 M. L. T. 612 226

— s. 23—Money paid in consideration of contract of marriage—Refund, suit for, whether barred.

A suit for refund of money paid in consideration of a contract of marriage is maintainable where the contract has been broken. Section 23 of the Contract Act does not bar such a suit. *N GANPAT v. LAHANA*, 10 N. L. J. 258 803

— ss. 23, 51—Reciprocal agreements—Agreement of one party void—Enforceability of the other agreement.

Where parties enter into reciprocal agreements one of them cannot be enforced if the other is void and unenforceable. *L MANGHU RAM v. NUR MUHAMMAD* 823

— s. 25. See LIMITATION ACT, 1908, s. 19 661

— s. 37. See VENDOR AND PURCHASER 831

— ss. 39, 73. See GROVE 268

— ss. 39, 94, 107—Sale of goods—Notice of arrival—Separate notices as to arrival of portions, validity of—Refusal to perform—Right to retract refusal before due date—Place of delivery—Buyer's duty to take delivery at seller's place of business—Re-sale—Reasonable time—Question of fact—New plea in appeal, whether allowable—Continuing sale for successive days without fresh notice, legality of—Sale by shipments—Tender of goods of different shipment, legality of—Waiver of condition, *u/a* amounts to.

Where a contract for sale of goods contemplates the arrival of the goods piece-meal or in one lot as the shippers or the other carriers may be able to deal with them, the fact that the goods contracted for arrived on two different days and the seller gave notice to the buyer of the separate arrivals without waiting for the arrival of the whole of the goods, does not constitute a breach of the condition regarding notice of the arrival of goods, provided the buyer has received notice of the arrival of all the goods contracted for.

A party to a contract who has refused to perform his part of the contract, is not precluded from retracting his refusal before the due date expires and giving notice of his readiness and willingness to perform.

Section 39 of the Contract Act applies to all breaches of contract which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches.

In view of s. 94 of the Contract Act a seller is not bound to offer delivery of the goods at the buyer's place of business, but it is the duty of the buyer to take delivery at the seller's place of business.

The fact that a re-sale advertised for a particular day was continued on subsequent days without fresh notice or proclamation in the hope of getting better price, does not vitiate the re-sale.

The question of reasonable time is one of fact and a buyer cannot be allowed to set up, for the first time in appeal, the plea that a re-sale was not conducted within a reasonable time.

A seller who has agreed to sell goods of a shipment of a particular month is not entitled to make a valid tender of goods of the same description of a different shipment,

Contract Act—contd.

The mere fact that a Bill of Lading showed that the goods tendered by the seller were those of a different shipment, and the buyer took no exception to this irregularity though he objected to shortage does not amount to waiver of this irregularity. *L. PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH*, 8 Lah. 501; 28 P. L. R. 512; A. I. R. 1927 Lah. 693 10

— s. 51. See CONTRACT ACT, 1872, ss. 23, 24.

823

— ss. 69, 70—*Agreement to deliver coal free on rails—Consignment under freight system—Consignee paying freight charges to Railway—Suit by consignee against contractor for recovery of freight paid, maintainability of.*

The defendant entered into a contract with the Executive Engineer of Godavari for the supply of a certain quantity of coal, to be consigned from a colliery in Bengal. The agreement was that the coal should be supplied free on rails at Rajahmundry. The consignments of coal were received under freight system under which the consignee was to pay the freight. No freight was paid at the time the coal was taken delivery of, but after some months the Railway Administration wrote to the Government of Madras to pay the amount of freight and the amount was paid by the Government. In a suit for recovery of the amount of freight paid by the Government to the Railway Administration from the contractor:

Held, (1) that when the coal was brought to Rajahmundry without paying the freight, it was open to the Executive Engineer to have rejected the coal as under the terms of the contract the delivery was to be free of charges at Rajahmundry; and not having done that, he was not entitled to claim from the defendant the amount of freight which he paid, since his right extended only to rejecting the coal and not to claim any charges that he chose to pay to a third person, namely, the Railway Administration; (2) that the Executive Engineer or the Secretary of State was in no way interested in paying the freight on behalf of the defendant and that neither s. 69 nor s. 70 of the Contract Act applied and the suit was liable to be dismissed. *M. SECRETARY OF STATE FOR INDIA v. RANGASWAMI & Co.*, (1927) M. W. N. 872; A. I. R. 1928 Mad. 198 357

— s. 72—"Coercion," meaning of—*Satisfaction of decree to save interference with business—Suit to recover, whether lies.*

The word "coercion" in s. 72, Contract Act is used in its general sense, and if a third person is coerced into paying the money in satisfaction of a decree against another, and is not himself liable for the money, a suit does lie to recover that money.

A payment to save a serious interference with one's business is a payment under coercion. *R. AN CHON v. T. S. FIRM*, 5 R. 653; A. I. R. 1928 Rang. 55 438

— ss. 73, 83, 107—*Contract for sale of unascertained goods—Subsequent appropriation by seller—Appropriation not assented to by buyer—Property, whether passes—Re-sale by seller before property has passed to buyer, legality of—Proper remedy of seller—Suit for damages.*

Property in goods contracted to be sold will not pass to the buyer under s. 83 of the Contract Act by a subsequent appropriation by the seller unless such appropriation is assented to by the buyer.

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A seller has no right to re-sell and claim from the buyer the difference between the contract price and the price fetched on re-sale under s. 107 of the Contract Act where the property in the goods has not passed to the buyer. The only remedy of the seller in such a case is to sue for compensation for breach of contract and the measure of that compensation would have to be based on the difference between the market price at the time of breach and the price agreed upon. *L. ISHAR DAS-DHARAM CHAND v. DHANPAT RAI-DAULAT RAM*, 8 Lah. 514; 28 P. L. R. 550; A. I. R. 1927 Lah. 687 59

— s. 74—*Agreement to pay enhanced compound interest on default, whether penal.*

An agreement to pay compound interest at an enhanced rate on default of regular payment is penal. *N. GANGADHAR RAO v. PARASHRAM* 38

— ss. 83, 107. See CONTRACT ACT, 1872, ss. 73, 83, 107 59

— ss. 94, 107. See CONTRACT ACT, 1872, ss. 39, 94, 107 10

— s. 108—*Mortgage of goods—Sale by mortgagor in possession—Bona fide purchaser, rights of.*

A bona fide purchaser of mortgaged goods from the owner of such goods who is in possession thereof, without notice of the mortgage, takes the goods free from the mortgage. *R. BACKER KHORASANEH v. AHMED ESMAIL JAMMAL*, 5 R. 633; 6 Bur. L. J. 238; A. I. R. 1928 Rang. 28 355

— s. 134—*Principal and surety—Abatement of suit against principal debtor—Discharge of surety.*

Where a suit against the principal debtor abates in consequence of his death and failure of the plaintiff to bring his legal representative on the record in time, the sureties are discharged under s. 134, Contract Act. *L. NUR DIN v. ALLAH DITTA*, 29 P. L. R. 68 481

— ss. 231, 251—*Bailee, position of—Partnership—Partners, liability of—Undisclosed principal—Civil Procedure Code (Act V of 1908), s. 99—Relief not asked for—Decree, whether good.*

The bailee is responsible to the bailor for loss, destruction, or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of bailment; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract.

Section 251 of the Contract Act which contains the law of partnership controls the relation between partners which is similar to the relation between principal and agent; and under s. 251 of the Contract Act the principal is as much liable for the act of the agent as the agent himself.

Under s. 251 of the Contract Act a partner is liable for the act of another partner if the act was necessary for or usually done in carrying on the business of the partnership.

If the principal be not known at the time of the purchase made by the agent, when discovered, the principal or the agent may be sued at the election of the seller.

Where a person is added as a defendant by a plaintiff on an allegation of partnership by the original defendant, a decree passed against the latter is fully covered by s. 99, Civil Procedure Code, even though the plaint was not properly amended and no

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relief was asked as against him. **C MATHURA NATH v. SREEJUKTA BAGESWARI RANI**, 46 C. L. J. 362; A. I. R. 1928 Cal. 57

— **s. 239.** See **INCOME TAX ACT, 1922**, s. 10 (ix) 308

— **s. 251.** See **CONTRACT ACT, 1872**, ss. 231, 251 516

— **ss. 254 (2), 263—Insolvency of partner—**

Firm not ipso facto dissolved—Insolvent partner's right to assign decree held by firm

In India the insolvency or even the adjudication of a partner as an insolvent does not by itself dissolve the partnership but only affords grounds for the Court to decree dissolution.

It is open to a partner of an undissolved firm who has been adjudicated an insolvent to assign a decree held by the firm. **S FIRM OF NICHALSING MAHTABING v. FIRM OF VISHENJI GOVERDHANDAS**, A. I. R. 1928 Sind 71 54

— **s. 264—Dissolution of partnership—Notice—New customers, whether entitled to plead want of notice.**

Provided a person had knowledge of a partnership, he would not be affected by the dissolution of that partnership in his dealings with the firm unless he had adequate notice of the same as provided in s. 264 of the Contract Act. The expression 'persons dealing with the firm' in s. 264 is not confined to persons who had dealings with the firm prior to dissolution but extends to all persons having dealings, including those dealing for the first time after the dissolution of the partnership. **M CHENCHUVENKATANAGIAH CHETTY & Co. v. PADMANATHAN CHETTY**, (1927) M. W. N. 770; A. I. R. 1928 Mad. 125 904

Co-owners—Abadi—Construction of building and transfer by co-owner in sole possession.—Right of other co-owners to sue for joint possession—Transfer, effect of—Sole possession, whether confers title—Custom, validity of.

If co-owners of the abadi under some arrangement remain in separate possession of a certain site, this does not give the other co-owners a right to sue. But if the co-owners in possession construct a building on the site, the other co-owners may sue for demolition of the building and for joint possession, provided that they do so within a reasonable time.

The right of co-owners to sole possession is a right which continues only so long as they possess themselves and such a right is consistent with the other co-sharers' title. If, however, the co-sharers transfer to a stranger, this amounts to a denial of the title of their co-owners and is inconsistent with that title. Such a transfer gives the co-owners a right to sue for a declaration that the transfer is invalid against them. It also gives them a right to sue for joint possession with the transferors and ejectment of the transferee; for the transferee gets no title to possession by the transfer.

A custom whereby a co-owner can by reason of new separate possession claim an absolute title is a custom which would be inconsistent with the very status of co-ownership and as such cannot be recognised. **A MOHAMMAD SHER KHAN v. BHARAT INDU**, 25 A. L. J. 933; A. I. R. 1928 All. 59 656

Co-sharers—Managing co-sharer—Power to grant lease for planting groves—Omission to raise objection to planting, whether creates estoppel.

The mere fact that a person manages property

Co-sharers—concl'd.

belonging to another does not clothe him with authority to grant leases of land for the purpose of planting groves.

The fact that a co-sharer did not raise any objection when a person claiming under an unauthorised lease from another co-sharer began to plant groves does not estop him from claiming possession of the land.

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. **O RAM DAT v. CHHOTAK**, 4 O. W. N. 1019; A. I. R. 1928 Oudh 23 244

— **Partition—Plot of land left joint—One co-sharer taking exclusive possession and planting trees—Right of other co-sharers to joint possession of land and trees.**

In a partition between co-sharers a certain plot of land was left undivided for the joint use of all the co-sharers. One of the co-sharers took exclusive possession of the said plot and planted trees thereon. In a suit by the other co-sharers for joint possession:

Held, that the plaintiffs were entitled to joint possession of the land and the trees planted thereon. **O SUBAKARAN SINGH v. GANESH BAKSH SINGH**, 4 O. W. N. 1058; A. I. R. 1928 Oudh 46 26

— **Partition—Settlement granted by former co-owner, how far binding on co-sharer to whom property is allotted.**

A person to whom a parcel of land has been allotted by a decree for partition does not take it subject to a settlement made by his former co-sharers without his concurrence when the land was the joint property of all the co-sharers. **PAT MADHO LAL v. MAHABO RAI** 389

— **Suit by co-sharer for his share of rent—Other co-sharers, whether necessary parties.**

A co-sharer is not entitled to maintain a suit for his share of rent unless he makes the other co-sharer-landlords parties to the suit in the absence of a contract, express or implied, by the tenants to pay the plaintiff's share of the rent separately. **PAT RAMDAS SINGH v. RAMPUR SINGH**, 8 P. L. T. 812; A. I. R. 1928 Pat. 119 835

Costs—Mortgage suit. See MORTGAGE 570

Co-tenants—Joint occupancy tenant dying sonless—Devolution of tenancy.

When a joint occupancy tenant of a common holding dies sonless his rights in the tenancy lapse to his co-tenants. **L SARU KHAN v. JAN MUHAMMAD**, A. I. R. 1928 Lah. 43; I. L. T. 40 Lah. 17 313

Counsel. See REVIEW 680

Counsel and client—Compromise by Counsel in excess of authority—Restrictions on Counsel's authority not known to other party—Compromise, whether can be set aside.

In a partition suit on the motion of the Counsel of the parties a consent decree was passed fixing the shares of the parties and referring the matter of accounts to a particular person. Subsequently one of the parties applied for vacating the decree alleging that she had given specific instructions to her attorney that certain matters in the case should not be referred. The Court found that the authority of the Counsel was in fact restricted and vacated the decree:

Held, that in view of the fact that the decree was

Counsel and client—concl.

a consent decree involving a reference to a particular individual named by the parties, the Court was justified in re-opening the case when it found that the Counsel had no authority to consent to such a decree, even though the other parties had no notice of the restriction of the Counsel's authority. *G CHUNI LAL MANDAL v. HIRA LAL MANDAL*, 32 C. W. N. 44 309

Court-fees—Change of law—Retrospective effect. See *MADRAS CIVIL COURTS ACT, 1873*, s. 13 616

Court Fees Act (VII of 1870), s. 5—*Decision of Judge of High Court on reference, whether appealable—'Final', meaning of—Government of India Act, 1915*, (5 & 6 Geo V, c. 61), s. 108 (1)—*Appeal*.

The decision of the Chief Justice or a Judge of the High Court appointed by him to whom a question relating to Court-fee is referred under s. 5 of the Court Fees Act is not open to appeal or revision.

The right of appeal does not exist in the nature of things but must be given by express enactment.

A Judge deciding a reference under s. 5 of the Court Fees Act sits as a person designated and not as a 'Court.' *B GANGARAM TILLOCKHAND v. CHIEF CONTROLLING REVENUE AUTHORITY*, 29 Bom. L. R. 1511; *A. I. R. 1927 Bom. 643*; *I. L. T. 40 Bom. 6* 66

ss. 10 (II), 12 (II), 28—*Declaratory suit with consequential relief—Court-fees—Deficiency of Court-fees in plaint and memorandum of appeal—Power and duty of Appellate Court to levy deficiency of Court-fees in lower Court—Procedure*.

Although the prayers in a plaint are worded in the form of mere declarations, yet, where some of them are really of a consequential nature, the plaintiff is bound to pay *ad valorem* fee on the plaint.

Where a plaint as well as the memorandum of appeal filed by a plaintiff are found to be insufficiently stamped, the proper course to be followed by the Appellate Court is to direct that the appeal be registered on the appellant supplying the deficit Court-fees as regards his memorandum of appeal and after the appeal has been registered and before it has been dealt with under O. XLII, r. 11, Civil Procedure Code, to place the case for orders under s. 12, sub-s. (ii) of the Court Fees Act as regards the deficit Court-fees on the plaint in the lower Court.

It is not necessary for the application of s. 12, sub-s. (ii) of the Court Fees Act that there should have been a formal decision on the question of sufficiency of Court-fees.

Provisions of s. 10 (ii) of the Court Fees Act are mandatory and the power conferred by this provision of law may be exercised at any time so long as the suit remains before the Court on appeal. *C BIDHU BHUSAN BAKHSI v. KALA CHAND ROY*, 31 C. W. N. 1015; *A. I. R. 1927 Cal. 775* 335

ss. 12, 28, Sch. II, Arts. 17, 22—*Court-fee, question of, when appealable—Suit to set aside alienation by female—Requisite Court-fee—'Ancestral land', meaning of—Insufficiently stamped plaint, acceptance of—Further proceedings, whether void—Civil Procedure Code (Act V of 1908), O. VII, r. 11*.

The term "ancestral land" in Art. 22 of Sch. I of the Court Fees Act means land in respect of which in order to enable the plaintiff to succeed, it is necessary for him to prove that the land is ancestral. A suit by the next heir to set aside an alienation by a female holder who has the customary life-interest in the estate is not within the purview of

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Art. 22 as it is not ordinarily necessary for the plaintiff in such a suit to aver or to prove that the land is ancestral.

In the case of a plaint insufficiently stamped the Court is bound to give the party concerned an opportunity to pay the proper stamp and it is on his failure to do so that the Court can decline to look at the document. But the fact that a Court has accepted an insufficiently stamped plaint does not render the proceedings which follow thereon void.

Section 12, Court Fees Act, bars an appeal only where the dispute is about the proper valuation of the subject-matter of the suit and not when the question is which of the several articles of the Court Fees Act applies to the facts stated in the plaint.

Where an order directing the payment of additional Court-fee is incorporated in the decree, it becomes an essential part of the decree and is appealable as such. *L JANTAN v. AHMAD* 817

s. 28.

See *COURT FEES ACT, 1870*, ss. 10 (ii), 12 (ii), 28

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See *COURT FEES ACT, 1870*, ss. 12, 28

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Covenant for quiet enjoyment. See *LIMITATION ACT, 1908*, Sch. I, Art. 97 804

Criminal Intent—Question of fact—Presumption from knowledge. See *PENAL CODE, 1860*, s. 84 559

Criminal Procedure Code (Act V of 1898), ss. 12, 529 (e)—*Trial by Magistrate of offence not committed within his circle of jurisdiction, validity of*.

The trial of an offence by a Magistrate who is otherwise competent to try the same is not invalid merely because the offence was not committed within the circle of the jurisdiction of the Magistrate. Such an irregularity is excused by the provisions of s. 529 (e) of the Code of Criminal Procedure. *A KHUB CHAND v. EMPEROR*, *L. R. 8 A. 144 Cr*; *8 A. I. Cr. R. 402*; *29 Cr. L. J. 124* 716

s. 14—Appointment of Magistrate to try a case—'Case', whether includes all charges.

A 'case' is not necessarily a single charge but comprises all charges or classes of charges. A Magistrate upon whom authority is conferred under s. 14 of the Criminal Procedure Code to try the case relating to the prosecution of a particular person is, therefore, empowered to try all the charges that may be laid against that person in that prosecution. *B JEHANGIR ARDESHIR CAMA v. EMPEROR*, 29 Bom. L. R. 996; *A. I. R. 1927 Bom. 501*; *8 A. I. Cr. R. 324*; *28 Cr. L. J. 1012* 100

s. 21—Bombay Government Rules, rr. 9, 10—

Bench of Honorary Magistrates—Difference of opinion—Dissenting judgment, whether should form part of record

Although under rr. 9 and 10 of the rules framed by the Bombay Government under s. 21 of the Criminal Procedure Code, where there is a difference between two Honorary Magistrates composing a Bench, the opinion of the Chairman prevails, the dissenting Magistrate has a right to have his judgment and finding recorded, and his dissenting judgment should, therefore, form part of the record in the case. *B EMPEROR v. FARDUNJI C. GORA*, 29 Bom. L. R. 1470; *A. I. R. 1927 Bom. 630*; *23 Cr. L. J. 1025* 209

s. 103—House search—Witness brought

Criminal Procedure Code—contd.

from distance—Witnesses, all whether must be produced.

The mere fact that one of the search witnesses is brought by the Police from a distance of about half a mile from the place of search is not sufficient to discredit that witness, unless it is shown that he was in any way connected with the Police.

The word "permitted" in s. 103 (3), Criminal Procedure Code, cannot be taken to mean that the person whose premises are searched shall be present and that he must be given the option of being present.

No duty is cast on the prosecution to put every search witness into the witness-box. *C HARI NARAYAN CHANDRA v. EMPEROR*, 46 C. L. J. 368; A. I. R. 1928 Cal 27; 29 Cr. L. J. 49

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— ss. 106, 123—Duty of Court to fix date for furnishing security before sentence—Sentence, form of.

Section 123, Criminal Procedure Code, contemplates that the accused shall be separately brought up for sentence if security is not furnished, so that the Court should in its judgment fix a date for the furnishing of security, without any order for alternative imprisonment and then, if by that date accused has not furnished the security, he must appear and receive sentence.

As an accused sentenced under s. 123, Criminal Procedure Code, is entitled to be released from custody the moment he furnishes security, the Court should not pass an absolute sentence of imprisonment for a particular period, but should sentence the accused for imprisonment for a particular period or until such date within that period as the required security is furnished. *M In re IBRAYA ROWTHAN*, (1927) M. W. N. 788; 26 L. W. 537; A. I. R. 1927 Mad 476; 53 M. L. J. 762; 28 Cr. L. J. 1034; 39 M. L. T. 658

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— ss. 110, 118, 417—Security proceedings—Order setting aside order to furnish security, whether order of acquittal—Appeal by Local Government, maintainability of—Evidence in security proceedings—Evidence of Police Officers of suspicion and of general repute, admissibility of.

The terms 'conviction' and 'acquittal' are wholly inapplicable to orders under s. 118 of the Code of Criminal Procedure. An order of a Sessions Judge setting aside an order of a Magistrate directing a person to furnish security for good behaviour is not, consequently, appealable under s. 417 of the Code.

In security proceedings the evidence of Police Officers should not be discarded altogether as of no value to prove bad character, although it has to be received with caution.

Suspicion in the mind of a witness is not admissible evidence in such proceedings although evidence of general repute is admissible.

The allegations in s. 110 of the Criminal Procedure Code can only be proved by direct evidence of people who have knowledge of facts to which they depose with the exception that in regard to all other clauses except cl. (f) of s. 110, a witness may give evidence of general repute.

Evidence of general repute is not hearsay evidence but direct evidence given on the basis of the witness's own knowledge of a fact. *A EMPEROR v. BABU RAM*, L. R. 8 A. 163 Cr.; A. I. R. 1928 All. 1; 29 Cr. L. J. 92; 26 A. L. J. 99; 8 A. I. Cr. R. 557

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— s. 120—Period for which security is to be given, commencement of—Joint trial of several persons, legality of.

Under s. 120, sub-s. 2, Criminal Procedure Code, the period for which security is to be given commences on the date of the order under s. 118, that is, the date of the final order, and not from the date of the preliminary order.

Where in proceedings under s. 107 of the Criminal Procedure Code the essence of the charge was that the accused formed one gang with one purpose, namely, that of harassing the complainant and each act spoken to by the witnesses was an act prompted by that common object and directed towards accomplishing it and the evidence of the common association of all the persons for that one purpose was particularly strong:

Held, that the accused could be jointly tried. *M TARANAGOWD v. EMPEROR*, (1927) M. W. N. 185; A. I. R. 1927 Mad 542; 29 Cr. L. J. 77

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— s. 123. See Cr. P. C., 1898, ss. 106, 123.

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— ss. 133, 138—Various obstructions by several persons—Order, what it must contain—Jury, appointment of—Procedure.

When in proceedings under s. 133, Criminal Procedure Code, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order issued under the section should state accurately with regard to each person, the specific obstruction made by him which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned.

Where in a proceeding under s. 133, Criminal Procedure Code, a Magistrate appointed the nominees of the two parties with a Foreman, appointed by himself, to constitute a Jury:

Held, that the Jury was not constituted legally and was incapable of making a legally binding award. *L KHEM CHAND v. EMPEROR*, 28 Cr. L. J. 1036

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— ss. 144, 145—Proceedings under s. 144, when to be taken.

A Court should not proceed under s. 144 of the Criminal Procedure Code where it will be better to draw up proceedings under s. 145 of the Code. *PAT LATIFAN v. MOHAMMAD IBRAHIM*, 28 Cr. L. J. 1039

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— s. 145—Evidence recorded by Reader and not by Magistrate—Irregularity—Trial, whether illegal.

The omission of a Magistrate in proceedings under s. 145, Criminal Procedure Code, to make a memorandum of the evidence as required by s. 356, Criminal Procedure Code, is a mere irregularity and does not vitiate the proceedings where no prejudice has been caused thereby. *O SUMRAN SINGH v. EMPEROR* 4 O. W. N. 1200; 29 Cr. L. J. 70; A. I. R. 1928 Oudh 112

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— ss. 145, 526 (8)—Proceedings under s. 145—Application for stay for moving for transfer, maintainability of.

A party to a proceeding under s. 145 of the Criminal Procedure Code is not entitled to make an application under s. 526, cl. (8) of the Code for stay of proceedings with a view to enable the applicant

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to move the High Court for transfer of the case. **PAT LOKA MAHTON v. KALI SINGH**, 6 Pat. 553; 8 P. L. T. 716; A. I. R. 1927 Pat 351; 28 Cr. L. J. 1035 **219**

— **s. 162.** See CRIMINAL TRIAL **442**

— **s. 162—Misuse of statement under s. 162, effect of.**

The misuse of a statement under s. 162 of the Criminal Procedure Code is not, in the absence of prejudice to the accused, sufficient to vitiate a trial. **B. JEHANGIR ARDESHIR CAMA v. EMPEROR**, 29 Bom. L. R. 996; A. I. R. 1927 Bom. 501; 8 A. I. Cr. R. 324; 28 Cr. L. J. 1012 **100**

— **s. 162—Reference to statements before Police to contradict prosecution witness, legality of.**

It is not competent to a Magistrate to refer to the statements made by a witness before the Police with a view to contradict a subsequent statement made by him until copies of those statements have been given to the accused on trial and an attempt has been made to prove those statements. **L. EMPEROR v. AHMAD**, 29 Cr. L. J. 14 **350**

— **ss. 162, 164—Preliminary inquiry by Criminal Investigation Officer—Statement of witnesses, whether falls within s. 162—Accused's right to copies—Magistrate's power to record statements of witnesses under s. 164.**

Statements taken by a Criminal Investigation Officer in a preliminary enquiry conducted by him against a public officer before sanction for prosecution was given and he was ordered by a Magistrate to investigate under s. 155 (2) of the Criminal Procedure Code, are not statements falling within the purview of s. 162 of the Criminal Procedure Code. To all intents and purposes they are on a par with statements made in a departmental enquiry, and the accused is not entitled to copies of such statements.

Similarly, statements recorded by a Magistrate in such a preliminary inquiry at the instance of the Criminal Investigation Officer do not fall within the purview of s. 164 of the Code.

Section 164 of the Criminal Procedure Code is not confined to confession of the accused but applies also to statements taken from witnesses, and although it is not desirable that witnesses should be pinned down by statements under s. 164, recording statements of witnesses under that section is not illegal. **B. JEHANGIR ARDESHIR CAMA v. EMPEROR**, 29 Bom. L. R. 996; A. I. R. 1927 Bom. 501; 8 A. I. Cr. R. 324; 28 Cr. L. J. 1012 **100**

— **s. 190 (1) (b)—'Report', meaning of—Competency of Magistrate to take cognizance of non-cognizable offence upon report by Police Officer.**

The word "report" as used in s. 190 (1) (b), Criminal Procedure Code, as amended in 1923, means not only a "Police report" or "report of a cognizable case" but also covers a "report in a non-cognizable case". Therefore a Magistrate is empowered under this section to take cognizance of cognizable as well as non-cognizable offences upon a report made by a Police Officer. **L. EMPEROR v. WALI MOHAMMED**, 29 Cr. L. J. 65; A. I. R. 1928 Lah. 66 **577**

— **s. 195 (a)—Offence committed before Commissioner appointed by Court—Power of Court to make complaint—Commissioner, status of.**

A Court which has appointed a Commissioner to examine accounts is competent to make a valid complaint under s. 195 (a) of the Criminal Procedure Code

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in respect of an offence committed by a person before the Commissioner under s. 179 of the Penal Code. A Commissioner is a public servant subordinate to the Court which appointed him. **B. NANA KHANDERAO GHADGE v. EMPEROR**, 29 Bom. L. R. 1476; A. I. R. 1927 Bom. 617; 28 Cr. L. J. 1021; I. L. T. 40 Bom. 12 **109**

— **s. 197—Government Officer acting as Polling Officer in Municipal election—Prosecution for offence under Madras District Municipalities Act (V of 1920)—Sanction of Local Government, whether necessary—Acting in the discharge of official duty, meaning of.**

A Government Officer, such as a Tahsildar, who is appointed by the Chairman of a Municipal Council as a Polling Officer under the Madras District Municipalities Act does not, while he is acting as a Polling Officer, act or purport to act in the discharge of his official duty as a Tahsildar; and sanction under s. 197 of the Criminal Procedure Code need not, therefore, be obtained before instituting criminal proceedings against him for an offence committed by him while acting as a Polling Officer. **M. JAGAN-NADHASWAMI NAIDU v. MANIKYAM**, 28 Cr. L. J. 1038; 27 L. W. 81; I. L. T. 40 Mad. 20; A. I. R. 1928 Mad 161 **222**

— **s. 197—Sanction to prosecute—Mistake as to date of offence, effect of.**

A mistake as to the date of commission of an offence in an order granting sanction under s. 197 of the Criminal Procedure Code for prosecution in respect of such offence will not necessarily vitiate the trial unless it has caused prejudice to the accused. In granting sanction under the section the Government need not specify the offence with the same degree of precision as in a charge. **B. JEHANGIR ARDESHIR CAMA v. EMPEROR**, 29 Bom. L. R. 996; A. I. R. 1927 Bom. 501; 8 A. I. Cr. R. 324; 28 Cr. L. J. 1012 **100**

— **s. 202—Complaint—Magistrate calling for counter-evidence—Dismissal of complaint without giving complainant opportunity to meet such evidence, legality of.**

Where a Magistrate holding an inquiry under s. 202, Criminal Procedure Code, has before him evidence opposed to the complainant's allegations, he should give opportunity to the complainant to explain or meet such evidence.

It is not open to a Magistrate to reject a complaint holding that the accused acted under a bona fide claim of right and that, therefore, no offence was committed by him, merely on a perusal of records sent for by him from the Police or a private individual. **M. MACCARTHY v. SHANNON**, 29 Cr. L. J. 48; A. I. R. 1928 Mad. 135 **464**

— **ss. 202, 203—Preliminary enquiry—Calling on accused to show cause against issuing process, legality of—Discharge of accused—Further enquiry, when to be ordered.**

It is incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under s. 202, Criminal Procedure Code, are in contemplation.

Further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. **L. MOTI LAL v. EMPEROR**, 9 Lah. L. J. 508; 29 Cr. L. J. 39; A. I. R. 1928 Lah. 97. **455**

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s. 233—Offences of mischief and riot—Joint trial—Misjoinder of charges.

A joint trial for offences of mischief and riot where they do not form part of the same transaction and the persons accused are not the same is bad for misjoinder of charges. *L BABU MAL V. GHASI*, 29 Cr. L. J. 34

ss. 235, 537, 556—Penal Code (Act XLV of 1860); ss. 120-B, 121-A—Conspiracy to overawe Government—Some members guilty of offence under s. 120-B—Joint trial of charges, legality of—Committing Magistrate conducting Jail identification—Magistrate giving evidence before himself—Commitment, whether vitiated—Criminal trials—Identification proceedings—Witness identifying in Jail unable to identify in Court—Evidence of identification, admissibility of—Evidence Act (I of 1872), ss. 10, 30—Conspiracy—Evidence—Confession of co-accused—Evidentiary value—Corroboration, nature of—Criminal trial—Robbery for political purposes—Sentence.

Several accused persons were all charged under s. 121-A of the Penal Code with conspiring to deprive His Majesty the King of the Sovereignty of British India, of conspiring to wage war against the Government and of conspiring to overawe the Government by means of criminal force. Apart from the conspiracy to effect these objects there was disclosed on the evidence a conspiracy to commit dacoities either accompanied by murder or not accompanied by murder and consequently certain of the conspirators were liable to punishment under s. 120-B of the Penal Code for being party to a criminal conspiracy to commit offences punishable with death or transportation for life. The actual participators in these offences were separately charged and the accused were all jointly tried on these charges:

Held, that the joinder of the charges was regular and legal as all the offences formed part of the same transaction.

Where a Magistrate who has conducted the Jail identifications happens to be the Committing Magistrate, ordinarily his evidence should be taken for the first time in the Court of Session by calling him as a Court witness. But the fact that a Magistrate took the unusual course of going into the witness-box during the committal proceedings will not vitiate the committal or the subsequent trial.

Section 10 of the Evidence Act renders admissible in cases of conspiracy much evidence which is not ordinarily admissible. The provisions of the said section are much wider than those of the English Law and under the section anything said or written by any conspirator in reference to the common intention of the conspiracy after the time when such intention was first entertained by any conspirator is a relevant fact as against each of the persons believed to be so conspiring as well for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The evidence of accomplices is always admissible and is always relevant but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of

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opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England.

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him; that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it, although it is not necessary that there should be confirmation of all the circumstances of the crime.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

When a witness, who has made an identification in Jail is unable to identify in the Court of the Committing Magistrate or of the Sessions Judge or in both, his evidence of identification, though weak, is not inadmissible in evidence. In such cases outside evidence is admissible to prove that the witness did make such identification and the circumstances in which he made it, though the question as to what weight may be given to it will depend on the facts of each case.

A confession of a co-accused in a case of conspiracy is admissible in evidence against all the accused under the provisions of s. 10 of the Evidence Act. It can also be taken into consideration against his co-accused under s. 30 of the Act.

The gravity of a robbery is not extenuated by the fact that it was committed not for the personal gain of the robbers but solely in order to obtain funds for the furtherance of a political cause which the robbers had at heart. *O RAM PRASAD V. EMPEROR*, 1 Luck. Cas. 339; A. I. R. 1927 Oudh 369; 8 A. I. Cr. R. 449; 2 Luck. 631; 29 Cr. L. J. 129 721

ss. 236, 403—Penal Code (Act XLV of 1860), s. 160—Bombay District Police Act (IV of 1890), s. 61 (o)—Fighting in public place—Acquittal under s. 160, Penal Code—Subsequent trial for offence under s. 61 (o), Police Act, legality of—Autrefois acquit—Alternative charges, framing of.

The accused who fought with another in a public place was tried for an offence under s. 160 of the Penal Code and acquitted as it was found that the public peace was not disturbed. He was again charged under s. 61 (o) of the Bombay District Police Act, 1890, on the same facts and same evidence:

Held, that the acquittal in the previous case, operated as a bar to the subsequent prosecution inasmuch as an alternative charge for the latter offence could have been framed in the previous case under s. 236 of the Code.

Per Patkar, J.—The test is whether the evidence in both cases is the same, and the subsequent trial is on the same basis of facts falling within ss. 236 and 237 of the Criminal Procedure Code. *B KALLASANI V. EMPEROR*, 29 Bom. L. R. 1478; A. I. R. 1927 Bom. 629; 28 Cr. L. J. 1032; I. L. T. 40 Bom. 3 216

s. 250—Complaint, dismissal of, without examining all prosecution witnesses—Compensation, whether can be awarded.

It is only after the examination of all the evidence a complainant wants to adduce that a Magistrate can

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comes to a conclusion that the case is false and vexatious, and though a Magistrate is entitled to discharge the accused at any stage, he cannot award compensation to the accused without examining all the complainant's witnesses. *M. PARTHASARATHI NAICKER v. KRISHNASWAMI IYER*, 27 L. W. 86; A. I. R. 1928 Mad. 169; 29 Cr. L. J. 114 706

— **ss. 250, 562**—*Accused released under s. 562—Order of compensation, legality of.*

A person released under s. 562, Criminal Procedure Code, cannot be ordered to pay compensation to the complainant. *L. MUHAMMAD ZAMAN v. EMPEROR*, 29 Cr. L. J. 38 454

— **ss. 256, 257**—*Re-call of prosecution witnesses for further cross-examination—Expense of witnesses—Order directing complainant to pay costs to accused, legality of.*

Where an accused after the framing of the charge demands the re-call of prosecution witnesses for further cross-examination the complainant cannot be made to bear their expenses.

Where a complainant failed to produce his witnesses for cross-examination by the accused after the framing of the charge and the Magistrate ordered the complainant to deposit the process-fee and to pay the accused a certain sum of money as costs:

Held, that the order of the Magistrate directing the complainant to pay costs to the accused was illegal. *L. FAIZ MUHAMMAD v. NABU*, 29 Cr. L. J. 20 436

— **s. 288**—*Statement recorded by Committing Magistrate transferred to Sessions Court record—Use of statement as substantive evidence, legality of.*

It is not illegal to treat as substantive evidence the statement of a witness recorded by the Committing Magistrate and transferred to the Sessions Court record under s. 288, Criminal Procedure Code. *L. ALA SINGH v. EMPEROR*, 29 Cr. L. J. 73 585

— **ss. 297, 307**—*Jury trial—Non-direction, when amounts to misdirection—Disagreement with verdict of Jury—Reference to High Court, when necessary—Discretion of trial Judge.*

It is only when the non-direction of a Jury is such that there are grounds for thinking that the Jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection.

Section 307 of the Criminal Procedure Code gives a discretion to the Judge in the matter of reference and it is only when he disagrees with the verdict of the Jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion his failure to submit the case is not a subject for interference by the High Court on appeal.

Where a Judge stated that although he still thought that the conviction of the accused was possibly against the weight of evidence, he had modified his original view and was satisfied that the accused took part in the crime, and that there was thus no reason why a reference should be made and accepted the verdict and convicted the accused:

Held, that the case was not a fit one for reference under s. 307 of the Criminal Procedure Code. *PAT BAJIT MIAN v. EMPEROR*, 6 Pat. 817; 29 Cr. L. J. 81; A. I. R. 1928 Pat. 120 673

Criminal Procedure Code—contd.

— **s. 342**—*Evidence, recording of, after examination of accused—Further explanation from accused, necessity of.*

Where a Magistrate records some evidence after the examination of the accused has been concluded he should call for further explanation from the accused. *L. MANGTA v. EMPEROR*, 29 Cr. L. J. 11 347

— **s. 342**—*Transfer of Magistrate—De novo trial—Succeeding Magistrate's duty to examine accused again—Omission to examine—Illegality.*

Where the Magistrate trying a case is transferred and the accused demands a *de novo* trial, the succeeding Magistrate is bound to examine the accused again under s. 342 of the Criminal Procedure Code, and failure on the part of the Magistrate to do so will vitiate the trial.

"It is not only a rule but a principle of law that the Magistrate who tries a case in the sense of 'decides' it, must give the accused an opportunity of explaining any points which may have been made against him and must hear what he has to say." *L. AKHTAR MOHAMMAD v. EMPEROR*, A. I. R. 1927 Lah. 720; 29 Cr. L. J. 125 717

— **ss. 342, 364**—*Summary trial of warrant case—Examination of accused, whether should be recorded.*

In a summary trial of a warrant case, although a Magistrate is bound to examine the accused under s. 342 of the Criminal Procedure Code he is not bound to record such examination as provided for in s. 364 of the Code. *PAT PARSHOTAM DAS v. EMPEROR*, 6 Pat. 504; A. I. R. 1927 Pat. 369; 8 P. L. T. 757; 28 Cr. L. J. 1037; 1 L. T. 40 Pat. 14 221

— **s. 360 (1)**—*Deposition of witness, reading of—Accused not present—Presence of Pleader, whether sufficient.*

The words "appear by Pleader", as used in s. 360 (1), Criminal Procedure Code, are nowhere defined. In ordinary acceptance these words mean "represented by Pleader" that is to say, having a Pleader to act and plead.

There is nothing in the provisions of s. 360 (1), Criminal Procedure Code to indicate that the Legislature intended that the reading over in the presence of the Pleader should be a compliance with the provisions of that section only in cases where the personal appearance of the accused is dispensed with by the Court. The natural meaning of the words is that if an accused person has engaged a Pleader, who is in attendance, the reading over of the deposition in the presence of the Pleader will be a full compliance with the provisions of the section, if the accused himself does not happen to be present at the time the deposition is read over.

Obiter.—Section 360 (3) is not an additional provision, requiring that the deposition recorded in English should be translated into the vernacular to a witness who has deposed in the vernacular, after having first been read over to him in English. *C. HARI NARAYAN CHANDRA v. EMPEROR*, 46 C. L. J. 368; A. I. R. 1928 Cal. 27; 29 Cr. L. J. 49 545

— **s. 364**. See Cr. P. C., 1898, ss. 342, 364 221

— **s. 367**—*Bench of Honorary Magistrates—President in minority—Bench judgment written by President—Judgment, whether in accordance with law.*

In a case where the President of a Bench of Honorary Magistrates is in a minority as to conviction or

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acquittal, the judgment should be written by some member of the majority since, otherwise, there will be a conviction based on an acquitting judgment, without any reasons for conviction which, under the provisions of the Criminal Procedure Code the Bench is bound to set out. *M BODDIPATI LALAMMA v EMPEROR*, (1928) M. W. N. 31 A. I. R. 1928 Mad. 197; 29 Cr. L. J. 207; 27 L. W. 233. 799

s. 403. See Cr. P. C., 1898, s. 238, 403 216

s. 403—Autrefois acquit—Subsequent prosecution on facts different from those of previous prosecution—Acquittal on charge under s. 498, Penal Code—Prosecution for subsequent detention, whether barred.

Where the prosecution of an accused rests on facts wholly and completely different from those on which he was previously prosecuted, the principle of *autrefois acquit* cannot be invoked.

The previous acquittal of an accused on a charge under s. 498, Penal Code, is not a bar to subsequent proceedings under the same section on a charge of subsequent detention of the same woman. *L WARYAM SINGH v. EMPEROR*, 29 Cr. L. J. 3; 29 P. L. R. 52 339

s. 408—Second Class Magistrate invested with First Class powers during pendency of trial—Conviction—Appeal, whether lies to District Magistrate or Sessions Court.

The moment a Second Class Magistrate is invested with the powers of a First Class Magistrate he becomes a First Class Magistrate and any convictions by him in cases which were taken up by him as a Second Class Magistrate are convictions by a First Class Magistrate, and appealable to the Court of Session and not the District Magistrate. *M TIRUMALA VENKATAREDDY v SIKATAPU RAMAYYA*, (1927) M. W. N. 669; 26 L. W. 685; 39 M. L. T. 497; 53 M. L. J. 733; A. I. R. 1928 Mad. 55; 29 Cr. L. J. 71 583

s. 417. See Cr. P. C., 1898, ss. 110, 118, 417 584

ss. 423, 439, 561-A—"Quashing of proceedings", meaning of—Power of High Court to quash proceedings in subordinate Court—Abuse of process—Power of Single Judge of Chief Court to quash proceedings—Limits of jurisdiction—Practice. "Quashing of proceedings" is a term of compendious connotation and the practical result of quashing is the setting aside or reversal of the order initiating the proceedings. This power is vested in the High Court under s. 439 read with cl. (1) of s. 423, Criminal Procedure Code.

The language of s. 561-A, Criminal Procedure Code, is wide and comprehensive and the High Court has jurisdiction to pass an order to set aside proceedings in a subordinate Court if the proceedings constitute an abuse of the process of the Court.

Any Single Judge of the Chief Court can exercise the jurisdiction which is conferred on a High Court by s. 561-A of the Criminal Procedure Code.

Though the limits of the jurisdiction under s. 561-A, Criminal Procedure Code, are very wide, yet as a rule of practice it will be exercised in exceptional cases only.

Sanction to prosecute certain officers of a Company was granted to the official liquidator on the 18th November, 1924. The official liquidator subsequently applied for public examination and for proceedings against them under s. 235 of the Companies Act. The Court declined to take proceedings until particulars

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of the charges against the officers were given. The official liquidator did not supply the particulars but filed a complaint against the officers in the Criminal Court on the 8th March, 1927, in pursuance of the sanction of 1924:

Held, that the conduct of the official liquidator in disregarding the order of the Court to specify the particulars of the charges, and making a complaint during the pendency of proceedings under s. 235 of the Companies Act was a clear attempt to divest the Court of its jurisdiction possessed under s. 237 of the Act, and that the High Court had power under s. 561-A of the Criminal Procedure Code to quash the criminal proceedings instituted against the officers. *O S C MITRA v. KALI CHARAN*, 1 Luck. Cas. 653; 29 Cr. L. J. 102; A. I. R. 1928 Oudh 101 694

s. 437—Revision—Finding of fact—Interference—Mere mistake of law—No injustice—Interference, whether legal—Appellate Court—Alteration of charge, legality of.

A Court of Revision has no right to disturb a finding of fact, even if it arrives at a different conclusion on an evaluation of the evidence.

It is not the duty of the Court of Revision to correct mere mistakes in law, which have no more effect than mistakes in grammar or spelling. The power of interference in revision is to be used only for the purpose of correcting injustice not mere illegality.

It is open to the Appellate Court to alter a charge to one under a different section and it should do so if another section applies to the facts, provided the accused knew all the facts alleged against him. *N NARSINGDAS MARWARI v. EMPEROR*, 29 Cr. L. J. 86 678

s. 439. See Cr. P. C., 1898, ss. 423, 439, 561. 694

s. 439—Charge—No offence disclosed—High Court's power to quash charge.

A High Court is competent to quash a charge and dismiss a complaint, in exercise of its revisional powers where no offence is disclosed by the prosecution evidence. *L TAHRU v. JALLU*, 9 Lah. L. J. 351; 28 Cr. L. J. 1010 224

s. 439—Revision—Acquittal, interference in.

The Court of Revision will not ordinarily interfere with an order of acquittal. *L BABU MAL v. GHASI*, 29 Cr. L. J. 34 450

ss. 439, 476-A—Hearing of case on appeal by Judge who made complaint under s. 476-A, whether legal—Prosecution for contradictory statements—Failure to draw up alternative charge—Order for re-trial on same charge, legality of.

The accused made a statement before a Sessions Judge which contradicted a previous statement made by him and the Sessions Judge made a complaint to the District Magistrate under s. 476-A, Criminal Procedure Code, in which he stated that the last statement made by the accused was false. The accused was tried by a Magistrate on this charge and convicted. On appeal, the same Sessions Judge, without ordering the framing of an alternative charge, ordered re-trial on the same charge as he found that there was no evidence to show that the last statement was false. The accused applied for transfer of the case:

Held, (1) that the proceedings against the accused must be quashed inasmuch as the complainant and the Appellate Court were one and the same;

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(2) that the accused should not be submitted to a fresh trial inasmuch as the principle of *nemo debet bis vexari* applied to the case in the spirit if not in the letter. *L. SAR v. EMPEROR*, 8 Lah. 496; A. I. R. 1927 Lah. 671; 28 P. L. R. 688; 29 Cr. L. J. 6 **342**

— **s. 440—Revision—Omission to hear party—Second application, whether maintainable**

No party has a right to be heard before any Court exercising its powers of revision under the Criminal Procedure Code although the Court may, if it thinks fit, hear any party either personally or by Pleader.

The fact that the Pleader for a party was not heard when a Court was exercising such powers is not, therefore, a ground for a second application for revision or for a review.

It is a good practice to hear Counsel in criminal references in matters of importance, but whether a matter is a matter of importance must be left to the discretion of the Judge hearing the reference. *A SRIPAT NARAIN SINGH v. GAHBAR RAI*, L. R. 8 A. 135 Cr.; 8 A. I. Cr. R. 337; A. I. R. 1927 All. 724; 25 A. L. J. 1010; 29 Cr. L. J. 88 **680**

— **ss. 464, 465, 469. See PENAL CODE, 1860, s. 84** **796**

— **s. 476-A. See Cr. P. C., 1898, ss. 439, 476-A** **342**

— **s. 476-B—Appeal from order making complaint—Party at whose instance complaint was made, whether entitled to notice—Limitation, starting point of.**

In an appeal under s. 476-B of the Criminal Procedure Code by a person against whom a complaint has been made, the opposite party entitled to notice is the Crown and not the person on whose application the complaint was made.

Starting point of limitation for an appeal from an order making a complaint is the date on which the complaint is filed and not the date on which it is signed. *L. LABHA MAL v. WASAWA MAL*, 29 Cr. L. J. 72; 29 P. L. R. 128 **584**

— **s. 476-B—Appellate order directing complaint to be made, whether appealable to High Court—Complaint, what amounts to.**

No appeal lies from an order passed by an Appellate Court under s. 476-B of the Criminal Procedure Code, directing a complaint to be made.

Per *Rankin, C. J.*—The policy of the law as laid down in s. 476-B, Criminal Procedure Code, is this that whenever there is a decision by a Court upon an application that a complaint shall be made—whether that decision be one way or another—there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court his remedy after that is to take his defence before a Jury or a Magistrate according to the nature of the case. Two Courts and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not.

A District Judge, in making a complaint, after giving his reasons for holding that there was a good *prima facie* case ordered as follows:—"I, therefore, direct the prosecution of A. Let a copy of this order be sent along with the records to the proper Magistrate as a complaint".

Held, that although in some cases a more formal and fuller document may be required, there was a

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proper complaint in the circumstances of the case. *O AHMADAR RAHMAN v. DWIP CHAND*, 32 C. W. N. 164; 29 Cr. L. J. 119 **711**

— **ss. 476, 526—Prosecution of witness for perjury—Transfer of case—Reasonable apprehension—Impartiality of Magistrate**

The proper time for taking action against a witness under s. 476, Criminal Procedure Code, is the time of delivering the judgment in the case.

Ordering prosecution of a defence witness under s. 476, Criminal Procedure Code, for an offence under s. 193, Penal Code, at the time his evidence is recorded is bound to strike terror in the heart of defence witnesses and is, therefore, a sufficient ground for transfer of the case.

Where the action of the Magistrate is such as to create a reasonable apprehension in the mind of the accused that the Magistrate has made up his mind against him, the case would be transferred even though the Magistrate may have acted with perfect impartiality. *L. GOPAL SINGH v. EMPEROR*, 29 Cr. L. J. 40 **456**

— **s. 503—Witness residing in Native State—Issue of commission to examine witness to officer representing British Indian Government—Duty of such officer—Refusal to execute commission, legality of—Court's discretion to examine witness by commission or summons.**

Once a commission has been issued by a District Magistrate or other Court mentioned in s. 503, Criminal Procedure Code, to an officer representing the British Indian Government in a Native State it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence or to delegate his functions under the commission to any officer subordinate to him and competent to execute the commission, and in that case such officer must proceed to the place where the witness is or summon the witness before him and take down his evidence. But neither the Criminal Procedure Code nor any other law leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar cause. The fact that the powers to execute the commission cannot be delegated to a Magistrate subordinate to a State does not absolve such officer from the duty of executing the commission or of procuring its execution in accordance with law. The provisions of sub-s. (3) of s. 503, Criminal Procedure Code, are mandatory in this respect.

It is for the Magistrate to decide whether he would summon witnesses residing in a Native State in Court to record their statements or whether he would issue a commission and if the Magistrate has decided upon the latter course it is not within the discretion of the Agent to the Governor-General to whom the commission is issued to decline to execute the commission on the ground that there exist other possible means for examining the witnesses. *L. SIKANDAR v. EMPEROR*, A. I. R. 1928 Lah. 76; 29 Cr. L. J. 202 **794**

— **s. 514—Surety bond—Failure of surety to produce accused on day fixed for appearance—Magistrate not holding Court on that day—Bond, whether forfeited.**

The failure of a surety to produce an accused on the day on which he has undertaken to produce him

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will not cause forfeiture of his bond, where the Judge does not hold Court on that day. **L. SAMMAN SINGH v. EMPEROR**, 9 Lah. L. J. 411; 28 Cr. L. J. 1020; A. I. R. 1928 Lah. 20 108

— **s. 526.** See Cr. P. C., 1898, ss. 476, 526 456

— **s. 526—Officials of district connected with case—Transfer of case, desirability of.**

Where a number of officials in the district in which an accused is being prosecuted are personally concerned in the case, whether as witnesses or otherwise, it is desirable that it should be tried elsewhere. **A BHOLA NATH v. MRS. VASHESHWAR NAUTH SINGH**, A. I. R. 1927 All. 708; 28 Cr. L. J. 1011 99

— **s. 526 (8).** See Cr. P. C., 1898, ss. 145, 526 (8) 219

— **s. 529 (e).** See Cr. P. C., 1898, ss. 12, 529 (e) 716

— **ss. 537, 556.** See Cr. P. C., 1898, ss. 235, 537, 556 721

— **s. 561-A.** See Cr. P. C., 1898, ss. 423, 439, 561A 694

— **s. 562.** See Cr. P. C., 1898, ss. 250, 562 454

Criminal trial—Accused's right, to trial by Judge with open mind.

An accused is entitled to a decision both in the trial Court, and on appeal from a Judge who approaches his case with an absolutely open mind. **L. SAR v. EMPEROR**, 8 Lah. 496; A. I. R. 1927 Lah. 671; 28 P. L. R. 688; 29 Cr. L. J. 6 342

— **Duty of prosecution and trial Judge to see that all material evidence is adduced—Police diary, proper use of—Criminal Procedure Code (Act V of 1898), s. 162.**

The Prosecuting Inspector, the Government Pleader in the trial Court and the trial Judge do not any of them discharge their duty, if they are merely content with getting recorded and recording such evidence as the Police may put before the Court. It is the duty of all of them to apply some intelligence, all the intelligence they can, to the problems that arise in the case and towards securing all possible evidence on material points. They must examine the motives and relations between the parties and insist upon their actions, where those actions are material, being disclosed.

A confession recorded in a Police diary cannot be used for anything other than to assist the presiding Judge in the enquiry or trial or for the purpose of enabling the defence under certain circumstances to contradict the witnesses for the Crown. But it is the duty of the Judge to bring on record by evidence any material facts that may come to his knowledge and for this purpose a Judge can and should use the diary. **A KARAN SINGH v. EMPEROR**, L. R. 8 A. 153 Cr.; A. I. R. 1928 All. 25; 29 Cr. L. J. 26; 26 A. J. J. 92; 8 A. I. Cr. R. 426 442

— **Inconsistent defences, legality of.**

An accused person is entitled to set up inconsistent defences. **L. SANTA SINGH v. EMPEROR**, A. I. R. 1927 Lah. 710; 29 Cr. L. J. 117 709

— **Proceedings before Bench Court—Application for transfer on ground of difficult question arising—Procedure.**

If a Bench Court thinks that a case pending before it should be transferred to the file of some other

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Court, on the ground that the case involves difficult questions which cannot be properly tried by a Bench it should move the matter officially and not leave it to the party to move. **M In re V. A. GOPAL NAIR**, 29 Cr. L. J. 123 715

— **Prosecution and defence evidence divergent—Benefit of doubt.**

Where the prosecution and the defence witnesses between whom there is not much to choose make two divergent statements about one and the same incident, the matter becomes doubtful and the accused is entitled to the benefit of doubt. **L. KALU v. EMPEROR**, 29 Cr. L. J. 208 800,

— **Recording of prosecution evidence piecemeal, legality of.**

In a criminal trial prosecution evidence should not be recorded piecemeal inasmuch as such a procedure would give every opportunity for succeeding witnesses to know what the statements of the previous witnesses are and on what lines the cross-examination of the witnesses is being conducted. **L. STRAJ-UD-DIN v. EMPEROR**, 29 Cr. L. J. 200 792

— **Respectable accused—Sentence.**

Per *Madgavkar, J.*—The law is not a respecter of persons; and a respectable person as such must not escape with a lesser sentence. **B JEHangir ARDESHIR CAMA v. EMPEROR**, 29 Bom. L. R. 996; A. I. R. 1927 Bom. 501; 8 A. I. Cr. R. 324; 28 Cr. L. J. 1012 100

— **Sentence, reduction of, when justifiable.**

A Court is not bound to reduce a sentence unless it appears to be heavier than the facts proved against the accused warrant, especially when the Courts below express the opinion that it is not so, even though the facts constitute a different offence for which the sentence passed is not a legal one. **N NARSINGHDAS MARWARI v. EMPEROR**, 29 Cr. L. J. 86 678

— **Sentence—Robbery for political purposes.** See Cr. P. C., 1898, ss. 235, 537, 556 721

— **Thumb impression—Power of Court to ask accused to give, his thumb-impression—Adverse inference on refusal—Evidence Act (I of 1872), s. 73—Identification of Prisoners Act (XXXIII of 1920), s. 5.**

A Court has power to ask an accused person whether he would consent to have his thumb-impression taken for comparison and may draw an inference adverse to him if he refuses to give his thumb-impression. **PAT ZAHURI SAHU v. EMPEROR**, 6 Pat. 623; 28 Cr. L. J. 1028; 8 P. L. T. 847; A. I. R. 1928 Pat. 103 212

— **Crown debts.** See COMPANIES ACT, 1913, ss. 228, 229, 230 27

— **Custom—Alienation—'Ancestral land'—Chela Sials of Mauza Chela, District Jhang—Sonless proprietor—Power to alienate ancestral land—Breaking of tribal bond, effect of.**

Among Chela Sials of Mauza Chela in the Jhang District a sonless proprietor is not allowed to alienate his ancestral property except for necessity.

Where a tribal bond has been broken the presumption of a restricted right of alienation must be deemed to have been rebutted.

Land situated in a village founded by and entirely owned by the common ancestor of the plaintiff and the alienor is 'ancestral' land. **L. PIRA v. FATTA**, 905

— **Succession—Chopra Khatri of Jullundur District—Collaterals, whether exclude daughters.**

Custom—conold.

There is no special custom among the Chopra Khatri of the Jullundur District by which daughters are excluded from inheriting the property of their father by collaterals, where the father was separate from the collaterals. *L. UMEA v. DURGA DEVI*, 8 Lah. 541; A. I. R. 1927 Lah. 539; 2nd P. L. R. 112 225

Succession—Daughters' daughters and collaterals; rights of—Muhammadian Naru Rajputs of Hoshiarpur District—Riway-i-am, presumption in favour of—"Aulad," meaning of.

Among Naru Muhammadian Rajputs of Hoshiarpur District daughters are by custom entitled to succeed in the presence of collaterals more remote than the descendants of the great-grandfather of the deceased proprietor; and where daughters have succeeded to their father's land as heirs excluding his collaterals, their daughters are entitled to succeed to their mothers' estate in the absence of direct male heirs.

In places where the right of females to succeed is widely recognised, the word "*aulad*" should be construed as including both male and female issue.

Where a *Riway-i-am* of a District sets up a particular custom, there is a presumption in favour of the existence of such custom and the onus of proving the contrary is on the party contesting such custom. *L. CHARAGH BIBI v. SULTAN BAKHSI*, A. I. R. 1928 Lah. 40 846

Widow of pre-deceased son, right of, to husband's share—Onus of proof.

Under the general agricultural custom the widow of a pre-deceased son is entitled only to maintenance. But in some tribes in which the right of representation is recognised, she is entitled to succeed to the share which her husband would have taken if he had been alive when such succession opened out. The burden of proving such a special custom is on the person who asserts it. *L. RAM CHAND v. WARYAM SINGH* 864

Decree—Construction—Partnership suit—Preliminary judgment dealing with certain matters and adjourning suit to later date, whether determination of entire suit.

Where in a suit for dissolution of partnership, the preliminary judgment directed dissolution, the appointment of a Commissioner and taking accounts and "the further consideration of the suit was adjourned" to a later date:

Held, that the suit could be considered to have been only partially and not entirely disposed of and it was competent to the Court later to take into consideration other matters covered by other issues and not disposed of in the original judgment. *M. SATHAPPA CHETTY v. SUBRAMANIA CHETTY*, A. I. R. 1928 Mad. 214 810

Deeds. See C. P. C., 1908, s. 100 250

Document executed nominally, whether can be relied on as gift.

The executant of a document executed with one intention cannot by change of mind utilise that document for a transaction of a wholly different character.

When a document is executed nominally without any intention of conveying title in favour of any person, it cannot afterwards be used for the purpose of conveying title merely because one of them changes his mind and wants the document to be operative as a real transfer. *M. KULANDAI VELUPILLAI v.*

Deeds—conold.

VENKATARAYAR, 39 M. L. T. 470; 53 M. L. J. 806; A. I. R. 1928 Mad. 25 652

Del credere agent and independent contractor, distinction between. See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 92 334

Divorce Act (IV of 1869), s. 2—Parties not domiciled in British India—Residence and adultery within British India—Jurisdiction of Courts of India to grant divorce—Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V, Ch. 40), applicability of.

Courts in India have jurisdiction under the Divorce Act to grant a divorce which will be valid for all purposes throughout British India in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in British India. The fact that the parties are not domiciled in British India and that the decree will not be binding for international purposes, is no bar to the granting of a petition for divorce.

The Indian and Colonial Divorce Act, 1927, has no application to a marriage celebrated in the Irish Free State. *O'NAN GREENWOOD v. L. V. GREENWOOD*, 3 O. W. N. 163 481

Easement—Right of easement against land owned by Government in occupation of lessee—User for 60 years, whether essential.

An easement cannot be claimed against Government unless the claimant has established user for 60 years even though the land over which the easement is claimed is in the occupation of a lessee. *O. JAGAN v. JAGDISH*, 4 O. W. N. 1035; A. I. R. 1928 Oudh 17 305

Easements Act (V of 1882), s. 13—Right of tenants to graze cattle on landlord's kancha lands—Customary right, evidence of.

A customary right of pasture on landlord's lands can be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right and if from the circumstances it could be gathered that the right was enjoyed by them customarily or might be due to a lost grant. But such a right cannot be held to exist where the tenants used to apply to the landlord formally for permission to graze and the landlord used to give them permission on terms agreed to between him and the tenants. *M. LAKSHMI KUMARA v. NARAYANAPPA NAIDU* 195

Ejectment suit—Parties—All persons in possession, whether necessary parties—Omission to implead heir of one party—Maintainability of suit—Ejectment suit and suit for damages, difference between.

Although an action for damages against one of some of several joint wrong-doers is maintainable, in an action in ejectment all persons in possession should be impleaded as defendants, and there is no distinction in principle, for the purpose of this rule, between the cases of trespassers and of tenants.

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two; first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of

Ejectment suit—concl.

risk involved in not making the persons in actual possession defendants, for in execution of the decree persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree.

Where during the pendency of a suit for ejectment one of the defendants died and his heir was not brought on record:

Held, that the suit could not be maintained in the absence of such heir unless there was evidence to show that the heir was not in possession of the lands sought to be recovered. **C ARUNADOTA CHAKRABARTY v. MAHAMMAD ALI**, 46 C. L. J. 433; I. L. T. 40 Cal. 13; A. I. R. 1928 Cal. 138 261

Election. See BOMBAY LOCAL BOARDS ACT, 1923, ss. 35 (2) (b) 27 265
See O. P. O. 1908, s. 115 398
See Cr. P. O., 1898, s. 197 222
See MADRAS CITY MUNICIPAL ACT, 1919, s. 55 (2) 144
See MADRAS DISTRICT MUNICIPALITIES ACT, 1920 129
See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 9 (1) 205

Escheat—Duty of Crown to show absence of relations and heirs-at-law.

Before the Crown can take property of a deceased person by escheat it must be shown that the deceased left no relations or heirs-at-law. **B NARAYAN PUNDLIK VALANJU v. LAKSHMAN DAJI SIRSEKAR**, 29 Bom. L. R. 930; A. I. R. 1927 Bom. 456; 51 B. 734 87

Estoppel. See EVIDENCE ACT, 1872, s. 115 20

Party taking particular position in previous litigation—Change of position in subsequent litigation, whether permissible.

It is a well-known rule of law that where a party has asserted a certain position in a previous litigation he cannot re-agitate the matter on the assumption of fresh fact against persons who were parties whether as plaintiffs or defendants in the previous suit. **L BHOLA v. SHEO CHAND** 484

Evidence—Expert evidence—Report, admissibility of—Examination of expert, necessity of.

The report of an Expert on similarity of thumb impression is not admissible in evidence unless he has been examined in Court or on commission. **L SANT SINGH v. LAL CHAND** 834

Expert evidence—Report, whether admissible—Examination of expert, necessity of.

Reports of experts are not legal evidence unless they appear in Court as witnesses and are examined in respect of their opinion. **L WADHWA v. JAI KISHAN DAS**, 29 P. L. R. 125 493

Findings and evidence adduced in Revenue Courts, admissibility of, in subsequent civil suit.

Findings in ejectment proceedings before the Revenue Authorities and the evidence led in those cases cannot be relied upon as evidence in subsequent proceedings in a Civil Court. **L SARU KHAN v. JAN MUHAMMAD**, A. I. R. 1928 Lah. 43; I. L. T. 40 Lah. 17 313

in security proceedings. See Cr. P. O., 1893, ss. 110, 118, 417 684

Evidence Act (I of 1872), ss. 8, 27, 32 (1)—Confession leading to discovery of weapon used, extent of admissibility of—Dying declaration, admissibility of, to prove charges other than homicide—Dying declaration made immediately after robbery—Res gesta.

Although the whole of the confession of a prisoner

Evidence Act—contd.

in Police custody cannot be admitted in evidence under s. 27 of the Evidence Act, yet where a confession includes a statement that a weapon was used for committing the offence charged, that part of the confession can go in if it leads to the discovery of the weapon.

A dying declaration is admissible in evidence under s. 32 (1) of the Evidence Act even where the charge is not one of homicide.

A dying declaration made by a person who has been robbed and killed, immediately after the robbery, regarding the robbery and also regarding the assault committed in the course of the robbery, is admissible in evidence in the trial of the assailant for robbery, under s. 8 of the Evidence Act as part of the *res gesta*.

Sections 8 and 32 of the Evidence Act may overlap in some cases but they provide for different and distinct conditions. **PAT LALJI DUSADH v. EMPEROR**, 6 Pat. 747; 29 Cr. L. J. 106; A. I. R. 1928 Pat. 162 698

ss. 10, 30. See Cr. P. O., 1898, ss. 235, 537, 556 721

ss. 27, 32 (1). See EVIDENCE ACT, 1872, ss. 8, 27, 32 (1) 698

s. 73. See CRIMINAL TRIAL 212

ss. 78, 114—Presumption as to regularity of official acts. See MADRAS CITY MUNICIPAL ACT, 1919, s. 55 (2) 144

s. 91. See PYATPAING, EFFECT OF 503

s. 91—Stamp Act (I of 1870)—Stamp Act (II of 1899), s. 2—Unstamped mortgage-deed—“Execution”, what is—Secondary evidence.

Under s. 2 of the Stamp Act, 1899, “execution” means signature, and an instrument which becomes chargeable with stamp duty only on being executed is not liable to stamp duty until it is signed.

“Execution” under the old Stamp Act of 1870 ordinarily connoted signature, though there may have been special instances where a document was executed other than by signature.

Secondary evidence of the contents of a formal unstamped mortgage-deed is admissible if it was not signed by the mortgagor. If the deed was executed by signing, then secondary evidence is inadmissible for lack of stamping. **R MA SAW v. MAUNG PA**, 5 R. 650; A. I. R. 1928 Rang. 32; I. L. T. 40 Rang. 23 476

s. 92—Vendor and purchaser—Oral evidence to show that a sum of money in addition to sale price was agreed to be paid, admissibility of—Suit for possession by purchaser—Purchaser, whether entitled to possession without paying consideration—Property, when passes.

A purchaser sued his vendor for possession of the properties sold. The latter pleaded that the plaintiff had agreed to pay him a sum of money in addition to that fixed as the sale price as a preliminary to the execution of the conveyance, and that the amount paid by the plaintiff at the time of the execution of the deed was this additional amount and not part of the price. The plaintiff admitted non-payment of part of the consideration. There was no recital of receipt of consideration in the sale-deed:

Held, (1) that it was open to the defendant to adduce oral evidence to substantiate his plea;

(2) that the plaintiff could be given a decree for possession only on condition of payment of the whole of the consideration remaining due to the defendant.

Evidence Act—contd.

There is no invariable rule that mere registration of an instrument without reference to other circumstances operates to transfer the property; where a transfer is intended to be effected only in the event of a certain condition being fulfilled and; that condition not being fulfilled, effect is not given to the intention to transfer, no property passes. *R MAUNG MON v. MA KIN OH*, 5 R. 636; A. I. R. 1928 Rang. 471

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— s. 108—*Person not heard of for more than seven years—Presumption of death but not of time of death—Mortgage by unauthorised person, validity of—Transfer of Property Act (IV of 1882), s. 43.*

Under s. 103 of the Evidence Act when the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years there can be no presumption that he was dead at a particular time.

A, a Muhammadan widow, executed a mortgage of certain property at a time when it was not certain whether her husband was dead. In a suit upon the mortgage instituted more than seven years after her husband was heard of:

Held, that under s. 43 of the Transfer of Property Act the mortgage was valid. *O MAHADEO SINGH v. HAR BUKISH DUBE*, 4-O. W. N. 1077; A. I. R. 1928 Oudh 13

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— s. 114. *See* C. P. C., 1908, s. 100

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— s. 115—*Estoppel—Declarations and acts—Mistaken idea of rights—Loss and injury.*

Section 115, Evidence Act, does not require that a person who by his declarations or conduct induces a belief in the mind of the other, must of a necessity have been aware of his rights.

The English Law or s. 115, Evidence Act, gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What is required is that the position of the person who was induced to act should have been altered; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. *A MATA DAYAL LAL v. LALJI SAHAI*, 25 A. L. J. 878

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— s. 115—*Will by testator having defective title—Estoppel of person who takes possession under Will from disputing validity of Will.*

One who obtains, or accepts, or retains possession of property under a Will and who neither has, nor professes to have, any title thereto except under the Will, is estopped, as against any remainderman or other person claiming under the same Will from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and, generally, from setting up any title to the property in himself which is independent of, and adverse to, the Will, or any interest of a different kind from that which he would have taken if the property had passed by the Will as it was impliedly represented by him to have passed. *A GANGA*

Evidence Act—concl'd.

DIN v. RAM PEASAD, A. I. R. 1927 All. 642; 26 A. L. J. 62

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— s. 116—*Under-proprietor in possession of land—Execution of kabuliyat—Estoppel—Agreement to take theka, whether destroys rights in sir lands.* Section 116 of the Evidence Act is designed to meet the case of a tenant who has been put in possession by his landlord and is not applicable where the tenant has not been so put into possession.

The execution of a *kabuliyat* by a person who is already in possession as an under-proprietor does not, therefore, estop him from setting up his under-proprietary rights.

An under-proprietor does not lose his rights as such in the *sir* plots by obtaining a *theka* of the whole village from the *taluqdar* until the end of the settlement. *O BISHUNATH SARAN SINGH v. SURAJ PAL SINGH*, 4-O. W. N. 1037, 1116; A. I. R. 1928 Oudh 33

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— ss. 145, 154—*Power of Court to allow witness to be treated as hostile—Revision—Interference—Evidence of hostile witness, whether should be rejected wholly.*

It is open to a Court to grant permission to a party calling a witness to treat the witness as hostile and to cross-examine him if it finds that the witness is equivocating, and a Court of revision will not ordinarily interfere with the discretion exercised in this matter by the trial Court.

The legal result of treating a witness as hostile is not to discredit his evidence *in toto*, and the party calling him is entitled to rely on those portions of his evidence upon which he wishes to rely, and it is for the Court in the particular circumstances of each case to credit or to discredit the different portions of his evidence. *B JEHANGIR ARDESHIR CAMA v. EMPEROR*, 29 Bom. L. R. 996; A. I. R. 1927 Bom. 501; 8 A. I. Cr. R. 324; 28 Cr. L. J. 1012

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— s. 163—*Account books—Inspection by adversary, effect of—Suit not based on account books—Failure to produce—Adverse inference, whether can be drawn.*

Under s. 163 of the Evidence Act a person, whose account books have been inspected by the opposite party may require the latter to tender them as evidence of both parties. Such account books need no further proof and are admissible and should be admitted *in toto*.

In a suit based on a bond or a mortgage and not on account books, it is not permissible to the Court to draw an adverse inference from the plaintiff's failure to produce his account books, unless the other party has called upon him to produce them and he has refused to comply with the demand. *N KISAN GHULE v. PURANSA*

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Execution. See EVIDENCE ACT, 1872, s. 91

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Execution of decree—Security for restitution—Order accepting security—Appeal.

No appeal lies from an order in execution proceedings accepting security, on the ground of insufficiency thereof. *L CHATTAR SINGH v. HARRI DATT LAKHMI DATT*

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Explosive Substances Act (IV of 1884), s. 5.

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Fatal Accidents Act (XIII of 1355), s. 1—Damages, assessment of—Elements to be considered—Fine paid to plaintiff in criminal case—Probable duration of life of deceased—Sentimental considerations, whether relevant.

Fatal Accidents Act—concl'd.

In awarding damages under the Fatal Accidents Act, the Court should take into account the amount of fine realised from the defendant and paid to the plaintiff in criminal proceedings instituted by the latter against the defendant.

In estimating damages under the Act it is settled law that no sentimental considerations are relevant. A plaintiff cannot get higher damages when the deceased had been brutally murdered than where the death had been due to mere error of judgment.

In assessing such damages it is necessary to take into account the probable duration of the life of the deceased. **A NATHU RAM v. CHAND KAUR**, A. I. R. 1927 All. 684; 26 A. L. J. 60 **165**

Finance Act (XIII of 1925), s. 7. See **INCOME TAX ACT, 1922**, ss. 23, 55, 58 **642**

Forest Act (VII of 1878), ss. 2, 39, 41—"Timber," and "forest produce," meanings of.

The words "timber" and "forest produce" in s. 41 of the Forest Act are used in the widest sense as given in the definitions to be found in s. 2 of the Act and not in the narrow and restricted sense specially introduced to define and limit the powers described in Chap. VII of the Act. **L. LAL BADSHAH v. EMPEROR**, A. I. R. 1928 Lah. 80; 29 Or. L. J. 193 **790**

Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 108 (1). See **COURT FEES ACT, 1870**, s. 5 **66**

Government of India Act, 1919 (9 & 10 Geo. V, c. 101), s. 49. See **MADRAS CITY MUNICIPAL ACT, 1919**, s. 55 (2) **144**

Grove—Land demised for purposes of grove—Portion of land ceasing to be grove—Landlord's right to eject—Breach of contract of tenancy—Contract Act (IX of 1872), ss. 89, 78.

Where an agreement between a zemindar and a tenant is that the tenant should have a specified area for the purposes of a grove, if the tenant either does not use a definite ascertainable portion, even a small portion, of that area for the purposes of a grove, by neglecting to re-plant for a considerable period or affirmatively uses a definite ascertainable portion, even a small portion, for some other purpose, e.g., ordinary cultivation or building a house, the tenant commits a breach of the contract, and the landlord is entitled to put an end to the contract and sue for ejectment unless he has acquiesced in the continuance of the contract. **A RAGHUNATH v. MUHAMMAD ALI HASAN KHAN**, L. R. 8 A. 292 Rev; I. L. T. 40 All. 46; A. I. R. 1928 All. 117 **268**

Guardians and Wards Act (VIII of 1890), s. 17—Court, whether entitled to disregard law in minor's interest. See **MUHAMMADAN LAW** **822**

s. 29 (b)—Sanction to mortgage property—Mortgagee's right to sell without intervention of Court.

Permission to mortgage a minor's property accorded under s. 29 (a) of the Guardians and Wards Act does not empower the guardian to confer on the mortgagee an absolute power to sell without the intervention of the Court. **S. ABDUL RAHIM v. ABDUL HUSSAIN** **872**

Hindu Law—Adoption—Rule against adoption of daughter's son, applicability of, to Kayasthas—Kayasthas of Bihar, whether Sudras—Pleadings—Necessity of averring rule of prohibition—Family

Hindu Law—cont'd.

custom to the contrary, validity of—Mere declaration of adoption by adoptive father, effect of—Actual giving and taking, necessity of—Suit for possession against alleged adopted son—Adoption, whether should be set aside—Limitation and adverse possession, effect of.

Kayasthas of Bihar are not Sudras but belong to the Dwija or regenerate classes, and the rule of Hindu Law prohibiting the adoption of a daughter's son, sister's son and mother's sister's son among the regenerate castes is, therefore, applicable to them.

Inasmuch as this rule of prohibition can be varied by a family custom, a plaintiff seeking to challenge an adoption on the ground that it is in contravention of this rule of Hindu Law should raise his legal objection in the plaint so that the defendant may be able to plead the existence of a family custom to the contrary.

A mere declaration of adoption by the adoptive father is not sufficient to create a valid adoption; the actual giving and taking is essential whether the parties belong to the three regenerate classes or are Sudras.

A, claiming that he was the adopted son of his maternal grandfather X, took possession of properties of X to the knowledge of B and C, his brothers. After A's death C who claimed to be the adopted son of A, and A's widow were in joint possession and C continued to be in sole possession after the death of A's widow. After the lapse of many twelve years B's descendants sued for partition against C's descendants;

Held, (1) that the suit was not maintainable inasmuch as the adoptions set up by the defendants' ancestors had not been set aside within time;

(2) that as there was no proof that the plaintiffs' ancestors were in joint possession with A and C the suit was barred by limitation. **PATISHWARI PRASAD v. HARI PRASAD LAL**, 8 P. L. T. 34; A. I. R. 1927 Pat. 145; 6 Pat. 506 **620**

Alienation—Father's alienation, whether void—Mortgage by father containing indemnity clause—Suit on mortgage—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 97, 116.

An alienation by a Hindu father not supported by legal necessity is not void *ab initio* but is voidable at the instance of his sons or reversioners.

A mortgage executed by a Hindu father in 1914 contained an indemnity clause that if any objection or claim arose the mortgagor would be personally liable. The mortgagee instituted a suit against the mortgagor's sons on the mortgage in 1922. The guardian of the sons contended that the land was ancestral and that the alienation was not supported by necessity. A decree was passed against the mortgagor's properties and the mortgaged property was held not liable. In a suit by the sons to set aside this decree on the ground that the suit was barred by limitation and the guardian had negligently failed to take this plea:

Held, that as soon as the decree was passed in favour of his sons that the property was not liable under the mortgage, the indemnity clause came into action, and the mortgagor became personally liable to recoup the mortgagee and, therefore, whether Art. 97 or Art. 116 of the First Schedule to the Limitation Act was applicable, the suit was within limitation. **L. BHARI LAL v. HARI SINGH** **816**

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— *Alienation—Suit to set aside alienation by guardian—Consideration binding to extent of half—Decree, form of.*

In a suit by a minor to set aside an alienation made by his guardian where the amount of consideration which is found not binding upon the plaintiff is large, Courts will not be justified in allowing the vendees to retain a portion of the property purchased by them. In such cases the proper decree would be to give a decree to the plaintiff for possession of the property sold, and give a charge to the defendants for the amount found binding on the plaintiff.

Where out of the consideration of Rs. 1,500 and Rs. 800 for two sales, the binding portions were Rs. 912 and Rs. 407 respectively:

Held, that the sales should be set aside on payment by the plaintiff of the binding amounts. *M GANAPATHI AYYAR v. RANGASWAMI IYENGAR*, 39 M. L. T. 607; A. I. R. 1928 Mad. 168 **370**

— *Debts—Antecedent debt, meaning of—Hindu son's liability for father's debt—Immoral nature of debt, necessity of proving—Sale of ancestral property for antecedent debts—Application of surplus money not accounted for, effect of.*

A debt is an antecedent debt if it is antecedent in fact as well as in time, i. e., truly independent and not a part of the transaction impeached.

A Hindu son cannot escape liability to pay his father's debt by showing that his father led an immoral life but to avoid liability it must be shown that the debt was incurred for an immoral purpose.

A sale of ancestral property by a Hindu father for discharge of his antecedent debts cannot be avoided on the ground that the application of the surplus money, i. e. money in excess of debts has not been accounted for. *L ULFAT KAI v. TEJ NARAIN*, 8 Lah 632; I. L. T. 40 Lah. 9; A. I. R. 1928 Lah. 83; 29 P. L. R. 132 **176**

— *'Apyavaharika debt', meaning of—Institution of deliberately false suit—Dishonest resistance to suit—Decree for costs—Liability of sons and grandsons.*

'Apyavaharika debt' means a debt incurred for a cause repugnant to good morals.

Where a Hindu knowingly brings a false case against another and knowingly on false grounds defends the suit brought by that man against him, his sons and grandsons are not liable to pay the costs for which decrees are passed against him in those suits. *O MUHAMMAD ALI v. JHAO LAL*, 4 O. W. N. 1089; A. I. R. 1928 Oudh 10 **392**

— *Guardianship—Mother's right to appoint guardian by Will.*

Under Hindu Law a mother has no power to appoint a guardian of her children by means of a Will. *L SANT SINGH v. LAL CHAND* **834**

— *Joint family—Alienation by father—Suit by alienee for possession—Burden of proof—Absence of legal necessity or antecedent debt—Purchaser's right to recover money enjoyed by son—Laches, effect of.*

In a suit by a purchaser of joint family property from a Hindu father to recover possession of such property the onus is upon the purchaser to show in the first instance that there was either necessity or benefit or proper inquiry or an antecedent debt. It is only when the burden has been shifted by some *prima facie* evidence that the sons can be called

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upon to show that the transaction was illegal or immoral or otherwise not binding on them.

In such a suit the purchaser will ordinarily be entitled to recover such part of the consideration as has been enjoyed by the sons, even though he is not able to prove legal necessity or antecedent debt in the absence of any special reason disentitling him from such relief.

But the Court will refuse to grant him this equitable relief where he is clearly guilty of laches. *PAT JOKHU GOSAIN v. GANESH SINGH*, 8 P. L. T. 704; A. I. R. 1928 Pat. 54 **189**

— *Joint family—Debt contracted by father for joint family purpose—Execution of mortgage as sole owner—Sale of father's interest in execution—Son's interest, whether passes.*

A Hindu having a son and a minor grandson borrowed money for purposes of the joint family business and executed a mortgage of property belonging to the family representing that he was the exclusive owner of the property. The mortgagee instituted a suit against him on the mortgage without impleading either his son or grandson as a party and sold the right, title and interest whatsoever of the judgment-debtor and purchased it himself. In a suit by the mortgagee purchaser for possession the minor grandson contended that his rights were not affected by the sale:

Held, that the right, title and interest of the minor grandson also passed to the purchaser, in spite of his absence in the mortgage suit and execution proceedings. *B VADILAL PURSHOTAM v. KANAILAL INDERLAL*, 29 Bom. L. R. 1441; A. I. R. 1927 Bom. 620 **46**

— *Family business—Speculative transaction, debts incurred for—Liability of sons.*

In the case of the members of a Hindu family there is a presumption of jointness not only of their properties but even as regards the business which they carry on and the burden lies upon the person who alleges that the business is a separate business and not a family business to prove his allegation.

The manager of a joint Hindu family has an implied authority to contract debts for the ordinary purposes of the business carried on by the family. He has power to incur debts for the business in speculative transactions as such debts cannot be said to be immoral.

The pious obligation of Hindu sons to pay off their father's debts extends to commercial debts. *L MAULUK CHAND KISHANJI v. DAYA KISHAN*, I. L. T. 40 Lah. 6 **183**

— *Father's powers of alienation—Merely benefit, whether sufficient—Deed tying up management of property after death, validity of—Father's power to appoint testamentary guardian.*

A Hindu who had only two minor sons executed a deed in favour of the defendant, his brother's son, by which the defendant was to manage his properties both during his lifetime and after his death during the minority of his sons. The defendant was not willing to accept management with the liability of accounting for profits and another deed was executed which was called a Chalgani for a term of thirteen years fixed, whereby certain annual payments were to be made, certain fixed sums were to be invested for the minors and the defendant was relieved from liability to account. The minors sued after the death of their father for cancellation of the deed:

Hindu Law—contd.

Held, (1) that whatever be the real nature of the documents, the father had no power to tie up the joint family property in this manner after his death, and that the documents were not binding on the plaintiffs.

A Hindu father has no power to alienate joint family property for anything that may be of general benefit to the family, apart from necessity.

Quære.—Whether a Hindu father in a joint Mitakshara family has power to appoint a testamentary guardian of property for his minor sons by Will. **B VENKATRAMAN MUKUND KAMAT v. JANARDHAN BABURAO KAMAT**, 29 Bom. L. R. 1522; A. I. R. 1928 Bom. 8; I. L. T. 40 Bom. 19 **79**

— **Joint family—Re-union between persons not parties to division, legality of—Division in respect of some properties—Jointness in status in respect of undivided properties, whether possible.**

Under the Hindu Law, a re-union in estate can take place only between persons who were parties to the original division.

Quære.—Whether there could be a division of some property among the members of a joint Hindu family and yet they could remain joint with regard to the other properties not divided between them. **M PUPPALA PICHAYYA v. MITTAPALLISARVAYYA**, 26 L. W. 746 **649**

— **Minor—Paternal grandmother, competency of, to act as guardian.**

Under the Hindu Law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grand-children and is entitled to act as such. **M KOLA SURAYYA v. KOLA SUBBAMMA**, 53 M. L. J. 677; A. I. R. 1928 Mad. 42; (1927) M. W. N. 911 **863**

— **Partition—Separation of one co-parcener—No presumption that others remain joint.**

There is no presumption that when one co-parcener separates from the others the latter remain joint. **A PADARATH PATHAK v. JAGDEO PATEAK**, L. R. 8 A. 308 Rev. **910**

— **Separation of one member—Effect on others—Allotment of definite shares to all co-parceners, effect of—Re-union of family—Mother, status of, in joint family.**

Where a *farighkhali* executed by a member of a joint family states in clear terms that defined shares in the whole joint family property have been allotted to the co-parceners and also gives them liberty either to live together or to separate, the effect of the deed is to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate is not inconsistent with separation in estate.

It is an elementary principle of Hindu Law of the Mitakshara School that a member of a joint Hindu family once separated can re-unite only with his father, brother or paternal uncle but with no other relation.

A mother is not a member of the co-parcenary body constituting a joint family. She is only entitled to maintenance while the joint status of the family continues and it is only when one of her sons brings a suit for partition that she is entitled to claim a share in the family property. **L HIRA SINGH v. MANGLAN** **877**

— **Religious endowment—Temple—Founder's right to appoint shebait.**

In the case of a temple, in the absence of a pro-

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vision in the deed of endowment prescribing the mode of devolution to the office of *shebait* and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder of the trust and a *shebait* has no right to appoint a successor to himself. **A GANGA CHARAN v. RAM CHANDRA**, 25 A. L. J. 502; A. I. R. 1928 All. 33 **389**

— **Stridhan—Gifts before marriage and after marriage from husband, nature of—'Ajautuka' and 'jautuka', meanings of—Suit for possession of ornaments from step-brothers—Limitation—Cause of action—Limitation Act (IX of 1908), Sch. I, Arts. 49, 120.**

Ornaments acquired by a woman partly as presents before her marriage from the husband's grandmother and partly as presents after her marriage from her husband are *ajautuka stridhan*.

Jautuka stridhan is not confined to presents given actually before the nuptial fire but the limits within which such presents become *jautuka stridhan* are somewhat narrow.

In 1905, plaintiff's mother died possessed of valuable ornaments. Her husband was in possession of the ornaments till his death in 1909. They remained after his death in the family safe and the step-brothers of the plaintiff who was an infant at the time, carried on the family concerns. The plaintiff attained majority in 1910. In 1919 disputes arose between the parties as to the ornaments and the plaintiff sued for their recovery from his step-brothers in 1920.

Held, (1) that the cause of action for the suit arose only when the plaintiff demanded the ornaments from the defendants, that the proper Article of the Limitation Act applicable to the case was Art. 49, and that the suit was not barred;

(2) that even assuming that Art. 120 applied to the case the suit was within time.

Article 49 of Sch. I of the Limitation Act is the ordinary Article applicable to a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. **C BHUPENDRA NATH BHOSSE v. GOONENDRA NATH BHOSSE**, 32 C. W. N. 133 **825**

— **Succession—Dancing girls—Sister, whether heir—Crown, whether entitled to succeed in preference to sister.**

Under the Hindu Law, the sister of a prostitute is entitled to inherit the property of the prostitute as an heir. She is at any rate a blood relation and entitled to succeed before the property goes to the Crown. **B NARAYAN PUNDLIK VALANJU v. LAKEEMAN DASIR SIKSEKAR**, 29 Bom. L. R. 930; A. I. R. 1927 Bom. 456; 51 B. 784 **87**

— **Widow—Admission of widow, whether binding on reversioners—Tests.**

An admission of fact made by a Hindu widow which is apparently a reasonable one and in the interests of the estate and the parties affected, is binding on the estate. **B RAVJI ANDU NIKAM v. RAMA KRISHNA MANE**, 29 Bom. L. R. 1346; A. I. R. 1928 Bom. 14 **206**

— **Gift by widow, validity of—Absence of challenge by reversioners—Donee's title, whether dates from date of gift—Death of donee—Donee's heir, rights of.**

A gift by a Hindu widow is not void, but is a good alienation until and unless it is challenged by

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the reversioner, and in case the reversioner does not challenge the alienation a Court of Law will not permit a third party to challenge it.

A Hindu widow made a gift in 1904. She died in 1907. The donee died in 1914 and was succeeded by his mother. The gift was not challenged by any of the reversioners:

Held, that the gift conferred a good title on the donee from the date of the gift and the donee's mother, therefore, held the properties not as a trespasser but as an heir with a limited estate. O. JAJUNA KUNWAR v. MADARI SINGH, 4 O. W. N. 903; A. I. R. 1927 Oudh 469 328

Identification of Prisoners Act (XXXIII of 1920), s. 5. See CRIMINAL TRIAL 212

Impartible estate, alienability of.

In the absence of proof of custom restricting alienation, an impartible estate is alienable. P. C. BAI-NATH PRASAD SINGH v. KEDAR NATH GOENKA, 54 M. L. J. 6; 5 O. W. N. 93; 47 O. L. J. 131; 1 L. L. T. 40 Pat. 18; 30 Bom. L. R. 115 646

Impartible Raj—Maintenance grant—Grantee's right to minerals—*Sab sudha*, meaning of—Principles of English Common Law, applicability of—Maintenance grant, whether conveys proprietary rights.

In the case of a maintenance grant where the reversion remains with the grantor minerals do not pass to the grantee without words of express grant or by clear implication.

The words '*sab sudha*' (including all) in a grant are not sufficient to pass minerals.

In an impartible Raj the junior members of the family have not the ordinary coparcenary rights which members of a joint Hindu family have; and a grant of maintenance by the holder of the Raj to the junior members of the Raj cannot and does not amount to a partition and such grants do not by themselves amount to a conveyance of full proprietary rights including rights to minerals and sub soil rights.

It is not safe to apply the principles of the English Common Law relating to the rights to mineral to India as there is a fundamental difference between land tenures in England and in India and the peculiarities of the feudal system of tenures are not to be found in India. Pat. UDAI PRATAP NATH SARI DEO v. JAGAT MOHAN NATH SARI DEO, 6 Pat. 638; A. I. R. 1928 Pat. 66; 9 P. L. T. 25 339

Inam. See SARANJAM 1

Service inam granted partly for public service—Resumption, legality of—*Kattu kalva* service; whether public service—Grant by two persons—One alone, whether entitled to revoke.

A service inam granted in part for performance of a public service cannot be resumed merely on the ground that the services are no longer required.

Where two persons having interest in a particular property make a grant of the same for the purpose of securing certain services, it is not competent to one of them alone without the concurrence of the other to cancel or revoke the grant.

A grant for *kattu kalva* service is a grant of a public nature. M. RAJA of VIJIANAGARAM v. JORREGA-GANGADU, 39 M. L. T. 338; A. I. R. 1927 Mad. 1001 671

Service inam—Grant to institution or to servant for services in institution—Tests—Expressions "*devadayam*", "*mulla*", effect of—Limitation

Inam—cont'd.

Act (IX of 1908), Sch. I, Art. 14—Suit to set aside resumption of personal service inam on ground of non-performance of services—Limitation.

There is a well-understood distinction between a grant to a religious institution such as a temple or a mosque and a grant to some person on condition of his rendering services to a religious institution, such as the *archaka* of a temple.

The word '*devadayam*' indicates a grant for religious purposes but does not necessarily connote that the grant is to the religious institution itself. The term is equally applicable to service inams connected with religious institutions.

The description of the grantee as "*mulla*" does not imply that the grant was made to him as representing a mosque.

A suit to set aside the resumption of a personal service inam by the Government on the ground of non-performance of services is governed by Art. 14, Limitation Act.

Where Government purports to act under powers reserved to them under the terms of a personal service inam grant though they may have acted erroneously in the interpretation of its terms or in finding on facts which justify the resumption, the act is *intra vires* and not *ultra vires* and the act of resumption cannot be regarded as a nullity.

Per Ramesam, J.—As the British Government were dealing favourably with inams connected with Hindu and Muhammadan religions, whether grants to temples and mosques, or grants to officials and servants on condition of rendering certain services in such temples and mosques, both were described as "*devadayam*" and the use of the word is not conclusive in favour of the temple or mosque itself where the question is whether it is a grant to the temple or to a temple servant though it may be some evidence along with other circumstances; but it is of very great weight where the claim of private property is set up.

Where the grant is made to a person in the capacity of a *mutawalli*, manager, superintendent, *dharmakartha*, or even servant of the mosque or temple, and where it does not appear that there is some other trustee, it may be regarded as a grant to the temple or mosque itself.

Where it appears that a substantial part of the income goes to the benefit of the institution, as for the erection of a building or for its upkeep and repairs, or such other things the grant may be considered as a grant to the institution itself even though some surplus may be used by the trustees for their own maintenance.

Where none of the above indicia appears, that is where the grant does not show that it was granted to a temple or mosque, nor describe the grantee in the capacity of trustee, manager, etc., and where it does not appear that any portion of the income that may be considered as substantial has gone to the benefit of the temple or mosque, then in such a case it must be treated as a grant to the grantee named (*persona designata*) and, if services are mentioned, it is a grant of service. M. YADLAMANNATH BALA v. SECRETARY OF STATE FOR INDIA, 27 L. W. 101 891

Service inam land—Lease for long term, whether void or voidable—Receipt of rent—Right to repudiate lease—Custom of alienability—Repeated illegal alienations, effect of—Construction of demised—Mortgage and lease, distinction between

Inam—contd.

Alienations of temple service lands by sale, gift or mortgage are invalid.

Permanent leases or leases of such lands for so long a period as would practically amount to an alienation will be invalid as against the successor-in-office entitled to the rents and other emoluments arising out of the land which goes with the office. A test to find whether a lease for a long period amounts to an alienation for this purpose is whether the rent paid is sufficient to maintain the holder of that office in such a way as not to interfere with the due performance of the duties attached to the office.

Where a lease of such lands is not of this character it is not absolutely void but only voidable at the option of the succeeding office-holder who will be bound by the transaction if he does not repudiate the same but affirms it by receiving rent, after he assumes office.

The holder of the lands attached to an office has by the very nature of his tenure no power to lease the property so as to ensure beyond his lifetime and the fact that the office is hereditary makes no difference.

A custom of alienability of service *inam* lands cannot be established by repeated illegal alienations.

Where the possession of certain lands was transferred to another under a document described as a *kanda bhogiam*, on receipt of a premium which was to be worked off by the enjoyment of the produce of the land for 30 years, a portion of the profits being reserved to be paid to the executant of the document, and there was no liability to account for the rent and profits nor was there any question of redemption on payment of any money:

Held, that the document was not a mortgage but only a lease. *M SUNDARA RAJU DIKSHATULU v. SESHADRI DIKSHATULU*, (1927) M. W. N. 556; 26 L. W. 739; A. I. R. 1928 Mad. 35; 54 M. L. J. 78. 426

Service inam land—Resumption by Government—Suit by grantee for ejectment—Burden of proof of right to eject.

When the right of Government to resume an *inam* is questioned by a person who was not a party to the resumption proceedings, the Government or its assignees will have to substantiate the right.

There is no presumption that an *inam* grant is a grant of both the *varams*. A grantee who claims the right to eject, has, therefore, to prove that the *kudivaram* right was included in the original grant where the defendant does not admit that he came into the possession of the lands as a tenant. *M VENKATASUBHA RAO v. B. SIVAJI*, (1927) M. W. N. 609; 39 M. L. T. 206; A. I. R. 1927 Mad. 946. 35

Suit for ejectment by plaintiff claiming to be pre-settlement inamdar—Inam found to be darmilla and not pre-settlement—Plaintiff's right to maintain suit in Civil Court.

A landlord claiming to be a pre-settlement *inamdar* sued to eject the defendants from their holding on the ground that they were tenants-at-will. The only ground on which the plaintiff sought to make out in both the Courts that the tenant was a tenant-at-will was because and only because he, the plaintiff landlord was a pre-settlement *inamdar*. The Court below found that the *inam* was a *darmilla inam* and not a pre-settlement *inam*, and directed the plaintiff to be presented to the proper Court.

Held, that it was not open to the plaintiff to con-

Inam—concl'd.

tend in second appeal that even on the footing of the *inam* being *darmilla inam* the defendants were liable to be ejected in a suit in the Civil Court itself. *M YENAMANDRA GANAPATI RAO v. PENDAM NAGANNA* 500

Income Tax Act (XI of 1922), s. 2—‘Agricultural income,’ meaning of—Fees for storing purchases, *punyaha nazar* and *nazar* on petitions, whether agricultural income.

Income which is derived from the use of land for storing purchases of food crops, etc., and *punyaha nazar* paid by tenants of agricultural holdings at the beginning of the agricultural year are not ‘agricultural income’ as defined in s. 2 of the Income Tax Act.

Nazar paid to the *zemindar* for petitions presented to him for dealing with questions of succession, settlement and partition is not agricultural income although *nazar* paid for landlord's recognition of such transactions is such income. *C EMPEROR v. PROBHA CHANDRA BARUA*, 31 C. W. N. 1047; A. I. R. 1927 Cal. 793. 353

s. 3. See CONTRACT ACT, 1872, s. 23. 226

s. 10 (IX)—Agreement for payment of share of profits without liability for losses—Construction—Payment out of profits—Liability to be deducted—Contract Act (IX of 1872), s. 289.

A number of persons entered into an agreement with another by which each of them was to have a certain share in the profits of the business conducted by the latter when ascertained at the end of the two years during which it was to be in force, without any liability in case of loss. The complete control of the business was retained by the person in whose favour the agreement was executed and he contributed the whole capital and was also to have the power of altering the shares:

Held, (1) that the transaction was not a partnership agreement;

(2) that the payments made to them out of the profits could not be deemed to be expenditure incurred solely for the purpose of earning such profits under s. 10 of the Income Tax Act and were not liable to be deducted for purposes of assessment of income-tax. *M COMMISSIONER OF INCOME TAX v. MAHOMED KASSIM ROWTHER*, 26 L. W. 659; A. I. R. 1927 Mad. 1053; (1927) M. W. N. 869; 1 L. T. 40 Mad. 43; 54 M. L. J. 219. 308

ss. 22 (4), 23 (4)—Failure to comply with notice after filing of return—Summary assessment under s. 23 (4), legality of.

Failure of a person to comply with notices issued by an Income Tax Officer under s. 23 or s. 37 of the Income Tax Act, 1922, after the filing of a return does not authorise the officer to make a summary assessment to the best of his judgment under cl. (4) of s. 23 of the Act.

A notice under s. 22 (4) contemplated by s. 23 (4) of the Act concerns only the stage before the filing of a return. *PAT BRU RAI-RANG LAL v. COMMISSIONER OF INCOME TAX*, 8 P. L. T. 686; A. I. R. 1927 Pat. 890. 198

ss. 26, 55, 58—Finance Act (XIII of 1925), s. 7—Unregistered Association converted into limited Company—Rate of super-tax applicable on profits made prior to conversion.

Where an unregistered Association is converted into a limited Company, the rate of super-tax

Income Tax Act—consolid;

applicable to it, in respect of the profits of the Association for the year previous to that of the conversion, is the flat rate of one anna in the rupee appropriate to a Company. **P O COMMISSIONER OF INCOME TAX, BOMBAY v. WESTERN INDIA TURF CLUB, A. I. R. 1928 P. C. 1; 30 Bom. L. R. 105; 54 M. L. J. 1; 47 O. L. J. 96; 5 O. W. N. 33; I. L. T. 40 Bom. 38; 27 L. W. 404 (P. C.)** 642

s. 50—"Tax was recovered," meaning of.

The words "tax was recovered" in s. 50 of the Income Tax Act mean "tax was received by the Government", and must not be read as meaning "tax was refunded to the assessee under the provisions of s. 27 of the English Finance Act of 1920." **M COMMISSIONER OF INCOME-TAX, MADRAS v. BINNY & Co., Ltd., 53 M. L. J. 672; 26 L. W. 679; 39 M. L. T. 481; (1927) M. W. N. 837; A. I. R. 1927 Mad. 1039; 50 M. 92)** 127

ss. 55, 58. See INCOME TAX ACT, 1922, 33, 26, 55, 58 642

s. 66—Reference—Duty of Commissioner.

In a reference under the Income Tax Act it is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires the opinion of the High Court. **PAT BRIJ RAJ RANG LAL v. COMMISSIONER OF INCOME TAX, 8 P. L. T. 686; A. I. R. 1927 Pat. 390** 193

Income Tax (Amendment) Act (XXIV of 1926),

s. 66A—Income-tax matters—Appeal to His Majesty in Council, when lies—S. 66A, whether retrospective.

The right of appeal to His Majesty in Council under s. 66A of the Income Tax Act is confined to cases falling within sub-s. (2) of the said section, namely, to cases which are certified by the High Court to be fit for appeal to His Majesty in Council.

Section 66A of the Income Tax Act does not, therefore, give a right of appeal to His Majesty in Council from orders passed before the coming into force of the enactment of the said section. **P C DELHI CLOTH & GENERAL MILLS Co. Ltd. v. INCOME-TAX COMMISSIONER, DELHI, A. I. R. 1927 P. C. 242; 4 O. W. N. 1053; 8 P. L. T. 791; 25 A. L. J. 964; 53 M. L. J. 819; 47 O. L. J. 1; 30 Bom. L. R. 60; I. L. T. 40 Lah. 1; 32 O. W. N. 237; 54 I. A. 421; 29 P. L. R. 37; (1928) M. W. N. 95; 27 L. W. 179 P. C.** 156

Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V. c. 40), applicability of.

See DIVORCE ACT, 1869, s. 2 481

Indian Merchandise Marks Act (IV of 1889).

See TORTS 277

Indian States (Protection against Disaffection)

Act, 1923, s. 3—Offence under s. 3—Accused's right to prove truth of his allegations.

A person who is accused of an offence under s. 3 of the Indian States (Protection against Disaffection) Act, 1923, is entitled to adduce evidence to prove that the allegations made by him are true inasmuch as he has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty which may be imposed on him in the event of his conviction and for making good such a plea it may be necessary for him to show that the allegations are true. **L SANTA SINGH v. EMPEROR, A. I. R. 1927 Lah. 710; 29 Cr. L. J. 117** 709

Injunction. See TORTS 277

Interest. See LAND ACQUISITION 903

Suit on mortgage—Interest from date of suit up to date fixed for payment, duty of Court to award,

In a suit on a mortgage the Court is bound to award to the mortgagee interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage-debt, at the rate stipulated in the mortgage-deed, unless the rate is penal or is excessive and the transaction is substantially unfair. **L SHANKAR DAS v. HUKAM CHAND, 29 P. L. R. 67** 486

Interpretation of Statutes—Illustrations as aid to interpretation.

Illustrations are part and parcel of enactment and when a Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision. **O RAM LAL v. EMPEROR, 1 Luck. Cas. 579; 28 Cr. L. J. 1029; A. I. R. 1928 Oudh 15** 213

Retrospective operation.

While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

Provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the Statute came into force, were final, are provisions which touch existing rights. **P C DELHI CLOTH & GENERAL MILLS Co., Ltd. v. INCOME TAX COMMISSIONER, DELHI, A. I. R. 1927 P. C. 242; 4 O. W. N. 1053; 8 P. L. T. 791; 25 A. L. J. 964; 53 M. L. J. 819; 47 O. L. J. 1; 30 Bom. L. R. 60; I. L. T. 40 Lah. 1; 32 C. W. N. 237; 54 I. A. 421; 29 P. L. R. 37; (1928) M. W. N. 95; 27 L. W. 179 (P. C.)** 156

Jail identification. See CR. P. C., 1898, ss. 235, 537, 556 721

Joint trespassers. See MESNE PROFITS 300

Jurisdiction—Civil Court's power to determine legality of tax. See PUNJAB DISTRICT BOARDS ACT, 1883, s. 31 882

Crime committed by British subject in Nepal territory—Jurisdiction of British Court.

A British Court has jurisdiction to try a British subject for an offence committed by him in the Nepal territory. **O EMPEROR v. BANDE ALI, 4 O. W. N. 1121; 29 Cr. L. J. 68** 580

Decree obtained by fraud outside Oudh—Execution of decree in Oudh—Jurisdiction of Oudh Court to entertain suit for declaring decree null and void.

Where a decree passed by a Court outside Oudh is put into execution in Oudh, a suit by the defendant for a declaration that the decree is null and void as having been obtained by fraud is cognisable by a Court in Oudh. **O DANAJI-JASRAJ v. PURAN LAL-BHAND PRASAD, 4 O. W. N. 1103; A. I. R. 1928 Oudh 88** 541

Jurisdiction of Courts. See C. P. C., 1908, s. 16 7

Jury, appointment of. See CR. P. C., 1898, ss. 133, 138 220

Kayasthas of Bihar, whether Sudras. See HINDU LAW 620

Land acquisition—Acquisition injuriously affecting income of claimants—Damages—Award—Onus of

Land acquisition—contd.

proving that award is wrong—Claimant's right to interest on compensation money.

The onus of proving that an award made by a land acquisition officer is wrong is on the claimant.

A claimant is entitled to interest on compensation money from the date on which the property acquired is taken possession of by the Collector.

In determining the amount of compensation to be awarded for property acquired under the Land Acquisition Act, the Court must take into consideration the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his earnings. **L KIRPA RAM-BRIN LAI v. SECRETARY OF STATE FOR INDIA** 90

Land Acquisition Act (I of 1894), ss. 11, 23 (2)—Acquisition of toka land—Claimant, whether entitled to 15 per cent. on entire market value or only on his interest—'Market-value,' meaning of.

The expression 'market value of the land' in s. 23, sub-s. (2) of the Land Acquisition Act *prima facie* means the market value of all interests in the land; but in cases where Government have an interest in the land that expression must mean the claimant's interest alone, that being the only interest acquired by Government.

Where land in which Government have an interest is acquired, the fifteen per cent. awardable under s. 23 (2) of the Act should, therefore, be calculated not upon the entire market value of the land but only upon the value of the claimant's interest after deducting the amount payable to Government. **B GOVERNMENT OF BOMBAY v. N. H. MOGS**, 29 Bom. L. R. 1450; A. I. R. 1927 Bom. 635 31

Landlord and tenant—Abadi—Sale of house by tenant—Absence of sale-deed—Landlord, whether entitled to invoke doctrine of part-performance—Transfer amounting to abandonment—Landlord's right to re-enter—Duty to pay sale price to tenant.

A tenant occupying a house in a village *abadi* sold his house without the consent of the proprietor. He received part of the consideration, and put his transferee in possession but no sale-deed was executed. In a suit by the proprietor for possession of the house together with the site thereof:

Held, (1) that the plaintiff was not entitled to invoke the doctrine of part performance as he was not privy to the transaction on which the estoppel rested;

(2) that the transfer amounted to an abandonment on the part of the tenant, which entitled the plaintiff to enter into possession;

(3) that the plaintiff must take the abandonment with all its incidents, one of the incidents being the payment of the sale price to the transferor. **O MATHURA v. DEVI BHAN SINGH**, 4 O. W. N. 913; A. I. R. 1927 Oudh 482 360

Abandonment, what constitutes.

The mere fact that a tenant leaves a particular village and goes to take residence in another village but retains control over his property situate in the village in which he originally resided, can be no indication of the fact that he intended to leave the village permanently. **O MAHADEO SINGH v. HAR BUKASH DUBEI**, 4 O. W. N. 1077; A. I. R. 1923 Oudh 13 489

Landlord and tenant—contd.

'Bakasht', meaning of.
The term 'bakasht' is an invention of the Survey Authorities and is used by them to denote actual cultivating possession. It does not solve the question whether the land is held as proprietors, tenure-holders, *rai-yats* or under-*rai-yats*. **PAT DURGA PRASAD THAKUR v. BASAWAN PANDAY** 272

Construction of patta—Rent payable partly in kind and partly in cash—Market price of grain fixed—Suit for arrears of rent—Fluctuation of market price—Landlord, whether entitled to value of paddy at current rate or rate fixed in patta—'Unavoidable reason', indefiniteness of.

A patta after stating that rent will be payable in cash and in paddy provided that, if for an unavoidable reason the tenant is unable to pay the paddy, its market-price at the rate of Rs. 4 per *pali* should be paid. This amount was fixed at Rs. 34-5 and the total price of the paddy together with road and public cesses were to be paid according to certain *kists*. In a suit for rent the landlord claimed the price of paddy which was not delivered at its market price on the date of suit:

Held, (1) that the landlord was not entitled to claim the value of paddy at its market-price at the date of suit but only its price as stated in the patta;

(2) that the fact that no unavoidable reason was pleaded by the tenant was quite immaterial as it is too vague an expression for any Court of Justice to take cognisance of. **C BANGSHTRAM MANDAL v. PRASANNOMOYI DEBI**, A. I. R. 1923 Cal. 166 26

Forfeiture of lease—Covenant to repair—Non-payment of rent—Relief against forfeiture—Transfer of Property Act (IV of 1882), s. 114.

The general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses", unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections.

Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration.

The test as to whether any particular renovation amounts to repair or not is whether the act to be done is one which in substance is the renewal or re-placement of defective parts, or the renewal or re-placement of substantially the whole.

Under s. 114 of the Transfer of Property Act, the Court is invested with a discretionary power to grant relief against forfeiture for non payment of rent which it may or may not exercise in favour of the tenant.

The Courts in India in exercising the discretion entrusted to them under s. 114 of the Transfer of Property Act, in the absence of any special circumstances, should adopt the rule that prevailed in the old Courts of Chancery, and, subject to any equitable that may have arisen between the date of the forfeiture and the application for relief, e.g., where the landlord during that period has re-let the pre-

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leases to other persons, or otherwise has dealt with them, or where the conduct of the tenant *qua* tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, the Court, provided the tenant complies with the conditions laid down in s. 114, ought to exercise its discretion in the tenant's favour, and grant him relief. *C. DEBENDRA LAL KHAN v. COHEN*, 54 O. 485; A. I. R. 1937 Cal. 908 **277**

Lease to karta of joint family—Karta throwing profits into family chest—Tenancy, whether becomes assets of joint family

Where a *zemindar* grants a lease of a land to a *persona designata* who is also the *karta* of a joint Hindu family, the tenancy does not become the assets of the joint family merely because the latter throws the profits derived from the leasehold into the common family chest, inasmuch as a tenancy is a creature of contract and it is not open to a lessee by his acts to impose upon the *zemindar* the other members of his family as co-tenants of the leasehold property. *A PADARATH PATHAK v. JAGDEO PATHAK*, L. R. 8 A 303 Rev. **310**

Occupancy tenancy—Custom of transfer—Evidence—Recognition by landlord after his interest has ceased, whether binding on his successor

In order to prove a custom of transferability of tenancy it is essential for the person setting it up to show that transferees had a right to be recognised by the landlord after purchasing the holdings without the consent of the landlord. Evidence which merely goes to prove that certain purchasers of tenancies were recognised by their landlords is not, therefore, sufficient to establish such a custom in the absence of proof of the circumstances under which the transfers were recognised.

Recognition of a transfer by a landlord after he had parted with his interest though not with his possession and during the pendency of a suit against him for possession by his successor-in-interest is not binding on the latter. *PAT FAKIRA SAHU v. ANJOL LAL* **330**

Planting of trees by tenant—Ejectment of tenant—Mortgagee of trees, rights of.

The ejectment of a tenant from his holding extinguishes his right in the trees which had been planted by him on it during the continuance of the tenancy and a mortgagee of such trees has consequently no right to retain possession of the trees after the ejectment of the tenant. *O GAURI SHANJAR v. NISAM-UD-DIN KHAN*, 4 O. W. N. 1081; A. I. R. 1928 Oudh 19 **434**

Legal Practitioners Act (XVIII of 1879), s. 39—Pleader guilty of improper conduct but not of dishonesty—Penalty.

Where a Pleader who was in possession of money belonging to his client did not pay the amount to his client notwithstanding many demands, and ultimately when a complaint was launched under the Legal Practitioners Act against the Pleader he paid the money and put forward an explanation for non-payment which was not fully made out, but during the period when the proceedings under the Legal Practitioners Act were pending, he did not take any *sahad* or practice:

Held, that the practitioner was guilty of improper conduct deserving severe censure though the conduct

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was not necessarily dishonest. *M In the matter of M S SECOND GRADE PLADDER*, 26 L. W. 652; 53 M. I. J. 689; 39 M. L. T. 433; 28 Cr. L. J. 1009; A. I. R. 1928 Mad. Mad. 18 **97**

Letters Patent (Mad.), cl. 15—Order granting review and amending decree, whether judgment.

An order of a Judge on the Original Side of the High Court granting a review and directing the decree to be amended is appealable under cl. 15 of the Letters Patent. *M T. R. GOVINDA CHETTY v. RANGAMMAL*, (1927) M. W. N. 411 **172**

cl. 15—Order refusing to transfer case, whether judgment—Appealability.

An order of a Single Judge of the High Court refusing to transfer a case from the file of one Subordinate Court to that of another is not a judgment and is not appealable under cl. 15 of the Letters Patent of the Madras High Court. *M SANKARALINGA REDDIAR v. RAMASWAMI REDDIAR*, (1927) M. W. N. 804; 39 M. L. T. 605; A. I. R. 1928 Mad. 232 **890**

Limitation Act (IX of 1908), s. 5—Preliminary order, copy of, filed beyond time—Extension of time for appeal.

Although in an appeal a copy of the order on a preliminary issue as well as a copy of the final order must be filed along with the memorandum of appeal, where the preliminary order is not contested the delay in filing it may be condoned under s. 5 of the Limitation Act. *L GANESHI LAL v. FIRM SINGH RAI NIHAL SINGH* 9 Lah. L. J. 586 **326**

s. 7, Sch. I, Art. 44—Alienation by guardian of minor brothers—Eldest brother, failure of, to set aside sale in time—Subsequent suit by younger brothers—Limitation.

In the case of an alienation by a guardian of members of a joint Hindu family who are minors, if the eldest brother, who is naturally the managing member of the family on attaining majority, does not bring a suit within time to set aside the alienation, any suit by the younger brothers thereafter would be barred inasmuch as the suit would be barred against the elder brother. *M KOLA SURAYYA v. KOLA SOBBAMMA*, 53 M. L. J. 617; A. I. R. 1928 Mad. 42; (1927) M. W. N. 911 **863**

s. 12 (2) (3)—Copies of judgment and decrees applied for, on different dates—Aggregate period, whether can be excluded—Copy of decree applied for before expiry of period as extended by s. 12 (2)—Period requisite for obtaining copy, whether can be excluded—Copy of judgment, filing of, in appeal, whether optional.

A party is entitled to deduct under s. 12 of the Limitation Act the aggregate period taken by him in obtaining copies of the judgment and the decree, even though he applied for them on different dates, provided the applications were made before the expiry of the period of limitation prescribed for filing an appeal.

He is entitled to exclude under s. 12 (2) of the Act, the period required for obtaining a copy of the decree, where he has applied for the same before the expiry of the extended time allowed by s. 12 (3).

A suit was dismissed on the 24th August, 1926. The plaintiff applied for a copy of the judgment on the 8th September, 1926, and obtained the copy on the 30th September, 1926. He applied for a copy of the decree on the 7th October, 1926, and obtained the same

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on the 12th October, 1926 and an appeal which had to be filed within 30 days was filed on that day. Held, that the appeal was not barred.

It is not optional for an appellant to file a copy of judgment with the memorandum of the appeal, even though it may be open to the Appellate Court to dispense with it. **N RAM CHANDRA RAO v. MAYARAM** 57

— s. 14—*Bona fide mistake as to nature of suit—Appeal filed in wrong Court—Exclusion of time spent in wrong Court—Land, change in character—Unclassed suit.*

Where a party under a bona fide, though mistaken, belief as to the nature of the suit files an appeal in a wrong Court, but on its being returned for presentation to the proper Court, presents it in the proper Court without any delay he is entitled to the benefit of s. 14, Limitation Act.

The plaintiff brought a suit for redemption of an area of 2 kanals 14 marlas of agricultural land. In 1924 the defendants had built a *kotha* on 2 marlas of the land and in *kharif* 1924 the land was not cultivated and the suit was instituted on 1st July, 1924:

Held, that the character of the land had not been so changed as to make a suit relating thereto an unclassified suit. **L MAULA BAKSH v. UDHAM SINGH** 812

— s. 14—*Suit ordered to be tried in another Court—No want of jurisdiction—Plaintiff, whether entitled to exclusion of time—Time for obtaining copy of order, whether can be excluded.*

A Union Court in which a suit for recovery of money was filed passed an order that the suit be conducted in a proper Court as it was of opinion that it was desirable that there should be a proper trial conducted by persons versed in law. The plaintiff subsequently filed the suit in the Small Cause Court:

Held, (1) that the plaintiff was not entitled to exclude the period of time during which the suit was pending in the Union Court, under s. 14 of the Limitation Act, as the Union Court did not decline to entertain the suit, or decide that it had no jurisdiction or that through want of jurisdiction or any other cause it was unable to entertain the suit;

(2) that the plaintiff was not entitled to exclude the period of time required for obtaining a copy of the order of the Union Court as the suit could have been filed without such copy. **C BONOMALI GOPE v. FAKIR CHAND PAL**, 14 C. L. J. 452; A. I. R. 1928 Cal. 26 324

— s. 19—*Acknowledgment—Computation of time—Acknowledgment, whether creates fresh contract.*

Under s. 19 of the Limitation Act, the fresh period of limitation should be computed from the time when the acknowledgment was signed.

A mere acknowledgment of liability cannot be treated as a fresh contract, furnishing the basis of a new cause of action. **M SOMASUNDARAM AYYAR v. KRISHNA AYYAR** 619

— s. 19—*Acknowledgment, whether implies promise to pay—Contract Act (IX of 1872), s. 25.*

An acknowledgment of debt implies a promise to pay and though an acknowledgment is required by s. 19 of the Limitation Act to be made before the expiry of the period of limitation, a promise under s. 25 of the Contract Act may be made after the period. **N FADAILAL v. ROOCHAND** 661

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— s. 19, Sch. I, Arts. 64, 85—*Acknowledgment and account stated, distinction between—Account, mutual, open and current—Tests—Account stated—Limitation.*

Where an account stated comprises items on both sides and a balance is deducted thereon, and the adjustment points to the common intention of the parties, to set off their cross-demands against each other and to strike a balance, by consolidation of all items, whether barred or not barred by time, and to start with a fixed consolidated amount as representing a liability of the debtor for the future, that balance is recoverable within three years from the statement of account, although some of the earlier items in the account may have then been already time-barred.

In order that an account may be mutual, open and current, the nature of the dealings must be such that the balance must shift on one side or the other. **N SITARAMSA v. AMIRBAK** 53

— ss. 36, 49. See TORTS 277

— Sch. I, Art. 7—*Suit by servant for wages—*

Entry in master's accounts, effect of—Limitation—Plea of limitation by defendant—Evidence let in trial saving limitation, effect of, on plea.

A suit for wages as a domestic servant must be brought within one year after the same became due under Art. 7, Limitation Act. But it is open to a master, instead of paying the salary then and there to give credit in his account books and treat the servant as his creditor, and if the master does that the Law of Limitation applicable is not that under Art. 7 but the ordinary rule of limitation as to debts.

When a defendant pleads limitation and in the course of the trial something transpires which shows that the plea of limitation is not sustainable, he cannot turn round and say that he has been prejudiced by the evidence which saves limitation. **M CHINNAN CHETTY v. VILATHAN**, 39 M. L. T. 415; A. I. R. 1928 Mad. 27; 27 L. W. 30 229

— Art. 11-A—*Execution of decree—*

Resistance to delivery of possession—Suit to recover possession—Limitation.

A obtained a decree against B for possession and obtained symbolical possession against B in execution of his decree. When A wanted to take *khas* possession by removing certain huts he was resisted by C who claimed to be a tenant in his own right. The Executing Court rejected A's application for possession on the 28th February, 1918. A sued C for possession on the 10th December, 1919:

Held, that the suit was barred under Art. 11-A of Sch. I of the Limitation Act as it was not instituted within one year from the date of the order rejecting A's application for possession. **C DEVEN MANDAL v. DHURBA KUMAR MANDAL**, 45 C. L. J. 588

— s. 371

— Art. 14—*Suit to set aside resumption of personal service inam on ground of non-performance of services—Limitation, See INAM*

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— Art. 31. See RAILWAYS ACT, 1890, 311

s. 77

— Art. 44. See LIMITATION ACT, 1908, 863

s. 7

— Arts. 49, 120. See HINDU LAW, 885

— Arts. 64, 85. See LIMITATION ACT, 1908, s. 19 53

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Sch. I, Art. 75—Instalment bond—Default of instalment—Waiver—Acceptance of money by creditor, when constitutes waiver.

In order to constitute waiver of the right to enforce a forfeiture clause in an instalment bond by acceptance of payment, the payment must be made on account of the specific instalments in arrears and not a mere part-payment in redemption of the whole debt, and the creditor must accept it as such. *I. BALLA v. RATI RAM-SITA RAM* **E74**

Arts. 83, 85—Suit by commission agent against principal—Limitation—Mutual, open and current account, meaning of.

Where a commission agent buys goods for a principal and they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses falls within the purview of Art. 83 and not Art. 85 of first Schedule to the Limitation Act and limitation in such a case begins to run from the date of payment made by the agent on behalf of the principal and not from the date of the sale.

The bare accident of there being several transactions between the commission agent and his principal all embodied in one account in consequence of which there is sometimes a credit in favour of one party and sometimes in favour of the other does not turn the account into a mutual, open and current account within the meaning of Art. 85 of first Schedule to the Limitation Act. *L. KIRPA RAM-LACHHMAN DAS v. SAWAN MAL-GOPT CHAND*, 9 Lah. L. J. 493; 29 P. L. R. 61 **40**

Art. 91. See O. P. C., 1903, s. 141 **503**

Art. 97—Vendor and purchaser—

Sale by alienee from widow to third person with covenant for quiet enjoyment—Declaratory suit by reversioner—Subsequent dispossession by reversioner—Suit for damages for breach of covenant for quiet enjoyment—Cause of action, whether arises on decision of reversioner's suit or actual dispossession—Silence after decree in reversioner's suit, whether amounts to acquiescence—Contract to indemnify, effect of.

Two widows sold certain property to S. Some of the reversioners instituted a suit for a declaration that the alienation was not binding upon them. In February, 1898, during the pendency of this suit, S sold the property to the plaintiffs. The sale-deed contained a stipulation that if any other claimant came forward or the property went out of the possession of the vendees, the vendor would be liable to refund the purchase-money with damages. On the same date a separate agreement was executed by S in favour of the vendees in which the suit by the reversioners was referred to and to safeguard the vendees against the consequences of the suit, certain other properties were hypothecated to them. The suit by the reversioners was decreed in their favour by the Privy Council on the 11th May, 1909. The last surviving widow died in January, 1919. In May, 1919, the reversioners sued the plaintiffs for possession and obtained delivery of possession on the 13th August, 1921. The plaintiffs instituted a suit for recovery of the purchase-money and damages against the representatives of S, on the 30th November, 1921:

Held, (1) that the indemnity bond only furnished an additional security to the vendees, but in no way abrogated or modified the terms of the sale-deed

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which were quite general and independent of the security bond;

(2) that the period of limitation for the suit did not commence to run notwithstanding the decision of the Privy Council in 1909, till the plaintiffs were actually dispossessed in the year 1921 and that the suit was not, consequently, barred by limitation;

(3) that the silence of the plaintiffs after the Privy Council decision in 1909 did not amount to acquiescence inasmuch as they were not only bound to take any action immediately after that decision, but could not have sued for any relief until they were actually dispossessed. *L. GOPAL DAS v. DHANNA MAL*, A. I. R. 1927 Lah. 570; 9 Lah. L. J. 468 **804**

Sch. I, Arts. 97, 116. See HINDU LAW **816**

Art. 118—Suit to declare that adoption did not take place and is invalid—Limitation.

A suit for a declaration that the defendant was not in fact adopted and that his adoption is invalid is governed by Art. 118 of Sch. I of the Limitation Act, and will be barred by limitation if it is not instituted within six years of the date on which the plaintiff became aware of the fact that a claim was being made on the basis of the alleged adoption. *P. C. JAGMOHAN SARAN v. DEOKI NANDAN*, 4 O. W. N. 832; 53 M. L. J. 301; A. I. R. 1927 P. C. 229; 46 O. L. J. 280; (1927) M. W. N. 742; 29 Bom. L. R. 1386; 32 O. W. N. 153; I. L. T. 40 All 4; 27 L. W. 449 **488**

Art. 120—Declaratory suit—Fresh invasion—Fresh cause of action.

A fresh invasion of the plaintiff's title arising from an entirely new situation gives the plaintiff a fresh cause of action for the institution of a suit for declaration of title. *PAT UDAI PRATAP NATH SAHI DEO v. JAGAT MOHAN NATH SAHI DEO*, 6 Pat. 638; A. I. R. 1928 Pat. 66; 9 P. L. T. 25 **399**

Art. 120—Money advanced for purchase of horse—Agent buying mare—Sale of mare by agent—Right of lender to follow proceeds in the hands of agent—Limitation.

A advanced money to S to buy him a horse. S bought a mare which A refused to take. S retained the mare and agreed to return the amount on selling the mare. S then sold the mare, whereupon A sued for recovery of the loan more than three years after the date of the loan:

Held, that A had an equitable right to follow the proceeds in the hands of S who was merely an agent and the suit being governed by Art. 120 of the first Schedule to the Limitation Act was within time. *O. AZAM ALI v. SHAMSHER ALI*, 1 Luck Cas. 587 **35**

Arts. 120, 126—Alienation by Hindu father—Possession not given to alienee—Suit to set aside alienation—Limitation.

Article 126 of Sch. I of the Limitation Act is not applicable to a suit by a Hindu to set aside his father's alienation of ancestral property where the alienee never gets possession of the property under the alienation. In such a case the right of the son amounts merely to obtaining a declaration that the deed is invalid and the suit will be governed by Art. 120. *A. BINDESHRI UPADHYA v. SITAL UPADHYA*, A. I. R. 1927 All. 702; 25 A. L. J. 734 **377**

Arts. 123, 144—Suit by co-heir for partition of share—Limitation.

A suit by a co-heir for a share in the corpus of

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an inheritance is governed by Art. 123 of Sch. I of the Limitation Act and not by Art. 144 unless it is shown that the person in possession of the inheritance was holding it with the consent express or implied of all the heirs on behalf of them all. **R. MAUNG SHWE AN v. MAUNG TOK PYU**, 5 R. 582; A. I. R. 1928 Rang 6 828

Sch. I, Art. 126. See LIMITATION ACT, 1908, SCH. I, ARTS. 120, 126 377

Art. 144. See LIMITATION ACT, 1908, SCH. I, ARTS. 123, 144 828

Art. 166. See C. P. C., 1908, O. XXI, RR. 84, 89 333

Art. 181. See C. P. C., 1908, s. 47 242

Art. 182 (5). See C. P. C., 1908, O. XXXIV, R. 6 395

Art. 182 (5)—Application by decree-holder for extension of time to file encumbrance certificate, whether step-in-aid of execution.

An application to amount to a step-in-aid of execution, within the meaning of Art. 182 (5) of Sch. I of the Limitation Act should be one asking the Court to take some step in furtherance of the execution of the decree.

An application by a decree-holder for extension of time to file an encumbrance certificate is not a step-in-aid of execution, within the meaning of the Article. **M. KASIVAJALA RAMASAMI v. BODDU VEEBANNA**, (1927) M. W. N. 792; 26 L. W. 725; 53 M. L. J. 766; A. I. R. 1928 Mad. 143 648

Art. 182 (5), Expl. 1—Joint decree against several judgment-debtors—One judgment-debtor dead and legal representative not brought on record—Application against other judgment-debtors, whether saves limitation as against legal representative of deceased judgment-debtor.

Under Art. 182 of Sch. I of the Limitation Act, where there is a joint decree against several judgment-debtors, an application for execution against one of the judgment-debtors has the effect of saving limitation even against the legal representatives of a deceased judgment-debtor, who were not parties to such application. **M. KONATAM KOTIGADU v. KOTTURI SUBBAYYA**, 39 M. L. T. 336 391

Art. 183 (5)—Execution application, unstamped, whether invalid.

An unstamped execution application is not necessarily invalid. Where action is taken on the application and properties are attached it will save a subsequent execution application from limitation. **M. ADIVI KRISHNAYYA v. THUMALAPALLY SEIRAMULU**, A. I. R. 1928 Mad. 442 485

Madras Abkari Act (I of 1886), s. 55 (1)—‘Sell,’ meaning of—Actual delivery to buyer, whether necessary.

It is not necessary to constitute a ‘sale’ within the meaning of s. 55 (1) of the Madras Abkari Act that there should be an actual delivery of the thing sold to the buyer.

A person accepted the price of a bottle of brandy and brought the bottle to be handed over to the buyer but was arrested before he had actually handed it over to the buyer:

Held, that there was a sale within the meaning of s. 55 (1) of the Madras Abkari Act. **M. PUBLIC PROSECUTOR v. BYENI RAMASUBBAYYA CHETTY**, 27 L. W. 84; A. I. R. 1928 Mad. 179; 29 Cr. L. J. 121 716

Madras City Municipal Act (IV of 1919), s. 55

(2)—Rules for conduct of elections—Power of Governor-in-Council to fix date of election—Government of India Act, 1919 (9 & 10 Geo. V, Ch. 101) s. 49—Notification by Department of Local Self-Government, validity of—Evidence Act (I of 1872), ss. 78, 114—Presumption as to regularity of official acts—Rules for conduct of Municipal Election, r. 6—Schedule of valid nominations—Proceedings before election Judge questioning Returning Officer’s order—Original nomination schedule, whether available for election on subsequent date.

Under the rules for the conduct of elections under s. 55 of the Madras City Municipal Act, a notification fixing the date of election has to be published by the Governor-in-Council. But a notification published in the Gazette by the order of the Government Ministry of Local Self-Government, is proof under s. 78, Evidence Act, of the order of the Government fixing the election and must be presumed to have been issued in accordance with law and consequently valid. Such a notification does not contravene s. 49, Government of India Act and is not liable to be called in question in any legal proceeding.

Where under r. 6 of the Election Rules framed under s. 55 of the Madras City Municipal Act the Commissioner prepared and published three days before the date fixed for election a schedule of valid nominations, but his order excluding a candidate from the schedule was called in question before the Chief Judge, Small Causes Court, and was ultimately upheld, and the election was ordered to be held on a subsequent date:

Held, that the original schedule of nominations having been published as prescribed by the rules was in force and was available for the election which was ordered to be held on a subsequent date and that a fresh publication of nomination papers was not necessary. **M. COMMISSIONER, CORPORATION OF MADRAS v. EKAMBARA NAIDERR**, 53 M. L. J. 603; 39 M. L. T. 367; 26 L. W. 569; A. I. R. 1927 Mad. 980 144

Madras Civil Courts Act (III of 1873), s. 13—

Appeal—Court to which appeal lies—Right of appeal to High Court on date of plaint—Amendment of Court Fees Act diminishing valuation below Rs. 5,000—Appeal, whether lies to District Court or High Court.

A decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000 but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court Fees Act, is appealable to the High Court and not to the District Court. **M. DAIVANAYAGA REDDIAR v. RENUKAMBAL AMMAL**, 26 L. W. 539; 53 M. L. J. 637; A. I. R. 1927 Mad. 977; 39 M. L. T. 417; 50 M. 857; (1927) M. W. N. 863 616

Madras District Municipalities Act (V of 1920).

See C. P. C., 1908, s. 115 398

—Election Rules, r. 15—Voting by illiterate voter—Marking by polling officer in presence of candidates or agents, whether illegal.

In regard to marking of votes of illiterate voters, r. 15 of the Rules for the conduct of election to Municipal Councils under the Madras District Municipalities Act does not insist on the absence of the candidates or their agents from the place where the ballot paper is marked by the polling officer and, therefore, the marking by the polling officer in the presence of the candidates or their agents is not illegal. **M. MAKAM CHANDRAYUDU v. MADASU PEDDA**

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RANGAPPA, 26 L. W. 533; 53 M. L. J. 655; 39 M. L. T. 456; A. I. R. 1927 Mad. 1000 129

—s. 9 (1)—*Election becoming infructuous on account of irregularities—Retiring Councillor, whether entitled to claim seat.*

Section 9 (1) of the Madras District Municipalities Act applies only to cases where a valid election has been held under s. 8 of the Act.

Where an election becomes infructuous and is dropped on account of irregularities in the conduct of the preliminaries the retiring Councillor cannot be deemed to have been re-elected under s. 9 (1) of the Act. *M. SUBRAMANIA MUDALIAR v. CHAIRMAN, MUNICIPAL COUNCIL, COIMBATORE*, (1927) M. W. N. 740; 53 M. L. J. 816; 39 M. L. T. 591; A. I. R. 1928 Mad. 141 205

—s. 92—*Companies tax—Del credere commission agent of Company—Liability to pay tax—Del credere agent and independent contractor, distinction between.*

A firm of merchants were appointed sole "banyans" of a Company for a period of 30 years to sell all goods manufactured or produced by the Company at such prices as shall be approved by, or on behalf of, the Company, and to be responsible to the Company for the due payment by the buyers of the prices of all such goods and merchandise sold by them for and on behalf of the Company, and for the due performance by the buyers of all contracts entered into by them through the said banyans with regard to such goods and merchandise. It was also provided that the price of goods was to be paid to the Company in a period of 1½ months from date of sale and in default the firm was to pay interest. They were also to assist the Company in procuring cotton. In lieu of all this they were to get certain commission from the Company.

Held, that the firm were agents of the Company for the sale of goods on terms of "del credere commission," that there was no relationship of vendor and purchaser between the firm and the Company, and that the firm was, therefore, bound to pay tax under s. 92 of the Madras District Municipalities Act. *M. SADAGOPA IYENGAR v. TINNEVELLY MUNICIPAL COUNCIL*, (1927) M. W. N. 277; 39 M. L. T. 256; A. I. R. 1927 Mad. 1020 334

—s. 354 cl. (2)—*House-tax, assessment of—Absence of service of notice, effect of—Suit for refund of amount collected, whether lies.*

Under the Madras District Municipalities Act, before house-tax could be collected, notice of the assessment should be given to the assessee and such notice should be properly served in accordance with the provisions of the Act.

Where the provisions of the Act relating to service of notice upon the assessee have not been complied with, the Municipality has no right to collect tax and s. 354, cl. 2 of the Act does not bar a suit to recover the amount collected. *M. MUHAMMAD SHAMSUDIN ALIM SAHIB v. MUNICIPAL COUNCIL OF TIRUVALUR*, I. L. T. 40 Mad. 64 529

—s. 354 cl. (2)—*Wrong assessment—Suit for refund, whether lies.*

Sub-section 2 of s. 354 of the Madras District Municipalities Act was intended to provide real protection to the Chairman and the Municipal Council and its effect is that, when they have proceeded in the

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matter of assessment in accordance with the Act, no suit will lie against them for recovery of the amount of assessment collected even if their actual decision is wrong. *M. LAKSHMANAN CAETTY v. MUNICIPAL COUNCIL, TRICHINOPOLY*, I. L. T. 40 Mad. 15; A. I. R. 1928 Mad. 208 659

Madras Estates Land Act (I of 1908), s. 6—

Suit in Revenue Court for patta—Burden of proof of right to sue in special forum—Kattukuthagai, meaning of—Kattukuthagai village, whether 'estate'—Construction of documents.

In a suit by a tenant in a Revenue Court for issue of patta, the onus of proving that he is entitled to bring the suit in the Special Revenue Court lies on the plaintiff.

"Kattukuthagai" is in essence a lease or grant of land at a favourable rent. There is nothing in the term itself from which it can be inferred that a kattukuthagaidar is merely a renter or farmer of the melwaram.

It is not open to a Court to infer retrospectively from recent documents that an ancient grant was of melwaram alone. *M. MEDDAI DELAVOIT v. KARUPPATY AMMAL* 505

—s. 112—*Tender of patta to heir of deceased pattadar with name of deceased pattadar, whether bad—Persons with joint right—Right of some alone to sue.*

In the case of a ryot coming under the Madras Estates Land Act the heir stands in the shoes of the ryot and is entitled to bring a suit under s. 112 of the Act and a tender of patta made to the heir with the name of the deceased pattadar is not, therefore, bad.

Persons who have got a joint right should join in an action to assert that right and it is not open to one or two persons who have a joint right along with others to bring a suit for the assertion of that right on behalf of all without joining them as defendants. *M. KALIAPPA NADAR v. MUTHU VYAJA THUMBAYASAMI*, A. I. R. 1927 Mad. 984; 39 M. L. T. 442 140

—ss. 125, 192—*Civil Procedure Code (Act V of 1908), O. XXI, r. 58, whether applicable to proceedings in execution of rent decree—Mortgage prior to Act, whether prevails over purchase in execution of rent-decree.*

Order XXI, r. 58, Civil Procedure Code, is applicable to proceedings in execution of rent-decrees under the Madras Estates Land Act.

A mortgage right acquired over a holding before the passing of the Madras Estates Land Act is saved by s. 125 of the Act as against a purchaser in execution of a rent-decree. *M. BATCHU CHINA VENKATRAYADU v. MAHARAJA OF PITHAPURAM*, 27 L. W. 139; 54 M. L. J. 138; (1928) M. W. N. 52 663

Madras Irrigation Cess Act (VII of 1865), s. 1,

proviso—'Engagement', meaning of—Grant of inam by Government—Increased cultivation, without use of more water—Government, whether entitled to levy water-cess.

The general principles underlying the Privy Council decision in the *Utham* case (1) are applicable also to the case of inams, and so long as more water

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is not taken by an *inamdar* than he was taking land at the time of the grant, he cannot be charged any water-cess for cultivating more land with the same amount of water, unless the Government proves that the right of cultivation is limited as alleged by it in any particular case.

Engagements arising out of the Inam Settlements are engagements contemplated by the proviso to s. 1 of the Madras Irrigation Cess Act, 1885, just like the Permanent Settlement *sanads*.

In case of grants of *inams* at least by the Government, the effect of the Inam Settlement is to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks or reservoirs, in the *inamdar* through whose *inams* the same respectively pass or in which they are situate.

Per *Ramesam, J.*—Where a certain easement is granted there are two ways of increasing cultivation without enlarging the easement. One is by a more economical use of water. The second method is by improving the capacity of the tank and by converting water which might have otherwise overflowed. *M YAHYA ALLY SAHIB v. SECRETARY OF STATE FOR INDIA*, 39 M. L. T. 508; 53 M. L. J. 769; A. I. R. 1928 Mad. 97 **377**

Madras Local Boards Act (XIV of 1920), s. 3 (18)—*“Public road”*—Road poramboke lying between roadway and boundary of adjacent property, whether public road—Encroachment—Offence.

‘Road poramboke’ which lies between the roadway and the boundary of adjacent property, is included within the term ‘public road’ as defined in the Madras Local Boards Act. *M PUBLIC PROSECUTOR v. PALANIYANDI NAICKEN*, 27 L. W. 16; A. I. R. 1928 Mad. 160; 29 Cr. L. J. 113; 54 M. L. J. 261 **705**

s. 93—*Profession tax*—Chetti agent receiving fixed salary, whether liable to pay profession tax.

A Chetti agent receiving a salary and not carrying on any other business holds a salaried appointment and is not liable to pay profession tax under s. 93 of the Madras Local Boards Act. *M TALUQ BOARD DEYAKOTTAI v. CHOCKALINGAM CHETTI*, 1 L. T. 40 Mad. 57; A. I. R. 1928 Mad. 212 **646**

ss. 166, 207 (a), Sch. VIII—*“Plying for hire”*, meaning of—Mere use of hired vehicle, whether amounts to plying for hire—Soliciting for custom, necessity of.

A vehicle cannot be said ‘to ply for hire’ on a public road simply because it is made use of as a hired vehicle on that road. Plying for hire means the act of waiting for soliciting custom and the act of plying for hire can only be done at the place and time that the hiring is effected.

A person who lets out his car for hire in a Municipality is not bound to take a license from the District Board for taking the car beyond the Municipal limits and traversing any of the District Board roads, inasmuch as there is no hiring and, therefore, no ‘plying for hire’ in any of the District Board roads. *M LOCAL FUND OVERSEER v. PAKKIRISAMI THEVAN*, 29 Cr. L. J. 30; 27 L. W. 66; A. I. R. 1928 Mad. 166 **446**

ss. 171, 173, 176, 177, 188, 212—*Private market before commencement of Act*—Refusal of license by Local Board, legality of—Disobedience of order—Offence.

A person who owned a private market before the commencement of the Madras Local Boards Act

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of 1920, is entitled to the grant of a license under s. 171 of the Act, subject only to such conditions as are prescribed by s. 173.

An order of the Local Board merely refusing license to such a person does not come under s. 212 (11) of the Madras Local Boards Act and is illegal and *ultra vires*, and unless and until a legal order is passed, his application for license cannot be considered to have been properly disposed of and the owner cannot be convicted under s. 175 of the Act.

Per *Jackson, J.*—A private market is a private property and an Act to consolidate the law relating to Local Boards can hardly be an Act of confiscation.

Refusal to function under an Act is not passing an order under the Act. An order must be *intra vires* and an order *ultra vires* is no order at all.

Per *Thiruvengkatachiar, J.*—Where no action is taken under s. 176 of the Madras Local Boards Act, a refusal to grant a license to the owner of a private market cannot be justified under s. 177 of the Act. *M ELLAMAL v. EMPEROR*, (1927) M. W. N. 801; 53 M. L. J. 810; 26 L. W. 771; A. I. R. 1928 Mad. 164; 29 Cr. L. J. 126 **718**

s. 207 (a). See MADRAS LOCAL BOARDS ACT, 1920, ss. 166, 207 (a) **446**

s. 212. See MADRAS LOCAL BOARDS ACT, 1920; ss. 171, 173, 176, 177, 188, 212 **718**

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Madras Motor Vehicles Rules, 1923, r. 30 (1)—*License, renewal of, whether may be taken during year*—“Annually”, meaning of.

The word ‘annually’ in r. 30 of the Madras Motor Vehicles Rules does not mean at the expiry of every twelve months but means once in a calendar year.

Where the registration certificate for running a motor bus expired on 29th March, 1926, but an application for renewal was not made till some days thereafter:

Held, that the owner was not guilty of an offence under r. 30 and that if a certificate was obtained before the end of December, 1926, r. 30 would be sufficiently complied with. *M PUBLIC PROSECUTOR v. GANAPATHI HEGDE*, 39 M. L. T. 269; A. I. R. 1927 Mad. 969; 28 Cr. L. J. 1022 **110**

Madras Religious Endowments Act (II of 1927), s. 78—*Ex parte order directing trustee to deliver possession without notice, legality of.*

An *ex parte* order under s. 78 of the Madras Religious Endowments Act of 1927 directing a trustee to deliver possession without giving him notice or getting his explanation is illegal and is liable to be set aside. *M KAILASANATHA AYYAR v. NALLASIVAM PILLAI* **487**

Malabar Law—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—*Decree against karnavan in representative capacity—Members of tarwad, whether parties to suit—Objection by member to attachment, whether falls within s. 47 or O. XXI, r. 58, Civil Procedure Code—Appeal.*

Where a decree is passed against the karnavan of a Malabar tarwad in his representative capacity, the junior members of the tarwad cannot be held to be parties to the decree within the meaning of s. 47 of the Civil Procedure Code, and a claim by a junior member to property attached in execution of that

Malabar Law—concl'd.

decree falls within the purview of O. XXI, r. 58 of the Civil Procedure Code and not within s. 47 of the Code.

Per Phillips, Offg. C. J.—Where a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must, consequently, come under s. 47 of the Civil Procedure Code; but when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party.

Per Anantakrishna Ayyar, J.—The circumstance that a decree obtained against the *tarwad karnavan* as such is binding on all the members of the *tarwad* does not make the other members parties to the suit.

Prima facie only those are parties to the suit within the meaning of s. 47, Civil Procedure Code, whose names appear in the decree.

Where such members of a *tarwad* are not *eo nomine* parties to the decree, and where only the *karnavan* of the whole *tarwad* is sued as such, the claims that might be put forward in the course of execution of such decrees by the joint co-owner members or the *tarazhi* members should not be dealt with as put forward by persons who are parties to the suit.

A decree for money obtained against the *karnavan* alone as such could not be executed against the junior members. Such a decree could be executed against the *tarwad* properties, but not against the junior members. *M. NARAYANAN NAMHODIRI v. PURTHISSERI THEVA AMMA*, A. I. R. 1927 Mad. 1043; 28 L. W. 775; 53 M. L. J. 824 **239**

Mallée, what constitutes. See *TORTS* **277**

Malicious prosecution—Suit for damages—Plaintiff, whether bound to prove his innocence—Points to be proved by plaintiff.

In a suit for damages for malicious prosecution the plaintiff is not bound to prove his innocence. He is bound to prove only: (i) that he was prosecuted by the defendant, (ii) that the proceedings terminated in favour of the plaintiff, if from their nature they were capable of so terminating, (iii) that the prosecution was instituted against him without reasonable and probable cause, and, (iv) that it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect. *R U SOO v. MAUNG NGWE THA*, 5 R. 705; A. I. R. 1928 Rang. 51 **654**

Market. See *MADRAS LOCAL BOARDS ACT, 1920*, ss. 171, 173, 176, 177, 188, 212 **718**

Maxims.

It is an elementary principle of law that no order should be passed which prejudices a person without giving him an opportunity to show cause against it. *M. KAILASANATHA AYYAR v. NALLASIVAM PILLAI* **437**
Meeting. See *BOMBAY LOCAL BOARDS ACT, 1923*, ss. 85 (2) (b), 27 **265**

Mesne profits—Joint trespassers—Suit for mesne profits—All trespassers, whether necessary parties—Decree against all—Appeal—All defendants, whether necessary parties—Effect of decree against some.

Mesne profits—concl'd.

In an action for mesne profits against co-trespassers while it is open to the plaintiff to proceed against one or some or all of several co-trespassers at his own choice, once a decree has been obtained, it is the decree in its entirety that may be challenged on appeal, and so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal against the others. *C. KAMALA PROSAD SUKUL v. CHANDRA NATH PARAMANIK, I. L. T. 40 Cal. 40* **300**

—suit for—Jurisdiction of Courts. See *C. P. C.*, 1908, s. 16 **7**

Minerals. See *IMPARTIBLE RAJ* **399**

Minor—Guardian ad litem—Decree against minor when liable to be set aside—Mere failure of guardian to diligently prosecute suit, effect of.

A decree obtained against a minor represented by a duly constituted guardian is binding on the minor unless there is something to show that there was any fraud on behalf of the guardian. The mere failure of a guardian to diligently prosecute the case on behalf of the minor cannot have the effect of vitiating such a decree. *A. BACHAN SINGH v. BHIKA SINGH*, L. R. 8 A. 229 Rev.; A. I. R. 1927 All. 601 **49**

Mortgage—Consolidation of mortgages—Mortgagor and mortgaged properties, identity of.

There can be no consolidation of mortgages unless the properties mortgaged are the same and the mortgagor is also the same. *M. KANIYUR GANAPATHI BHATTAR v. BEERU BHANDARY*, A. I. R. 1927 Mad. 1039; 27 L. W. 200 **196**

—Lease by mortgagor in ordinary course of management, validity of.

The lease of *khudkasht* land by a mortgagor during the continuance of a mortgage of the village is valid and binding on the mortgagee only, when it is made in the ordinary course of the village management.

If the lease is given with the express object of making a large profit or seriously depreciating the value of the security, which the mortgagee may be entitled to, it cannot be said to be one in the ordinary course of management. *N. NAGO v. TARACHAND* **14**

—Oral mortgage—Suit by mortgagor based on title—Mortgagee, whether entitled to claim amount borrowed—Equity.

In the case of a mortgage which is invalid for want of a registered instrument evidencing it, it is open to the mortgagor to bring a suit for possession solely based on title, but in such a case the Court should on equitable grounds order the mortgagor to repay the amount borrowed. *R U PO HLA v. U PO THA*, 5 Bur. L. J. 280 **861**

—Redemption—Assignee of portion of equity of redemption—Suit for redemption of whole property

—Mortgagor entitled to redemption at date of decree—Subsequent disability, effect of—Costs of suit.

An assignee of a portion of the equity of redemption is entitled to redeem the entire mortgage. A person who had a right to redeem at the time of the passing of a decree for redemption in his favour and who had executed the decree and obtained possession cannot be deprived of the fruits of such a decree merely because he lost his right to redeem after the conclusion of the trial in the first Court.

Mortgage—concl'd.

A mortgagee who resists a suit for redemption on frivolous grounds is not entitled to recover his costs of the case. But where the opposite party also has been careless in not claiming redemption at the proper hour, the mortgagee should not be made to pay the mortgagor's costs. *L ASHAQ ALI KHAN v. MOHAMMAD SHAFI ALI KHAN*, 9 Lah. L. J. 481; A. I. R. 1928 Lah. 105; 29 P. L. R. 129 **570**

Redemption—Mortgagee's right to compensation for improvements.

A mortgagee in possession is not entitled to claim compensation for value of improvements effected by him on the mortgaged property, unless they are of a permanent character and add to the saleable value of the property. *L RAMSARN DAS v. BHAGWAN SINGH*, 1 L. T. 40 Lah. 24 **303**

usufructuary—Absence of registration—Redemption suit, whether maintainable—Suit for recovery based on title, effect of—Oral evidence, whether admissible.

When a plaintiff sues for redemption alleging that possession of immovable property was given to the defendant as security for a loan of Rs. 100 or upwards, but without the execution of any registered instrument, his suit would fail, as oral evidence would not be admissible to prove the transaction.

But if the plaintiff instead brings a suit merely for recovery of possession based on title, without alleging the usufructuary mortgage, he would be entitled to succeed if he can show his title, unless the defendant can show that he is in possession under a contract of sale.

The burden of proving such contract of sale would be on the defendant, and on his bringing evidence of such contract of sale, the plaintiff would be entitled to bring rebutting evidence that no such contract was entered into. Such rebutting evidence would in no way contravene the provisions of s. 91 of the Evidence Act. *R MAUNG KIN LAY v. MAUNG TUN THAING*, 5 R. 679; A. I. R. 1928 Rang. 53 **503**

Usufructuary mortgage and lease to mortgagor—Decree for rent—Execution sale—Equity of redemption, whether passes to purchaser.

A executed a usufructuary mortgage to B and on the same date executed a *kabuliyat* to B for a period of five years in respect of the property covered by the mortgage. A did not pay the rent fixed in the *kabuliyat*. B sued for the rent and purchased in execution of his decree the right of A to remain in *khas* possession of the land. A sold his rights subsequently to C who sued for redemption. B contended that he had acquired the equity of redemption by his purchase:

Held, that what was sold and intended to be sold in execution of the decree for rent obtained by B was only A's right to remain in possession for the remaining period of the term under the *kabuliyat*, and that C was entitled to redeem B. *PAT DAWARIKA NATH KARMAKAR v. JASODA DEVI* **563**

Mortgage and lease, distinction between. See ENAM **426**

Muhammadian Law—Guardianship—Mother's rights—Marriage not within prohibited degrees, effect of—Grandmother's right to guardianship—Guardians and Wards Act (VIII of 1890), s. 17—Court, whether entitled to disregard law in minor's interest.

Under the Muhammadan Law a mother is dis-

Muhammadian Law—concl'd.

qualified from guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees.

Where the law definitely lays down that an appointment cannot be made, the Court cannot disregard the law even in the interests of the minor.

Under the Muhammadan Law maternal grandmother comes next to the mother in the order of priority among females who are entitled to be appointed guardians. *A ANSAR AHMAD v. SAMIDAN*, 5 O. W. N 87 **822**

Property purchased in name of minor son from father's funds, whether common property belonging to all heirs.

Children in a Muhammadan family are not co-owners in the sense that what is purchased by or in the name of one person enures for the benefit of another.

The fact that certain property was purchased in the name of a minor son of a Muhammadan with money taken from the father's estate after his death would not make the property so purchased the common property of the family.

It is not proper to apply the principles governing the Hindu joint family system to a Muhammadan family. *M ABDUL HUCK v. SEETHAMSETTI JAYARAO NAIDU*, 39 M. L. T. 506; A. I. R. 1928 Mad. 14 **76**

Suit by rival Imams to officiate at mosque and at marriages in houses of Muhammadans—Injunction to restrain defendant from officiating in houses, legality of.

Under the Muhammadan Law the presence of the *Kazi* is not of absolute necessity for the validity of a marriage.

Pending a suit respecting the right to officiate at a mosque and at marriages of the Muhammadans of the locality, it is open to the Court to grant an interim injunction restraining the defendants from officiating at the mosque; but it is beyond the powers of Court to issue an injunction restraining them from performing ceremonies in the houses of the Muhammadans inasmuch as even if the plaintiffs have the right as against the defendants, the Muhammadan public could not be compelled to take the services of particular persons as *Imams*. *M JANA MUHAMMAD SULEMAN v. KADIRSA LEVVAL*, A. I. R. 1927 Mad. 1070 **523**

Municipality—Power to cut off water supply, limits of—Failure of ratepayer to pay charges, other than water rates—Water supply, whether can be cut off—Rules, construction of—Right to present consolidated bill, effect of—Suit for injunction and damages, whether maintainable.

A Municipal Committee presented the plaintiff, a rate-payer, with a consolidated bill for water rate and other charges. The plaintiff paid the water rate but did not pay up the other charges. The Committee declined to accept payment and cut off the water supply to the plaintiff. The bye-laws of the Municipality gave power to the Municipality to cut off water supply for default in paying water charges. In a suit by the plaintiff for a mandatory injunction for restoration of water supply and for damages incurred by him for procuring water from other sources:

Held, (i) that inasmuch as the power to cut off water supply was given by the bye-laws in the limited event of default in payment of water charges, the Municipality was not entitled to cut off the water supply to the plaintiff;

Municipality—concl'd.

(ii) that the fact that the Municipality was entitled under the rules to present a consolidated bill for all charges did not entitle them to cut off the water supply.

(iii) that the plaintiff was entitled to a mandatory injunction to restore the water supply;

(iv) that the plaintiff was entitled to recover the damages incurred by him, even though he could have prevented the same by paying up the balance due under the bill. **B BHUKHANDAS LALLUBHAI v. THAKORRAM KAPILRAM**, 29 Bom. L. R. 1465; A. I. R. 1927 Bom. 640; I. L. T. 40 Bom. 14 **147**

Mutual, open and current account. See LIMITATION ACT, 1908, SCH. I, ARTS. 83, 85 **40**

Occupancy tenant—Mortgage of occupancy rights acquired under agreement with landlord—Mortgagor, whether can challenge mortgage.

The representatives of a tenant who has executed a mortgage of occupancy rights acquired by him under a settlement decree subsequent to the year 1868 as the result of an agreement with the landlord are not entitled to challenge the mortgage on the ground that it is void in law. **O ABDUL GHAFOR KHAN v. KARAMAT KHAN**, 4 O. W. N. 1033; A. I. R. 1928 Oudh 41 **126**

Oudh Civil Courts Act (XIII of 1879), s. 37—

Suit for redemption—Limitation—Mortgage of 1795—Award recognising mortgage, whether gives fresh cause of action.

The plaintiff's predecessors-in-interest had executed a mortgage to the defendant's predecessors in 1795. There was nothing to show what the terms of the mortgage were. In 1858 there was some dispute between the parties, the matter was referred to arbitration and an award was made by which the defendant's predecessors were held entitled to remain in possession until the amount due to them under the mortgage-bond was paid. In a suit for redemption by the plaintiff:

Held, (1) that the claim to redeem the mortgage of 1795 was barred under s. 37 of Act XIII of 1879 as there was nothing to show that there was any term in the instrument of mortgage and that such term had not expired before the 13th February, 1856;

(2) that the award did not amount to a fresh mortgage and did not give a fresh cause of action. **O SARDAR SINGH v. GANGA BAKSH SINGH**, 2 Luck. 437; A. I. R. 1928 Oudh 20 **363**

Oudh Courts Act (IV of 1925), ss. 11, 12 (2)—

Application for declaration that case is fit one for appeal—Period of limitation—R. 7 in Ch. XII of the Rules framed by Chief Court, validity of.

The Chief Court of Oudh has authority under s. 11 of Act IV of 1925 to fix the period of limitation for an application for a declaration that a case is a fit one for appeal to the Bench under s. 12 (2) of the Oudh Courts Act. Rule 7 of the Rules framed by the Chief Court under s. 11 of Act IV of 1925 and published in the Gazette of 24th September, 1927, is not *ultra vires* and is applicable to an application under s. 12 (2) of Act IV of 1925 and the period of limitation for such an application is 30 days.

An application made after 30 days from the date of the judgment should ordinarily be refused unless the Judge deciding the case extends the period under the said rule. **O BRAJ RANI v. SIBTA DIN**, 4 O. W. N. 1473; A. I. R. 1928 Oudh 108 **436**

Oudh Estates Act (I of 1869), s. 12. See SUCCESSION ACT, 1885, ss. 54, 71 **534**

Oudh Laws Act (XVIII of 1870), ss. 10, 13. See PRE-EMPTION **539**

Oudh Rent Act (XXII of 1886), s. 108, cl. (15)—
Suit for profits—Lambardar liable to account on basis of demand—Simultaneous liability to pay interest, whether justified.

A lambardar is not liable to account to the co-sharer on the basis of demands and also to pay interest on the arrears of profits. **O CHITAR KET SINGH v. KANHAIYA BAKHSH SINGH**, 4 O. W. N. 930; A. I. R. 1927 Oudh 481 **204**

s. 108, cl. (15)—Usufructuary mortgage—
Decree for possession in favour of mortgagee—Failure to get actual possession and mutation—Right of mortgagor to maintain suit for profits.

Where a usufructuary mortgagee in spite of a Civil Court decree in his favour and formal delivery of possession in pursuance thereof has not obtained entry of his name in the Revenue Records and actual possession of the share mortgaged, the mortgagor can maintain a suit for profits under s. 108, cl. (15) of the Oudh Rent Act. **O BALKARAN DUBE v. HAR BILAS**, 4 O. W. N. 950; A. I. R. 1927 Oudh 504 **299**

s. 108, cls. (15), (16)—Suit by Lambardar for share of revenue under cl. (16)—Plea of agreement to collect from joint estate, whether available—Absence of prejudice, effect of.

In a suit by a Lambardar under s. 108, cl. (16) of the Oudh Rent Act for arrears of revenue due for the defendant's share, the defendant pleaded that there was an agreement between the parties that the Lambardar would make collections from a certain portion of the joint estate to recoup himself for the defendant's share of revenue and that this arrangement had been acted upon for a number of years. The agreement was upheld by the Courts below. In appeal it was contended that the conclusion which the Courts below had arrived at could be reached only in a suit under cl. (15) of s. 108 of the Act!

Held, that the decision of the lower Courts was not liable to be set aside on this ground inasmuch as the method of trial of the broad issue of the defendants' liability adopted by the lower Courts had not prejudiced the plaintiff. **O JAGANNATH v. UMRAI SINGH**, 4 O. W. N. 933; A. I. R. 1927 Oudh 468 **569**

s. 127—Suit for rent—Defendant in possession of land—Duty of landlord to prove that defendant's possession is without title.

A landlord has no right to sue a person in possession of land for a reasonable rent under s. 127 of the Oudh Rent Act, unless he can show that the defendant is retaining possession without being entitled to such possession. **O BAIJ NATH UPADHYA v. GHAZIKHAN** **907**

Part-performance. See LANDLORD AND TENANT **360**

Parties. See CO-SHARERS. **335**

• See EJECTMENT SUIT **261**

• See MEANE PROFITS **300**

Partition suit—Court-fees.

Court-fee is leviable on the construction of the plaint alone. *Ad valorem* fee on the value of the properties concerned cannot be levied on a plaint in a suit which is one for partition pure and simple. **PAT ISHWARI PRASAD v. HARI PRASAD LAL**, 8 P. L. T. 34; A. I. R. 1927 Pat. 145; 6 Pat. 508 **620**

Partnership action. See C. P. C., 1908, s. 73, O. XXI, r. 52 **113, 184**
See CONTRACT ACT, 1872, s. 204 **204**

Partnership—contd.

—*Suit by partner for specific share in sale-proceeds of stock-in-trade, whether maintainable—Suit for general accounts, necessity of—Conversion of suit into one for accounts, legality of.*

An action by one partner against the other partners for a specific share in the sale-proceeds of the stock-in-trade is not maintainable without a suit for accounts.

The general rule of law is that a suit by a partner after the dissolution of the partnership must be for a general account unless special circumstances exist which entitle one partner to bring a suit against another or others for a particular item. But if the suit relates to the loss and profits of the partnership business or to the stock-in-trade or capital employed in the business in respect of which all partners have equal rights, it must be one for a general account of the partnership business.

A suit for recovery of a specific sum of money cannot be converted into a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. **C** MAGNAMOYI RAI v. BROJENDRA LAL DAS, 46 C. L. J. 561; A. I. R. 1928 Cal. 127 **843**

Patni—*Patnidar's right to minerals—Patni tenure, history and incidents of—Construction of grant—'Ohhayahrad', 'sayer', 'darabast hakuk', meanings of—Patni and mokarrari compared.*

The grant of a *patni* conveys to the *patnidar* all rights including underground rights, in the absence of reservation.

The word '*ohhayahrad*' in a *patni* lease does not mean any right to underground minerals. The word '*sayer*' means all sorts of imports in addition to land revenue but does not include minerals.

The expression '*darabast hakuk*' in a *patni* lease is a familiar expression intended to throw a net so as to include every thing which might be considered as belonging to the *zemindari* right.

Although there are various points of similarity between a *mokarrari* and a *patni*, a *patni* tenure is different in many respects from the former. **C** BHUPENDRA NARAYAN SINHA v. RAJESWAR PRASAD BHAKT, 32 C. W. N. 16; 46 C. L. J. 307 **117**

Penal Code (Act XLV of 1860), s. 75—Previous conviction very old—Enhanced sentence.

An enhanced sentence under s. 75, Penal Code, should not be passed where the previous conviction took place as much as 12 years before the subsequent one and there is only one previous offence. **L** ALLAH DIN v. EMPEROR, 29 Cr. L. J. 32; 29 P. L. R. 59 **448**

—**ss. 73, 442, 511—S. 73, whether applies to attempts—House trespass, what constitutes—Entry, necessity of.**

The accused with intent to commit house-breaking stepped on the platform in front of a door, but were disturbed and captured as soon as they had opened the door, before they had effected an entry:

Held, that the accused were not guilty of house-breaking but only of an attempt to commit house-breaking.

Section 75, Penal Code, does not apply to attempts punishable under s. 511 of the Code. **L** MOHAMMAD HUSSAIN v. EMPEROR, 29 Cr. L. J. 4; 29 P. L. R. 54 **340**

—**s. 79—Public servant acting under colour of office—Right of private defence.**

Where a constable effects an arrest under colour

Penal Code—contd.

of his office, there is no right of private defence against him even though the arrest is not strictly justified by law. **L** MUNSHI SINGH v. EMPEROR, 29 Cr. R. J. 69; 9 A. I. Cr. R. 287 **581**

—**s. 84—Insanity—Burden of proof—Evidence of insanity—Motive, mere absence of, effect of—Benefit of doubt—Criminal Procedure Code (Act V of 1898), ss. 464, 465, 469—Defence of insanity—Magistrate, when bound to order medical enquiry.**

Where an accused person relies upon s. 84 of the Penal Code to escape the legal consequences of his act, the onus is upon him to prove that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing its nature or that what he was doing was either wrong or contrary to law. That onus may be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards; also by evidence of his mental conditions, his family history and so forth. If contemporaneous acts of his are proved to have been of such a nature as to indicate that he was quite incapable of forming rational views, that would be a strong element to show that at the time of the crime in question he was not capable of knowing that it was a wrongful act.

Although the fact that a murder has been committed in a particularly brutal and purposeless way for no motive whatsoever, is a circumstance which may be taken into consideration together with other material to enable a Court to decide whether or not the crime in question was committed at a time when the accused person was in such a state of mind that he was incapable of knowing the nature of his act, yet in the absence of other evidence mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind for the purposes of defence under s. 84, Penal Code.

To attract the application of s. 84, Penal Code, it is not enough to establish a doubt as to the soundness of the mind of the accused at the time of the commission of the crime. This is not a kind of doubt of which the accused may be given the benefit. To entitle the accused to the benefit of the section the accused must satisfy the Court that his condition of mind was such that he was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law.

There is no provision of law in India making it incumbent upon a Committing Magistrate to order a medical enquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable by reason of mental infirmity of taking his trial that this issue of insanity must be tried before the trial for the offence is proceeded with. Where the Magistrate is of opinion that the accused is sane at the time he has no alternative but to proceed in accordance with the provisions of s. 469, Criminal Procedure Code. **L** EMPEROR v. BAHADUR, 29 Cr. L. J. 204 **726**

—**s. 84—Plea of insanity—Burden of proof—Criminal intent—Question of fact—Presumption from knowledge—Inveterate gunja smoker, setting fire to school—Criminal intent, proof of.**

The onus of proving the defence of insanity afforded by s. 84 of the Penal Code rests upon the accused. Though ordinarily intention is to be inferred from

Penal Code—contd.

knowledge, there may be cases where intent must be found as a fact and cannot be assumed. It is a question of fact in each case whether having regard to the mental condition of the prisoner, the general inference of intention from knowledge can reasonably be drawn.

An inveterate *ganja* smoker set fire to the thatched building of a school, by taking a torch from a kitchen and putting it to the thatch, and after throwing the torch on the roof of the kitchen ran away. It was found that as a result of the vicious habit of *ganja* smoking he was in the habit of beating his wife and children and refusing to take food, but the Medical Officer pronounced that the case was not one of insanity. It also appeared that the accused, who was a teacher in the school had some ground for annoyance in connection with his service:

Held, (1) that the facts of the case were not strong enough to give him exemption from the criminality of his conduct under s. 84 of the Penal Code:

(2) that the requisite criminal intent could be presumed from his knowledge that his act was wrongful. *M. PUBLIC PROSECUTOR v. BUDIPITI DEVASIKAMANI*, 29 Cr. L. J. 63; 27 L. W. 77; A. I. R. 1928 Mad. 193; 9 A. I. Cr. R. 280 559

— s. 114—*Abetment of offence—Presence and instigation, whether sufficient to constitute abetment.*
To come within s. 114 of the Penal Code the abetment must be complete apart from the presence of the abettor.

The accused was present at the occurrence of an offence under s. 326 of the Penal Code and it was found that the assailant inflicted a blow at the instigation of the accused. There was no evidence to show that there was any conspiracy between the accused and the assailant prior to the occurrence:

Held, that the accused could not be convicted under ss. 326 and 114 of the Penal Code for abetment of the offence under s. 326. *M. In re VIJAYARANGA NAIDU*, 26 L. W. 649; 53 M. L. J. 760; 39 M. L. T. 529; 29 Cr. L. J. 72; 9 A. I. Cr. R. 271 584

— s. 120-B—*Explosive Substances Act (IV of 1884), s. 5—Arms Act (XI of 1878), s. 10—Conspiracy, person found at place of—Appearances against accused—Presumption—Possession of explosives—Temporary residence.*

Where there is no means of discriminating between the cases of various persons found at a place of a criminal conspiracy, and the circumstances point to the conclusion that every person found in the house was a member of the conspiracy, absence of proof that a particular person was there innocently leads to the conclusion that no one's presence was innocent.

Per Sukrawardy, J.—When appearances are against the accused in a case, and the prosecution has established *prima facie* the existence of incriminating circumstances, it is the duty of the defence to rebut the presumption arising from them by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock. The idea that the defence is not bound to adduce any evidence is dangerous. In Jury trials the last word may have some value but in a trial before three experienced Judges the prosecution and the defence stand on the same footing.

It cannot be said that temporary residence in a house containing explosive articles, even with the

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knowledge of their existence there, is possession within the meaning of s. 5 of the Explosive Substances Act. Conspiracy to possess connotes some act of possession or attempted possession. *C. HARI NARAYAN CHANDAR v. EMFEROR*, 46 C. L. J. 368; A. I. R. 1928 Cal. 27; 29 Cr. L. J. 49; 9 A. I. Cr. R. 228 545

— ss. 120-B, 121-A. See *Cr. P. C.* 1898, ss. 235, 537, 556 721

— ss. 142, 147, 353—*Unlawful assembly—Persons joining assembly, liability of—Mob—Innocent spectator—Burden of proof—Assault in furtherance of common intention—Separate sentences under ss. 147, 353, legality of.*

Any person who intentionally joins or continues in an unlawful assembly while the assembly is committing an offence becomes a member of that assembly. Any person who has innocently got into the crowd and is unable owing to pressure of numbers to escape from it is not a member of the unlawful assembly; but he would have to make out his case on the point.

Separate convictions are legal under ss. 147 and 353 of the Penal Code even when assault is committed in furtherance of the common intention of the unlawful assembly. *PAT GENDU URAON v. EMFEROR*, 6 Pat. 828; 29 Cr. L. J. 79; A. I. R. 1928 Pat. 115; 9 P. L. T. 167; 9 A. I. Cr. R. 256 591

— ss. 143, 441—*Criminal trespass—Unlawful continuance of occupation after unlawful entry, whether punishable—True owner's right to eject trespasser—Resistance to true owner—Offence—Person entering with permission of trespasser, liability of—Assembly to enforce right to possession by criminal force—Unlawful assembly—Liability of members of assembly.*

A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself possession, in the legal sense of the term, against the person whom he ejects, and the latter may, if he does not acquiesce, re-enter and reinstate himself provided he does not use more force than is necessary. Such a re-entry will be viewed only as a resistance to an intrusion upon a possession which had never been lost.

The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the Law of Limitation.

Where an unlawful entry is followed by an unlawful continuance of occupation each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by s. 441 of the Penal Code, a new offence under that section is committed and a new liability arises.

A person who unlawfully enters upon the property of another with the intention specified in s. 441 of the Penal Code can be convicted of the offence of criminal trespass even though he enters with the permission of another trespasser who has already unlawfully entered and occupied the property, where the owner has not acquiesced in the possession of the latter.

Penal Code—contd.

Even assuming that trespassers have a right to possession after they have once unlawfully entered, they will be guilty under s. 143 of the Penal Code, if they, being more than five in number, enforce that right by means of criminal force. *PAT EMPEROR v. BANDHU SINGH*, 6 Pat. 794; 29 Cr. L. J. 99; A. I. R. 1928 Pat. 124; 9 A. I. Cr. R. 258 691

— ss. 147, 149, 325, 352—*Conviction and sentence for offences under ss. 325 and 352—Acquittal under s. 325—Sentence, whether must be reduced—Offence under s. 147, whether necessarily embraces one under s. 352.*

Where an accused person is convicted of an offence under s. 325 and also under s. 352 read with s. 149, Indian Penal Code, but on appeal the conviction under s. 325 is set aside, the sentence must be reduced.

It cannot be said that an offence under s. 147 necessarily embraces an offence under s. 352, inasmuch as persons may riot without actually committing an offence under s. 352. *IN RE, SRINIVASULU NAICKEN*, 39 M. L. T. 409; A. I. R. 1928 Mad. 21; 29 Cr. L. J. 2 338

— ss. 149, 300, 302, 325—*Unlawful assembly—Fatal assault by some members—Common intention—Sudden quarrel—Sentence.*

The deceased, a village goldsmith, who was obstructing the view of a proprietor in the village at a wrestling match was abused by the latter and returned the abuse. On this the proprietor asked his relations to kill (*mar do*) "these goldsmith dogs". On this four of his relations stood up, two out of whom belaboured the goldsmith with *dangs* causing fatal injuries in the heads of which the goldsmith died the next morning. The other two beat a person who tried to stop the assault. The proprietor continued shouting to his relations but did not strike any blow himself.

Held, (1) that when at the behest of the proprietor, the four relations arose for the assault, they intended at least to inflict grievous hurt on the goldsmith, and being five in number including the proprietor they all were guilty under ss. 325/149, Penal Code;

(2) that the two relations who struck *dangs* on the head of the goldsmith were in addition guilty of murder in that their attack on the goldsmith was made either with the intention of causing death or such bodily injury as they knew to be likely to cause death, but that as the elements of preparation and premeditation were absent, the ends of justice would be met by a sentence of transportation for life. *L. NIHAL SINGH v. EMPEROR*, 9 Lah. L. J. 262; A. I. R. 1927 Lah. 516; 28 P. L. R. 674; 29 Cr. L. J. 35 451

— s. 160. See CR. P. C., 1898, ss. 236, 403 216

— s. 174. See U. P. LAND REVENUE ACT, 1901, s. 147 686

— ss. 192, 199—*False affidavit by identifier for proving service of process—Offence—S. 199, scope of.*

An identifier who knowingly makes a false affidavit of service of process for the purpose of being used in a judicial proceeding commits the offence of fabricating false evidence within the meaning of s. 193 of the Penal Code. He is also guilty of an offence under s. 199 of the Code where the Court is authorised under its circular orders or any other

Penal Code—cont

law to receive an affidavit from an identifier as evidence of the fact of service of summons.

Section 199 of the Penal Code is much wider than s. 192 and applies to every kind of affidavit which the Court is bound or authorised to receive. *PAT KART GOPE v. MANMOHAN DAS*, 6 Pat. 760; 29 Cr. L. J. 111; A. I. R. 1928 Pat. 161 703

— s. 193—*Perjury—Denial of knowledge of fact—Proof that accused had personal knowledge, necessity of.*

In the course of the examination of a prosecution witness he was asked whether the accused had arrested his sons, and the witness denied knowledge of the fact. In a prosecution of the witness for perjury it was proved that his sons had been arrested and that he had heard of the arrest, though he had no personal knowledge of the same:

Held, that the accused could not be convicted of an offence under s. 193 of the Penal Code, as there was no proof that the accused had personal knowledge of the fact. *L. NATHA SINGH v. EMPEROR*, 9 Lah. L. J. 414; 28 Cr. L. J. 1010; 29 P. L. R. 190 98

— s. 199. See PENAL CODE, 1860, ss. 192, 199 703

— s. 215—*Offence, nature of—Taking money to find stolen property—Screening offender—Desire to save oneself from vengeance of thieves.*

The primary aim of s. 215, Penal Code, is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice.

It is not an offence to take money from another in order to help him to find stolen property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. The section is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence.

The fact that a person undertaking to recover stolen horses says that he will take them, if recovered, either to the cattle-pound or leave them near some place, does not necessarily show that he knows the criminal and wishes to screen him. It may equally be that he intends to save himself from the vengeance of the people from whom he intends to take away the horses if he discovers their whereabouts. *A. EMPEROR v. MANGU*, L. R. 8 A. 158 Cr.; 25 A. L. J. 866; A. I. R. 1928 All 22; 29 Cr. L. J. 21; 8 A. I. Cr. R. 551 437

— ss. 300, 302—*Murder and culpable homicide, distinction between—Act done with intent to cause bodily injury likely to cause death, whether murder.*

Two girls were struggling for the possession of a handful of gram. The elder girl gave a blow with a thin *lathi* to the younger. The uncle of the latter came running to the place and gave a blow with a *lathi* on the head of the elder girl and after the girl had fallen gave two more blows on her thigh. The blow on the head caused fracture of the skull.

Penal Code—contd.

and the girl died. The uncle was convicted for murder. On appeal.

Held, that the accused could not be convicted for murder but was guilty only of culpable homicide not amounting to murder.

A blow on the head with a *lathi* is certainly likely to cause death and the person who inflicts a *lathi* blow on the head of another person must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a *lathi* blow on the head is always sufficient in the ordinary course of nature to cause death.

Per Kulwant Sahay, J.—The essence of the crime of murder under cl. (2) of s. 300 of the Penal Code is that there must be the intention of causing such bodily injury as the offender knows is likely to cause death, and in order to convict a person of the offence of murder under the said clause, it has to be found that he had the intention of causing the injury and also that he had the knowledge that such injury which he intended to inflict was likely to cause death. For a conviction of an offence under cl. (3) of s. 300 it must be shown that the injury which the person intended to cause was such as to be sufficient in the ordinary course of nature to cause death.

If a person causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under s. 299, and it is only if the intention was to cause bodily injury, which injury was sufficient in the ordinary course of nature to cause death, that the offence would come under s. 300, cl. (3).

Although a man is presumed to intend the natural and inevitable consequence of his own act, the presumption of intention must depend upon the facts of each particular case, and 'knowledge' as used in cl. (2) of the section is a word which imports a certainty and not merely a probability.

The difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue. *PAT GANBAS PANDÉ v. EMPEROR*, 29 Cr. L. J. 17; L. L. T. 40 Pat. 28. 433

— s. 300, Except. 1—Murder and culpable homicide—Sudden and grave provocation—Aggressive provocation by deceased—Challenge by accused—Subsequent provocation by deceased—Fatal blow by accused—Offence, whether murder or culpable homicide not amounting to murder.

In the course of a quarrel between the party of the accused and that of the deceased, the deceased came out of his house shouting for the accused. The accused who was then standing near a tree in front of his house near by abused in return and decided the deceased and told him to come on. The deceased then caught hold of the accused by the tuft and gave him two blows with the fist. There was a struggle and the deceased held the accused firm by the tuft. The accused then gave a fatal blow to the deceased on the left side with a dagger which he had in his hand.

Held, (*Per Wallace and Tiruvengkatachiar, JJ.*), that though the first provocation of the deceased in calling out for the accused was not grave and sudden, it was aggressive and the second provocation, i.e., seizing the accused by the tuft was grave, and sudden and the stabbing being directly attributable to it, Exception 1 to s. 300 applied to the

Penal Code—contd.

case and the accused was not guilty of murder but of the lesser offence of culpable homicide not amounting to murder.

Per Jackson, J. (dissenting).—When a man defies another and tells him to come on, in brief challenges him to fight, and a fight ensues, he cannot claim that he has been gravely and suddenly provoked merely because he is getting the worst of it. *M In re GUTURI NAGADU*, (1927) M. W. N. 796; 29 Cr. L. J. 7; A. I. R. 1928 Mad. 136; 9 A. I. Cr. R. 263. 343

— s. 302—Murder—Provocation—Sentence.

A person who was trusted and treated with hospitality by another seduced the latter's wife and persisted in remaining in his house after having been requested to leave. The injured man killed the seducer. There was no evidence to indicate the circumstances which led to the commission of the murder.

Held, that the conduct of the deceased was certainly provoking, and, in the absence of evidence to indicate the circumstances of the crime, it was not a case for the infliction of the extreme penalty of the law, but for a sentence of transportation for life. *L. KHANU v. EMPEROR*, 29 Cr. L. J. 41. 457

— ss. 302, 304—Murder and culpable homicide not amounting to murder, distinction between.

Per Hasan J.—If an act which an accused person is said to have committed falls within any of the explanations to s. 300, Penal Code and does not fall within any of the exceptions, the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in s. 300, the act is one of culpable homicide not amounting to murder. *O RAM LAL v. EMPEROR*, 1 Luck. Oas 578; 28 Cr. L. J. 1029; A. I. R. 1928 Oudh 15; 9 A. I. Cr. R. 217. 213

— s. 304—Murder—Single blow—Sudden quarrel—Sentence.

In a quarrel between the accused's wife and his brother's wife, the latter abused the accused's daughters, whereupon the accused hit her a single violent blow with a stick which he picked up there and then. The woman died of her injury the following day. There was no feeling of enmity between the accused and the deceased.

Held, that the quarrel being unpremeditated and the blow having been struck in the heat or passion, a severe sentence was not called for, and that a sentence of three years' rigorous imprisonment would meet the ends of justice. *L. KARAM ILAHI v. EMPEROR*, 29 Cr. L. J. 33. 449

— ss. 304, Part II, 325—Dang blow on head causing death—Skull not fractured—Offence.

In most instances a man who strikes a person on the head with a heavy weapon such as *dang* must know that such a blow is likely to cause death. But this cannot be said about the case where the blow is not a very violent one and the injured person is able to walk about for a couple of days before he succumbs to the injury. In such a case the offence committed is one under s. 325, Penal Code. *L. MEHR SHAH v. EMPEROR*, 29 Cr. L. J. 24; 9 A. I. Cr. R. 255. 440

— s. 325. See PENAL CODE, 1860, ss. 147, 149, 325, 352. 338

— s. 339—Wrongful restraint, what constitutes—Presence of person abetted, whether necessary.

Penal Code—contd.

—'Any direction', meaning of—Vertical direction, whether included—Offence and mere infringement of property rights, difference between.

The physical presence of the person obstructed at the moment of obstruction is not necessary for the commission of an offence under s. 339 of the Penal Code.

Section 339 of the Penal Code covers the case of obstruction to a person who reasonably wants to go in any direction, even vertically upwards if he has a right to do so.

But the section does not cover cases where there is no ordinary or special reason for a person to proceed in the direction which is obstructed.

During the absence of the complainant the accused constructed a tin projection hanging over the complainant's court-yard at a height of over 6 feet. The projection was such that it did not prevent anybody from moving under it but only caused obstruction to white-washing and repairs:

Held, that the accused was not guilty of an offence under s. 339, Penal Code. **B. CHHAGAN VITHAL v. EMPEROR**, 29 Bom. L. R. 494; A. I. R. 1927 Bom. 369; 28 Cr. L. J. 1023 111

—s. 352. See PENAL CODE, 1860, ss. 147, 149, 325, 352 338

—s. 353. See PENAL CODE, 1860, ss. 142, 147 591

—s. 376—Girl under 10 years—Consent, effect of—Assailant suffering from gonorrhœa—Gonococci not found on girl—Inference.

In the case of a conviction for rape where the girl is 10 years of age, no question of consent arises.

The fact that a person accused of having committed rape is found to be suffering from gonorrhœa but the injured girl is not infected with the disease, is by no means conclusive of the innocence of the accused. **PAT EMPEROR v. ASADALI**, 29 Cr. L. J. 12, 9 P. L. T. 186 348

—ss. 379, 409, 417, 420, 511—Theft, criminal breach of trust, criminal misappropriation and cheating, distinction between.

The distinction between theft, criminal breach of trust, criminal misappropriation and cheating is that in theft, the original taking is without honesty and without the consent of the owner and in criminal breach of trust it is with both. In obtaining property by cheating, the taking is dishonest but with the consent of the owner and in criminal misappropriation it is honest but without the consent of the owner.

A sentence of one year's rigorous imprisonment and a fine with further rigorous imprisonment for four months in default of payment of it, though legal under s. 420, Penal Code, is illegal, if the finding is altered in the Appellate Court to a conviction of attempting to cheat punishable under ss. 417 and 511 read together, under which the longest term of imprisonment that could be imposed substantively is six months and the longest that could be imposed in default of payment of fine is a month and a half. **NARSINGHDAS MARWARI v. EMPEROR**, 29 Cr. L. J. 86; 9 A. I. Cr. R. 282 678

—s. 391—Trial by Jury—Three named men charged with dacoity along with two other unknown men—Acquittal of one accused on ground of insufficient identification—Conviction of other two for dacoity, legality of—Duty of Court to direct Jury to possible results of such acquittal.

Penal Code—contd.

Three known and named persons were charged with dacoity along with two other unknown men. The Jury acquitted one of the three accused and convicted the other two of the offence with which they had been charged:

Held, (1) that it was quite open to the Jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five;

(2) but that the Judge should have asked the Jury definitely whether they had considered the possible result of the acquittal and whether they still found that the number of robbers was five, since it was possible that if the questions had been put, the remaining two accused would have been found guilty only of robbery and received lighter sentences. **M. In re ABBAS ALI SAHIB**, (1927) M. W. N. 853; 53 M. L. J. 732; 29 Cr. L. J. 5; A. I. R. 1928 Mad. 144; 9 A. I. Cr. R. 248 341

—s. 397—Minimum sentence—Seven years' rigorous imprisonment.

A person convicted under s. 397 of the Penal Code cannot be sentenced for a period of imprisonment less than seven years. **PAT EMPEROR v. RADHIA**, 29 Cr. L. J. 35; 9 A. I. Cr. R. 279 451

—ss. 399, 402—Preparation to commit dacoity, what constitutes.

The accused assembled on a night under a *shisham* tree outside a village to commit dacoity. Two of them were armed with revolvers and one with a spear. Three of them were residents of another District:

Held, that the accused were guilty of the offence of preparing to commit dacoity under s. 402, Indian Penal Code. **L. EMPEROR v. AHMAD**, 29 Cr. L. J. 14 350

—s. 405—Criminal breach of trust—No proof of conversion—Delay in remittance—Explanation available, effect of.

In a prosecution for criminal breach of trust delay in making remittance to the head office of money received, according to departmental rules is a circumstance to be taken into consideration and it may be, if there is no explanation, *prima facie* evidence of dishonesty. But where an explanation is available mere delay in making the remittance in the absence of proof of conversion or falsification of accounts is nothing more than evidence of breach of departmental rules. **PAT FARMOD BAN BEHARI SARAN v. EMPEROR**, 29 Cr. L. J. 10 682

—s. 409. See PENAL CODE, 1860, ss. 379, 419, 417, 420, 511 678

—s. 409—Criminal breach of trust concerning public moneys—Sentence.

An offence of criminal breach of trust by a person in charge of public moneys is one of a specially serious nature and calls for a severe sentence. **L. PARMA NAND v. EMPEROR**, 29 Cr. L. J. 1 337

—ss. 417, 420. See PENAL CODE, 1860, ss. 379, 409, 417, 420, 511 678

—s. 427—Mischief—Complainant, whether bound to prove his title.

Obiter—A person accused of having committed mischief cannot be allowed to put the complainant who is admittedly in possession of the thing in respect of which mischief was committed, to proof of his title. **A. SRIPAT NARAIN SINGH v. GAHAR RAI**, L. K. J.

Penal Code—conold.

A. 135 Cr.; 8 A. I. Cr. R. 337; A. I. R. 1927 All. 724;
25 A. L. J. 1010; 29 Cr. L. J. 88 680

— s. 441. See PENAL CODE, 1860, ss. 143, 441 691

— s. 448. See PENAL CODE, 1860, ss. 75, 448, 511 340

— s. 511. See PENAL CODE, 1860, ss. 379, 409, 417, 420, 511 678

Petroleum Act (VIII of 1899), ss. 5, 11, 15 (a)—
License to transport petroleum, whether includes permission to possess or keep for process of and during transport.

Per *Wallace and Madhavan Nair, JJ. (Jackson, J. contra)*—A license for the transport of petrol under the Petroleum Act of 1899 includes permission to be in possession of petrol for the purpose of and during the process of transportation, so as to cover a halt over-night, and the possession of petrol during such halt is not 'keeping' of petrol within the meaning of s. 5 (1) of the Act.

Per *Madhavan Nair, J.*—The keeping of petroleum received under a transport license, for a short period which is incidental to, and necessary for, the distribution of it cannot amount to 'keeping' or 'possession' within the meaning of ss. 5, 11 and 15 (a) of the Petroleum Act. The question whether the period of time is short enough to be considered reasonable or too long to be considered reasonable will have to be decided with reference to the particular facts of each case. *M. PUBLIC PROSECUTOR v. RATNAVELU MUDALI*, 29 Cr. L. J. 43; 27 L. W. 69; 54 M. L. J. 158; A. I. R. 1928 Mad. 147; 9 A. I. Cr. R. 273 459

Pleadings. See HINDU LAW 620
—, amendment of—*Suit for perpetual injunction, conversion of, into one for possession—Possession—Presumption of continuance.*

Where in a suit for a perpetual injunction restraining the defendant from preventing the plaintiff from reconstructing a fallen house it was found that the defendant had quietly taken possession of it in the absence of the plaintiff:

Held, that the Court should not dismiss the suit forthwith but should allow the plaintiff to amend it so as to make it a suit for possession.

In case of a house which has fallen down the presumption is always in favour of the continuance of the possession of the person who occupied it before it fell down and the placing of some articles by a stranger in a portion of the house which has not fallen down does not amount to possession of the house by such a person. *L. MUKH RAM v. HAR KESH*, 9 Lah. L. J. 577; A. I. R. 1928 Lah. 112 615

— *Estoppel—New ground.*

A plea of estoppel cannot be upheld on a ground not pleaded in the written statement, and inconsistent with what was stated therein, and with regard to which no issue had been framed. *L. SHERA v. GAHVA*, 28 P. L. R. 303 474

Police Act (V of 1861), ss. 30, 32—Notification under s. 30—Occasion for notice passing away—Notice, whether continues to operate—Contravention of notification—Conviction.

A notification under s. 30 of the Police Act prohibiting processions without a license cannot be held to be operative after the occasion which called for the notification has passed away.

The accused were convicted under s. 32 of the Police Act for having promoted and directed a pro-

Police Act—conold.

cession without a license on the 19th March, 1927, in contravention of an order promulgated by the Superintendent of Police under s. 30 of the Act on the 18th July, 1926, preceding the *Mohurram* festival of 1926:

Held, that the order of the Superintendent of Police had ceased to be operative in March, 1927, and the conviction of the accused was illegal. *C. GANGADHAR BHATTACHARYA v. EMPEROR*, 32 C. W. N. 162; 29 Cr. L. J. 126 718

— ss. 30, 30-A, 32—*License for procession on certain conditions—Duty of licensee to observe conditions throughout the procession—Licensee's liability for conduct of members subsequently joining, extent of.*

Where an application for license to take out a procession is granted subject to the condition that no member of the procession carries a *lathi* or sword, it is the duty of the licensee to see not only that no member of the procession carries a *lathi* or sword at the commencement of the procession but also that no one subsequently joins the procession with such weapons. He cannot be heard to say that they joined without his permission and that he was in no way responsible for them.

Per *Wort, J.*—The fact that there is a provision in s. 30-A of the Police Act giving power to the authorities to stop any procession which violates the conditions of a license does not excuse the licensee from controlling the persons who may join the procession. *PAT BADRI DASS v. EMPEROR*, 6 Pat. 763; 29 Cr. L. J. 114; A. I. R. 1929 Pat. 166 706

Practice. See APPEAL TO PRIVY COUNCIL 867
— Application for leave to sue in forma pauperis—Defendant declared ex parte appearing later—Right to take part in proceedings.

Where a defendant who is declared *ex parte* in proceedings for leave to sue in forma pauperis appears later on and wants to take part in the case, he is entitled to do so at the stage which it had reached, provided that his intervention at that stage does not delay the proceedings. Where evidence has been closed it would not be proper to allow him to call fresh evidence unless the Court is satisfied that he had good reason for not appearing earlier. *M. ARUMUGAM PILLAI v. KANDASAMI PILLAI*, 39 M. L. T. 656; A. I. R. 1928 Mad. 211 664

— Concurrent findings of fact—Non-interference on appeal.

Concurrent findings of the Courts in India on questions of fact (as, for instance, fraud and misrepresentation) will not be disturbed by the Judicial Committee on appeal. *P. C. BAIJNATH PRASAD SINGH v. KEDAR NATH GOENKA*, 54 M. L. J. 6; 5 O. W. N. 93; 47 C. T. J. 134; 1 L. T. 40 Pat. 18; 30 Bom. L. R. 115; 32 C. W. N. 481 P. O. 646

— Decree for relief not sought, legality of—*Suit for lambardari haq—Decree for muccadami haq.*

Where a plaintiff claims a certain amount as *lambardari haq* he cannot be given a decree for the amount as *muccadami haq*.

A Court should not grant a relief which is not sought for by the plaintiff nor find a case which has not been tried. *N. BANI BAI v. MAHADEQ* 659

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Petition "recorded", whether amounts to disposal.

A Court should either allow or dismiss a petition presented to it. An order simply stating "petition will be recorded" is no order at all and should not be passed on any petition. *M. MUNISWAMI MURALI v. MEENARSHI AMMAL*, (1927) M. W. N. 884; 54 M. L. J. 134; 27 L. W. 320; A. I. R. 1928 Mad. 215 **660**

Review—Duty of Counsel to see that application is placed before same Judge—Attempt to have application heard by another Judge, impropriety of.

An application for review must come before the Judge who passed the decision which is to be reviewed, and the Counsel for review should ask that the application be put before the Judge who decided the matter. It is contrary to all propriety that a Counsel should put in an application for review and attempt to get it heard by another Judge by styling his application as an application in revision. *A. SRIPAT NARAIN SINGH v. GABBAR RAI*, L. R. 8 A. 135 Cr.; 8 A. I. Cr. R. 337; A. I. R. 1927 All. 724; 25 A. L. J. 1010; 29 Cr. L. J. 88 **680**

Stay of criminal proceedings during pendency of civil suit.

When the subject-matter for adjudication before a Civil Court is the same as before a Magistrate, the Magistrate would be exercising a wise discretion in staying criminal proceedings pending the decision of the Civil Court even though the civil suit is filed during the pendency of the criminal proceedings. *L. PHUMAN SINGH v. EMPEROR*, 29 Cr. L. J. 47 **463**

Treating appeal as revision.

An appeal may be treated as an application for revision where no appeal lies. *L. OHARANJILAL v. RAJA RAM* **890**

Treating suit as application.

Where an independent suit is necessary a mere application may have to be dismissed; but where the plaintiff has adopted a more formal and elaborate procedure than he should have adopted in applying to the correct Court, no lack of jurisdiction is involved and the question becomes one of costs and of discretion. *C. IMPERIAL TOBACCO Co v. A. BONNAN*, 46 C. L. J. 455; A. I. R. 1928 Cal. 1 **277**

Pre-emption—Benami sale—Sale to co-sharer in stranger's name—Right of other co-sharers to pre-empt—Oudh Laws Act (XVIII of 1876), ss. 10, 13.

A co-sharer is entitled to exercise his right of pre-emption where a sale-deed is executed ostensibly in the name of a stranger even though the real beneficiary under the sale is another co-sharer. In the case of a *benami* sale, for purposes of pre-emption, the Court has only to see who the transferee is according to the proper construction of the deed.

The *benamidar* may have no beneficial interest in the property or business standing in his name but he represents in fact the real owner, and is in the legal position of such representative. *O. MANSUR ALI v. SULTAN*, 4 O. W. N. 952; A. I. R. 1927 Oudh 509 **539**

Suit by reversioner for declaration challenging alienation—Compromise of suit—Alienee re-selling land to reversioner—Suit for pre-emption by heir of alienee, whether competent.

Two sons as proprietors sold certain lands. Their collaterals instituted suits for declaration that the sales effected by the vendors were inoperative against

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their reversionary rights. After framing of issues but before evidence these suits were compromised. In pursuance of these compromises the vendors re-sold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. Two suits for pre-emption were instituted, one by a son of one of the original vendees and the other by a collateral of another vendee.

Held, that the suits for pre-emption were not competent inasmuch as besides the money that the reversioners had agreed to pay there was an additional consideration for the sales, namely, the withdrawal of the suits, and this part of the consideration was incapable of valuation in money. *L. HAMIR SINGH v. SUNDAR SINGH* **908**

Preliminary decree, nature of. See C. P. C., 1908, O. XXXIV R. 5, 6 **128**

Prerogative of Crown. See COMPANIES ACT, 1913, ss. 228, 229, 230 **27**

Presidency Towns Insolvency Act (III of 1909), ss. 6 (2) (c), 8 (1)—Calcutta Insolvency Rules, r. 5—Registrar in insolvency, jurisdiction of, to rescind order of discharge—Successive insolvencies—Rescission of order of discharge in prior insolvency—Creditors in prior insolvency, whether entitled to prove in second insolvency.

A person was adjudicated an insolvent by the Registrar in Insolvency in 1920. No assets were recovered and he was unconditionally discharged. He was again adjudicated an insolvent in 1925 and property which he had acquired subsequent to his first discharge vested in the Receiver. Meanwhile the order of discharge in the previous insolvency was cancelled by the Registrar on the ground that the insolvent had misled the Court, and the adjudication was revived. Creditors in the previous insolvency applied for participation of the assets in the later insolvency:

Held, 1) that the Registrar had power to cancel the previous order of discharge passed by him;

(2) that the Official Assignee, as the representative of the creditors in the first insolvency, was entitled to prove in the second insolvency and to receive dividends *pari passu* with the creditors in the second insolvency.

A Registrar in Insolvency has jurisdiction to pass an order rescinding an order of discharge that he himself has made, whether the application for rescission is opposed or unopposed. *C. In re J. M. GREGORY*, 54 C. 858; 1 L. T. 40 Cal. 37; A. I. R. 1928 Cal. 50 **326**

ss. 9 (e), 12 (c)—Attachment for over twenty-one days.—Act of insolvency—Application for adjudication—Limitation—Three months, when begin to run—Continuing attachment, whether gives continuing cause of action.

Under s. 9 (e) of the Presidency Towns Insolvency Act, the act of insolvency is committed immediately on the expiry of the definitely fixed period of twenty-one days and there is no recurring or continuing act of insolvency where the attachment is continued for more than twenty-one days.

The period of three months within which a petition for adjudication on the basis of such an act of insolvency should be presented, by a creditor under s. 12 (c) of the Act, therefore, begins to run from the date of the expiry of the twenty-one days even though the attachment is continued for more than

Presidency Towns Insolvency Act—consolid.

twenty-one days. *In re HYDERABAD HUSSEINBAI*, 29 Bom. L. R. 1455; A. I. R. 1927 Bom. 633 36

ss. 49. See COMPANIES ACT, 1913, ss 228, 229, 230 27

ss. 55, 56—*Alienation attacked under s. 55*
—*Burden of proof of invalidity—'Good faith',*
—*meaning of—Absence of good faith, proof of.*

The onus of proving that a transfer effected by an insolvent is void against the Official Assignee under s. 56 of the Presidency Towns Insolvency Act is on the Official Assignee; but the onus of proving good faith and valuable consideration in a case coming under s. 55 of the Act is on the garnishee.

Absence of good faith under s. 55 of the Act could be proved not only by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent but also by other circumstances.

If a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith. *M. OFFICIAL ASSIGNEE OF MADRAS v. MOIDEEN ROWTHER*, 39 M. L. T. 378; 26 L. W. 665; A. I. R. 1927 Mad. 1013; 53 M. L. J. 890; 50 M. 918 61

Presumption of voluntary execution. See C. P. C., 1908, s. 100 250

Principal and surety. See CONTRACT ACT, 1872, s. 134 481

Probate and Administration Act (V of 1881), s. 24—Probate—Will not proved—Probate of copy, whether can be granted.

In the absence of proof that the draft of a Will has been prepared under instructions from the testator, a Court cannot order the Probate of the draft when the execution of the Will has not been proved. *N. V. N. DATAR v. S. L. MAHAJAN* 531

Procession. See POLICE ACT, 1861, ss. 30, 30-A, 32 706

See POLICE ACT, 1861, ss. 30, 32 718

Promissory note—Description of maker in body of note as Managing Director—Unqualified signature—Personal liability.

Where the maker of a promissory note described himself in the body of the note as the Managing Director of a Company but signed his name without any qualification whatsoever and did not take any steps to indicate that he was signing the document not in his personal capacity but for and on behalf of the Company:

Held, that the mere description in the body of note as Managing Director had not the effect of excluding the personal liability of the maker. *C. SHYAM SUNDAR CHAKRAVARTY v. TITAGARH PAPER MILLS CO. LTD.* 46 C. L. J. 566; 32 C. W. N. 125; A. I. R. 1928 Cal. 123 848

Provincial Insolvency Act (V of 1920), s. 10—Applicant when entitled to declaration of insolvency—Inability to pay debts, proof of.

For purposes of being declared insolvent all that an applicant need show is that *prima facie* his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man or that his father allows him to cultivate some land is not sufficient to show that he can pay his debts. *L. THAKAR SINGH v. HARDIT SINGH* 574

Provincial Insolvency Act—1920—consolid.

ss. 56 (2), (b)—*Receiver—Sale of mortgaged property of insolvent free of mortgage—Commission of Receiver, calculation of—'Assets'.*

Where any part of an insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase-money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage, and it is only on such part that the Receiver is entitled to remuneration. *R. R. M. M. CHETTYAR FIRM v. UHLA BU*, 5 R. 623; A. I. R. 1928 Rang. 23; I. L. T. 40 Rang. 8 200

ss. 69, 70—*Order directing complaint to be made to nearest Magistrate of First Class—Debtor, whether should be called upon to show cause why such order should not be passed.*

Under s. 70 of the Provincial Insolvency Act, the Insolvency Court has the alternative of either enquiring into an offence itself or, instead of inquiring into the offence under s. 69, of making a complaint thereof in writing to the nearest Magistrate of the First Class having jurisdiction.

Section 70, cl. (1) does not provide that notice is to be served on the debtor to show cause why a complaint in writing should not be made to the nearest Magistrate of the First Class having jurisdiction. It only requires that a notice shall be served, calling on him to show cause why a charge or charges should not be framed against him by such Magistrate. *S. VIRJILAL VIRCHAND v. DHARAMDAS THAWERDAS* 486

s. 74 (ii)—*Summary administration of insolvent's estate—Appointment of interim Receiver, effect of—Purchaser in execution sale, rights of.*

When summary administration of the estate of a debtor has been ordered the property of the debtor under s. 74 (ii) of the Provincial Insolvency Act vests in the Court as a Receiver on the date of admission of the insolvency petition, in the sense in which the term is used in s. 28 (2) and not merely as an interim Receiver, and when the property is so vested it cannot, without the permission of the Court, be the subject of an execution sale.

But if property which has so vested in the Court is sold in execution without the permission of the Court, a purchaser who has bought in good faith is entitled to retain the property, and the creditors of the insolvent are entitled only to the sale-proceeds of the property as assets for distribution among them. *M. RAMANATHA MUDALIAR v. VIJAYARAGHAVALU NAIDU*, 39 M. L. T. 369; A. I. R. 1927 Mad. 983 34

Provincial Small Cause Courts Act (IX of 1887), s. 17—Setting aside ex parte decree without deposit or security, legality of—Dismissal of suit on date on which case is not fixed for hearing, legality of.

The provisions of s. 17 of the Provincial Small Cause Courts Act are imperative and it is not competent to a Court to set aside an *ex parte* decree in a Small Cause suit if the defendant fails either to deposit the amount under the decree or give security for its due performance.

An order dismissing a suit for non-appearance of the plaintiff on a date to which the case was not posted for hearing is *ultra vires* and illegal. *L. MAHESHA MAL- DAYAL DAS v. MUHAMMAD JAMIL* 830

Sch. II, Art. 1—*Suit for damages for use and occupation, whether triable by Small Cause Court.*

Provincial Small Cause Courts Act—consolid.

A suit against a trespasser for damages for use and occupation is triable by a Small Cause Court. *N. SRINIVAS BALAKISANDAS v. MUNICIPAL COMMITTEE, NAGPUR* 498

Sch. II, Arts. 8, 13—*Suit by shrotriendrar to collect rent and swatantram from tenant, whether of Small Cause nature.*

The words 'by reason of his interest' in Art. 13 of the Provincial Small Cause Courts Act confine the cesses or other dues contemplated by the Article to payments to be made to a person claiming to be entitled to them by reason of his interest in the immoveable property, and operate to exclude payments which a landholder receives not for his personal benefit but for some public or communal purpose.

A suit for *swatantram* which a *shrotriendrar* collects from his tenants towards the cost of the village agency does not come within Art. 13 and is not excluded from the jurisdiction of a Small Cause Court. *M. KRISHNASWAMI NAIDU v. SRIRAM SRIRAMULU NAIDU*, (1927) M. W. N. 826; 26 L. W. 676; 39 M. L. T. 490; 53 M. L. J. 727; A. I. R. 1928 Mad. 21 5

Arts. 8, 13—*Suit for fees payable to Municipality for permission to sell from sites within Municipal limits—Jurisdiction of Small Cause Court—Suit for rent.*

A suit to recover fees payable by a vendor of goods to a Municipality for permission granted to him by the Municipality to sell his goods from a site within the Municipal limits is cognisable by a Small Cause Court. It is neither a suit for rent within Art. 8 of Sch. II of the Provincial Small Cause Courts Act, nor a suit for dues payable by reason of an interest in immoveable property within Art. 13 of the said Schedule. *O. RAM LAL v. BADAL KHAN*, 1 Luck. Cas. 663; A. I. R. 1928, Oudh 99 491

Art. 35 (g)—*Contract of marriage—Breach—Suit for refund of money advanced, whether triable by Small Cause Court.*

A suit for refund of money advanced as consideration for a marriage, on breach of the contract of marriage is, in reality, a suit for damages in respect of the breach of contract of marriage falling within the scope of Art. 35 (g) of Sch. II of the Provincial Small Cause Courts Act and is not triable by a Small Cause Court. *N. GANPAT v. LAHANA*, 10 N. L. J. 258 803

Art. 35 (ii)—*Suit by landlord for value of trees illegally cut by tenant—Jurisdiction of Small Cause Court—Small Cause suit tried as regular suit—Appeal.*

A suit by a landlord for value of trees illegally cut by a tenant is not exempted from the jurisdiction of a Small Cause Court by reason of the provisions of Art. 35 (ii) of the Provincial Small Cause Courts Act where it does not appear from the allegations in the plaint that the act of the tenant constitutes an offence under Chap. XVII of the Penal Code.

No appeal lies from a decree passed in a suit which is really of a Small Cause nature even though it is erroneously tried as a regular suit. *O. RADHA BALLABH GUHA v. PANOHKARI SIK*, 46 C. L. J. 552; A. I. R. 1928 Cal. 153 859

Punjab Courts Act (VI of 1918), s. 41—*Finding of fact based on erroneous assumptions—Second appeal—Interference.*

Punjab Courts Act—consolid.

A finding of fact based on erroneous assumptions and unwarranted conjectures is liable to be set aside in second appeal. *L. NARAIN DAS v. BHEE RAM* 862

s. 41—*Second appeal—Judgment in Appellate Court not proceeding on pleas—Interference.*

A judgment of the Appellate Court which does not proceed upon the pleas of the parties is liable to be set aside in second appeal. *L. SARU KHAN v. JAN MUHAMMAD*, A. I. R. 1928 Lah. 43; I. L. T. 40 Lah. 17 313

s. 44,
See O. P. C., 1908, s. 115 901
See PUNJAB COURT OF WARDS ACT, 1903, s. 31 141

s. 44—*Error of law—Revision—Interference.*

A mere error of law is no ground for revision. *L. ALLAH DITTA v. SECRETARY OF STATE (N. W. RY.) FOR INDIA*, A. I. R. 1928 Lah. 102 829

Punjab Court of Wards Act (II of 1903), s. 31

Assumption of management by Court of Wards—Decree against ward—Deputy Commissioner's certificate, necessity of, to proceed with execution—Execution without certificate—Jurisdiction—Revision—Punjab Courts Act (VI of 1918), s. 44.

Execution of a decree against a person whose estate has come under the management of Court of Wards under the provisions of the Punjab Court of Wards Act must be stayed until the decree-holder files a certificate from the Deputy Commissioner that the claim has been notified in accordance with s. 26 of the Act. Where a Court proceeds with the execution in the absence of such certificate it acts without jurisdiction and the proceedings are liable to be set aside in revision. *L. COURT OF WARDS v. DAVIDASS*, 8 Lah. 351; A. I. R. 1927 Lah. 638; 28 P. L. R. 692 141

Punjab District Boards Act (XX of 1883), s. 31

Tax on professions, trades or callings according to income, legality of—Double income-tax—Jurisdiction—Civil Court's power to determine legality of tax.

If the method of assessment of a tax in reality makes the tax one on incomes, it is illegal and *ultra vires* even though it purports to be a tax on persons practising a profession or carrying on a trade or calling. The tax which can be imposed without the sanction of the Governor-General in Council on professions, trades or callings must be one which is not a second tax on the incomes of such persons, i.e., it must be a flat rate imposed by the tax on each profession, trade or calling or rather on all persons practising a particular profession or carrying on a particular trade or calling.

A Civil Court has jurisdiction to determine whether the imposition of a tax is illegal or *ultra vires* and to give relief if it has been levied from persons who for that reason are not liable to pay the same. *L. DISTRICT BOARD, SIALKOT v. SUBHAN MUHAMMAD KHAN*, A. I. R. 1928 Lah. 53; 29 P. L. R. 177 882

Pyatpaing, effect of—Evidence Act (I of 1872), s. 91.

The *pyatpaing* or report to the Revenue Authorities is signed not for the purpose of recording the transaction, but for reporting to the Revenue Authorities for revenue purposes what has been done. When all that a *pyatpaing* suggests is that a certain land is sold for a certain sum, it cannot bar oral evidence of the transaction under s. 91 of the Evidence Act. *R. MAUNG KIN LAY v. MAUNG TUN THAING*, 5 R. 679, A. I. R. 1928 Rang. 53 503

Railway Company—Reserved Accommodation—
Company agreeing to make endeavours to provide reserved carriage—Issue of necessary tickets—Contract, whether complete—Failure to supply carriage—Passengers' right to damages.

The plaintiffs applied to a Railway Administration for a reserved carriage. The Officiating Traffic Manager replied that endeavours will be made to supply the carriage and issued orders to his subordinates that a reserved carriage should be supplied. The necessary tickets were also issued to the plaintiffs by the booking clerk. No reserved carriage was available when the train arrived and the plaintiffs instituted a suit for damages against the Railway Company.

Held, that there was no complete agreement between the plaintiffs and the defendant Company inasmuch as the Company had merely stated that endeavours would be made to provide such a carriage, that the fact that the necessary tickets were issued did not amount to a completion of the contract, and that the plaintiffs were not, therefore, entitled to damages. *A B. N. W. Railway v. BAIJ NATH PRASAD*, 25 A. L. J. 899 **387**

Railways Act (IX of 1890), s. 72—Consignor sending illiterate person to deliver goods—Signature of such person to Risk Note, whether binding on consignor—Condition of package—Consignor agreeing in Risk Note that condition was unsatisfactory—Subsequent plea to the contrary, whether allowable.

If a consignor sends another person to deliver goods to a Railway Administration and that person signs the contract, the contract so signed by that person is binding upon the consignor as though he had signed it himself. It is immaterial whether that person was literate or illiterate, was authorised to sign or not authorised, or signed personally or as agent of the consignor.

If at the time of booking the Railway Company was dissatisfied and the person delivering the goods for carriage agreed that the condition of the packages was not satisfactory, it cannot afterwards be made a matter of objection in a suit upon the contract that the packages were in good condition. *C GREAT INDIAN PENINSULA RY CO. v. CHAKRAVARTY SONS & Co.*, 32 C. W. N. 53; 47 O. L. J. 32; I. L. T. 40 Cal. 25 **247**

s. 72—Risk Note Form B—Loss of goods—Liability of Railway Company—Wilful negligence.

In a suit for damages for loss of goods consigned under Risk Note in Form B, the Railway Company can only be made liable if it can be shown that the loss was occasioned on account of the wilful negligence on the part of the Railway Administration. *PAT JANKI DES v. EAST INDIAN RAILWAY COMPANY* **529**

s. 72—Risk Note Form B—Non-delivery of goods—Suit for damages—Burden of proof of negligence—Duty of Railway Company to produce their servants for examination, whether confined to Small Cause suits.

Per *Blackwell, J.*—Apart from suits in a Small Cause Court whatever may be the moral obligation upon a Railway Company to render facilities in discovering how goods entrusted to them under a special contract, and not as bailees, may have disappeared, there is no legal obligation upon them to call any evidence to show by examination-in-chief how a loss occurred, or to enable a plaintiff by cross-examination to prove this if he can.

Per *Jhaveri, J.*—In a suit against a Railway Com-

Railways Act—contd.

pany for non-delivery of goods consigned under Risk Note Form B the Railway Company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of the goods. This rule is not confined to suits in Small Cause Courts but applies to all the Courts in the country. *B SECRETARY OF STATE FOR INDIA v. AHMEDABAD GINNING & MANUFACTURING Co. LTD.*, 29 Bom. L. R. 1460; A. I. R. 1927 Bom. 638 **42**

s. 72—Risk Note B—Suit for damages for loss of goods—Burden of proving neglect of Railway—Theft from running train, onus of—Admission of theft, effect of.

Before a person who has consigned his goods under Risk Note B is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants. If and when he has succeeded in proving such neglect it will be open to the Railway Administration to claim immunity by proving that the theft was from a running train. The onus of proving that the Railway was guilty of wilful neglect lies clearly upon the plaintiff.

Where a Railway Company alleges theft from a running train but fails to prove it, the admission is not of theft at large but of a specific form of theft and the onus still lies on the plaintiff to prove neglect or theft by the Railway servants. *L SECRETARY OF STATE FOR INDIA v. SHEIK HAJI-BAKHA FAZAL DIN*, I. L. T. 40 Lah. 20 **226**

s. 72—Risk Note Form B—Suit for damages for non-delivery—Burden of proof of loss—'Loss,' meaning of.

In a suit against a Railway Company for damages for non-delivery of part of a consignment, unless the fact of the loss is admitted by the plaintiff, it is necessary for the Railway Company, to get the benefit of the clause in Risk Note B which exempts it from liability for loss, to show that the goods are lost, or at least to show, in the first instance that the goods are not then and there in the control of the Railway Administration, so that they might have been delivered to the proper consignee.

There may be a 'loss' within the meaning of Risk Note B although the loss is caused by theft of the servants of the Railway Administration or its agents or by wilful neglect of the Railway Administration itself. *C GREAT INDIAN PENINSULAR RAILWAY CO LTD. v. JESRAJ PATWARI*, 46 C. L. J. 428, 32 C. W. N. 76; A. I. R. 1928 Cal 65 **252**

s. 75—Risk Note Form B—Interpretation of note—Onus of proving dealings with consignment—Evidence of Railway servants, value of—Duty of Railway Company.

Under the new Risk Note Form B it is always safe for the plaintiff to give due notice to the Railway to disclose and, if not satisfied with the disclosure, to call upon the Railway to give evidence making this a portion of his pleas. On the other hand, it is desirable for the Railway whether called upon or not to take the precaution of disclosing the dealings in pleadings and to inquire from the Court whether it would require further evidence thereon other than pleadings quoted by such relevant copies of entries from books as the Railway might think fit to put in with its pleadings or at the time of production of documents.

Railways Act—*Continued*.

A Court should not disbelieve a Railway servant merely on the ground that he is a Railway servant and that, therefore, he is bound to state that he had done his duty. At the same time where possible the Railway should support the oral evidence of its servants by books which should be proved to have been duly kept. But before the Court can disbelieve the Railway servants the plaintiff must cross-examine those servants or otherwise prove that relevant books could have been forthcoming and that there was no reason for their non-production. If this is done it is, of course, open to the Court to disbelieve the oral evidence on the ground that the corroborative evidence of the books had not been produced in the case. *L. SECRETARY OF STATE FOR INDIA v. TULSI DAS-KISHEN DAYAL*, A. I. R. 1928 Lah. 56. 801

s. 75, Sch. II, cl. (a)—"Gold manufactured or unmanufactured," whether includes sweepings from goldsmith's shop.

Sweepings and gatherings from a goldsmith's shop from which gold is separated do not come within Sch. II, cl. (a) of the Railways Act. *L. ALLAH DITTA v. SECRETARY OF STATE FOR INDIA*, A. I. R. 1928 Lah. 102. 829

s. 77—Letter to Agent threatening to sue for price—Notice—Suit for damages against carrier—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 81.

A consigned four boxes to B by Railway. Upon the goods reaching the destination B refused to take delivery as one of the boxes was not his and contained goods of a value considerably less than the goods consigned to him and insisted on taking open delivery, which was at first refused. On 16th July, 1923, B wrote a letter to the Agent mentioning the facts and intimating his intention to claim the price. Open delivery was subsequently allowed:

Held, (1) that the letter was a sufficient notice under s. 77 of the Railways Act;

(2) that the suit was one against a carrier for compensation for non-delivery of goods and limitation began to run from the date on which open delivery was permitted. *O BALA PRASAD v. B. N. W. Ry. Co.*, 4 O. W. N. 909; A. I. R. 1927 Oudh 478. 311

s. 113—Duty of passenger to produce ticket on demand—Failure to produce—Levy of penalty—Subsequent production of ticket—Passenger's right to refund—"With him", meaning of.

A passenger from whom excess fare and penalty are realised by a Railway Administration for failure to produce his ticket on demand is not entitled to a refund of the same on producing the ticket later on.

The words 'with him' in s. 113 of the Railways Act must be construed as meaning that the ticket is on the passenger's person, and under the said section it is the duty of a Railway passenger to have in his possession immediately available throughout the journey, the ticket which entitles him to travel. *N. G. I. P. Ry. Co v. MAHADEO BARI*, 23 N. L. R. 121; A. I. R. 1918 Nag. 30. 420

s. 75
Sch. II, cl. (a). See RAILWAYS ACT, 1890, 829

Recorded. See PRACTICE
Record of Rights—Presumption of correctness, rebuttal of, by evidence of subsequent date. 660

There is no rule that the presumption of correctness of the Record of Rights cannot be rebutted by producing evidence of a date subsequent to the Record of Rights. *PAT DURGA PRASAD THAKUR v. BASAWAN PANDAY* 272

Registration Act (XVI of 1908), ss. 17, 49—

Compromise decree relating to immoveable property—Registration, necessity of.

Where the terms of a compromise relating to immoveable property have been embodied in a decree its registration is unnecessary. *L. GANESHI LAL v. FIRM SHRO SINGH-RAI NIHAL SINGH*, 9 Lah. L. J. 566. 826

Religious endowment—Mutt—Mahant—Agreement to transfer property—Absence of necessity—Agreement, whether 'lawful'—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.

A mahant has no absolute right over the properties of the sanghat. He is a mere trustee and he can transfer the properties belonging to the mutt only for legal and justifying necessities of the mutt.

An agreement by a mahant to transfer the property of the mutt, even if it is proved to be true, is not a lawful agreement which can be enforced under the provisions of O. XXIII, r. 3 of the Civil Procedure Code where there is no necessity for such transfer. *PAT ANANDILAL v. JAGANNATH DAS*, 9 P. L. T. 214. 645

Riparian owners. See O. P. C., 1908, ss. 109, 110. 538

Sale of goods—Payment of advance, whether constitutes deposit—Right of vendor to retain amount on default by purchaser.

In mercantile contracts for sale of goods, when a seller accepts an "advance" from the purchaser, he cannot be held to take the amount, in the absence of evidence to the contrary, as a deposit with all its implications under the Common Law, so as to entitle him to retain the money in case of default by the purchaser in the performance of the contract. *M. DESU RATTAMMA v. KAKARAPARTHI KRISHNAMURTHI*, 54 M. L. J. 40. 482

Saranjam—Resumption—Saranjamdar, whether entitled to claim occupancy rights—Right of Government to levy rent—Grant of revenue only, effect of—Decisions as to inams, applicability of.

A saranjamdar is not entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made, or held by others then but forfeited on one ground or another during the subsistence of the grant. On resumption of a saranjam by the Government, such lands also become the property of the Government who become entitled to levy not merely the Government revenue assessed on such lands but actual rent.

This principle applies not only to grants of the soil itself but also to grants of the land revenue only.

[Incidents and history of saranjam grants considered.]

Although the word 'inam' is sometimes vaguely applied to all grants of revenue-free land without reference to perpetuity or any specified conditions, it would be unsafe to apply to a peculiar grant like the Mahratta Saranjam rules which are held applicable to grants in perpetuity. *P. C. SECRETARY OF STATE FOR INDIA v. GIRJABAI*, 53 M. L. J. 431; A. I. R. 1927 P. O. 238; 39 M. L. T. 463; 29 Bom. L. R. 1503; 46 O. L. J. 420; 51 B. 957; 26 A. L. J. 32; 27 L. W. 124; 54 I. A. 35; 32 C. W. N. 329 (P. O.). 1

Sea Customs Act (VIII of 1878), ss. 18, 19A. See TORTS. 277

Slander of goods. See TORTS. 277

Specific Relief Act (I of 1877), s. 42. See O. P. C., 1908, O. XXI, s. 63. 368

Specific Relief Act—*consolid.*

s. 42—*Hindu reversioner, whether entitled to sue for declaration of his right—'Right,' meaning of—Useless declaration, granting of.*

Section 42 of the Specific Relief Act applies only to vested rights and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession.

A Court will not grant a declaration which is perfectly useless.

Plaintiffs, alleging that they were presumptive heirs of the last male holder, sued for a declaration that the defendant, a Hindu widow, was in possession of certain properties not as heiress to her husband but as mother and heiress of her son, and that the plaintiffs were the future heirs to the property after the defendant's death. A daughter of the defendant and the daughter's son who were in existence and who would be entitled to succeed the defendant in preference to the plaintiffs if she was holding as heiress to her husband were not impleaded as parties:

Held, that the declaration could not be granted inasmuch as the plaintiffs had no legal right but only a mere *spes successionis*, and inasmuch as the declaration would further be an entirely useless one as it would not bind those persons who may claim the estate upon the death of the defendant. *Pat PRANLACHHI KUR v. JAGESHAR SAHI*, 9 P. L. T. 210

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Stamp Act (I of 1879). See EVIDENCE ACT, 1872, s. 91

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Stamp Act (II of 1899), s. 2. See EVIDENCE ACT, 1872, s. 91

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s. 36—*Document admitted after objection—Admissibility of document, whether can be questioned subsequently.*

Once a document has been admitted in evidence the admission of such a document cannot be questioned whether the document was admitted with objection or without objection. The operation of s. 36 of the Stamp Act is not confined to cases where a document has been admitted without objection. *Pat. JAGDIP SINGH v. FIRANGI SINGH*, 6 Pat. 765; A. I. R. 1928 Pat. 135

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Succession Act (X of 1865), ss. 54, 71—*Oudh Estates Act (I of 1869), s. 19—Will of Oudh taluqdar—Request in favour of attesting witnesses—Oral evidence showing that legatees did not sign as attesting witnesses, but signed for some other purpose.*

A Will executed by an Oudh taluqdar contained the following clause (para. 8):—"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will may be acted upon fully and they may not quarrel among themselves after my demise". The testator's sons accordingly appended their signatures to the Will:

Held, that although the position of the signatures created a presumption that they had been attached by the sons as attesting witnesses, such presumption was capable of being rebutted by parole evidence narrating what actually occurred at the time of the execution of the Will.

Held, also, on the evidence, and agreeing with the concurrent findings of the lower Courts) that the sons did not sign the Will as attesting witnesses,

Succession Act—1865—*consolid.*

and, therefore, the bequests in their favour were not void under s. 54 of the Succession Act, 1865, read with s. 19 of the Oudh Estates Act, 1869. *P C SHIAM SUNDAR SINGH v. JAGANNATH SINGH*, A. I. R. 1927 P. O. 218; 4 O. W. N. 1205; 30 Bom. L. R. 110; 27 L. W. 7; I. L. T. 40 All. 11; 47 O. L. J. 101; 26 A. L. J. 28; 54 M. L. J. 43; 32 O. W. N. 305; I. L. T. 40 All. 64 (P. O.)

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s. 71. See SUCCESSION ACT, 1865, ss. 54, 71

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s. 187—*Unprobated Will, whether can be pleaded in answer to claim of heir-at-law.*

A defendant resisting a claim made by the plaintiff as heir-at-law can rely in defence on a Will executed in his favour at Madras in respect of property situate in Madras when the Will is not probated and no Letters of Administration with the Will annexed have been granted, provided, however, that he does not do so in order to establish a right under the Will.

Where in a suit by the heir-at-law, the defendant relies on and pleads a Will, the mere existence of the Will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the Will and this the defendant cannot do by virtue of s. 187 of the Succession Act.

There is nothing in s. 187 of the Succession Act which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants. *M GANSHANDOSS NARAYANDOSS v. GULAB BI BAI*, 39 M. L. T. 431; 53 M. L. J. 709; 23 L. W. 697; A. I. R. 1927 Mad. 1054; 50 M. 927

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Succession Act (XXXIX of 1925), s. 317—*Probate—Inventory and accounts, how to be filed—Procedure—Remedy of parties interested.*

The intention of the Legislature under s. 317 of the Succession Act appears to be that the inventory and accounts filed under that section should, so far as the proceedings on the Testamentary Side are concerned, be regarded as final. The protection afforded to parties interested in the Will is that if the inventory and the accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Penal Code. Another remedy open to the interested parties would be to file an action against the executor or administrator questioning the correctness of the accounts.

The practice of the Bombay High Court is to require an executor to file the inventory and accounts with the Testamentary Registrar. The executor is not required to pass his inventory and accounts before the Commissioner for taking accounts. *B BAI PANBAI v. MORARJI KANJI*, 29 Bom. L. R. 683; A. I. R. 1927 Bom. 438

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Succession Certificate Act (VII of 1889), s. 16

—*Issue of certificate to one claimant—Time given to other claimant to sue—Dismissal of suit on preliminary ground, effect of—Interest on debt, right to.*

Where on the death of a person disputes arose between his widow and his brother in respect of a debt due to the estate and a Succession Certificate was issued to the widow on her undertaking not to collect the amount in a month from the date of the certificate so as to enable the brother to institute a suit and to prove an alleged Will set up by him, and the suit instituted by the brother was dismissed on the ground that he had not obtained Probate:

Succession Certificate Act—consolid.

Held, (1) that on the dismissal of the suit the creditor was bound to pay the amount to the widow as s. 18 of the Succession Certificate Act afforded him a complete indemnity;

(2) that the widow was entitled to interest from the date of demand. *M SITHAMBARAVADIVU AMMAL v. THIRUPALKANDANATHA PILLAI*, 39 M. L. T. 405; A. I. R. 1928 Mad. 56. 125

Tax on professions, trades or callings according to income, legality of. See *PUNJAB DISTRICT BOARDS ACT, 1883*, s. 31. 882

Thumb impression. See *CRIMINAL TRIAL*. 212

Timber. See *TRANSFER OF PROPERTY ACT, 1882*, s. 3. 421

Toka land. See *LAND ACQUISITION ACT, 1894*, ss. 11, 23 (2). 31

Torts—Causing detention of goods by Customs Authorities, whether actionable—Suit for damages—Limitation—Limitation Act (IX of 1908), ss. 36, 40—Sea Customs Act (VIII of 1878), ss. 18, 19A—Indian Merchandise Marks Act (IV of 1889)—Wrongful institution of civil suit—Action for damages, whether lies—Wrongfully obtaining injunction, whether actionable apart from malice—Undertaking for damages, how enforced—Separate suit or application to Court—Slander of goods, when actionable—Praising one's goods as superior to another's, whether slander—Malice, what constitutes—Special averment of slanderous words, necessity of.

The plaintiff and the defendants were dealers in Gold Flake cigarettes. When the plaintiff's goods arrived in Bombay and Calcutta, the defendants who had, up to then, exclusive rights of selling the said cigarettes in India applied to the Collectors of Customs in Bombay and Calcutta for orders for detention of the plaintiff's goods, on the ground among others that the importation of the said cigarettes by the plaintiff infringed their trade mark. The plaintiff's goods were accordingly detained by the Collectors. The defendants then filed two suits, one in Calcutta on the 11th May, 1922, and another in Bombay on the 22nd May, 1922. In the High Court of Calcutta the defendants obtained a temporary injunction against the plaintiff and this injunction was dissolved on the 8th June, 1922, on the plaintiff undertaking to place a certain sum in fixed deposit. In Bombay the defendants gave notice of motion for an injunction on the 23rd May, 1922, but on the plaintiff undertaking not to sell, the injunction was dissolved on the 19th June, 1922. The defendants' suits were finally dismissed by the Privy Council. Thereafter, on the 21st January, 1925, the plaintiff filed a suit against the defendants for damages (a) for wrongfully and maliciously obtaining orders of detention from the Collectors, (b) for wrongfully and maliciously prosecuting the civil suits, (c) for similarly obtaining an injunction against the plaintiff, (d) for having applied for an injunction in the Bombay Court and compelled plaintiff to give an undertaking not to sell, and (e) for publishing various statements slandering the plaintiff's goods:

Held, (1) that the plaintiff was not entitled to any damages for detention by the Collectors as there was no mis-statement or malice on the defendants' part, and as the cause of action for such a claim was further barred by limitation under Art 36 of Sch. I of the Limitation Act;

(2) that the plaintiff was not entitled to damages for the institution of the civil suits inasmuch as the

Torts—consolid.

bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause will not support a subsequent action for malicious prosecution;

(3) that the plaintiff was not entitled to damages for injunction apart from any special undertaking given by the defendants inasmuch as apart from malice or want of probable cause a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights;

(4) that the plaintiff was entitled to enforce an express undertaking for damages given by the defendants to the Court in the former suit at the time of the granting of the injunction, even though his proper remedy would have been to have applied to that Court to enforce the undertaking, and not by way of a separate suit;

(5) that the plaintiff could not seek for any relief in the suit, in respect of his damages relating to the injunction proceedings in the Bombay Court in view of the consent order and undertaking in that Court and that this claim also was further barred by limitation;

(6) that the plaintiff was not entitled to recover any damages on account of slander of goods inasmuch as the defendants had stated that their goods were superior to those of the plaintiff, with a view to push their own business and not with the direct object of injuring the plaintiff's business.

Per Rankin, C. J.—An undertaking to the Court in a suit is not such an undertaking as amounts to contract with the other party, nor does it ground any action at Common Law. It is to be enforced by application to the Court to which it was given and in the suit or proceeding in which it was given. The Court ought to be asked to enforce the undertaking within a reasonable time but there is no statutory period of limitation for enforcing the same.

Threats to litigate or threats to boycott are unlawful only where the purpose of the threat is "wilfully and ultroneously to injure the trade of another" as distinct from the purpose to forward one's trade.

If the words are uttered to an individual and repetition is not intended except to a limited extent general loss of custom cannot ordinarily be a direct and natural result of the limited slander.

Per C. C. Ghose, J.—In an action for damages for slander of goods the precise words complained of must be set out in the statement of claim; it is not sufficient to allege that the slanderer used such and such words or to that effect. *C IMPERIAL TOBACCO CO. v. A. BONNAN*, 46 C. L. J. 455; A. I. R. 1928 Cal. 1. 277

Joint wrong-doers—Suit for contribution.

Though as a general rule the liability of joint wrong-doers in tort is joint and several, this is not an inflexible rule which needs no relaxation according to the view that is taken of the jointness of the act on facts which constitute the wrong. *C KAMALA PRASAD SIKUL v. CHANDRA NATH PRAMANIK*, I. L. T. 40 Cal. 40. 300

Transfer of Property Act (IV of 1882), s. 3—

Standing "timber"—Karuvela and velveta trees.

Even if the term "timber" in s. 3, Transfer of Property Act, is taken to mean only such trees as are fit to be used in building and repairing houses, *Karuvela* and *velveta* trees are 'timber' as they are

Transfer of Property Act--contd.

used for building purposes in the Southern Districts of the Madras Presidency.

Obiter.—The term "timber" in s. 3, Transfer of Property Act, cannot be limited to the class of trees the timber of which is used for building purposes. **M THINA RUNA ANA VELLACHAMI SREVAI v. SAMUSIVA ROWTHER** 421

— **s. 43.** See EVIDENCE ACT, 1872, s. 108 439

— **s. 43**—Sale by Official Receiver of insolvent's properties before vesting order—Sale, whether effective.

A sale by an Official Receiver of properties belonging to an insolvent, before the passing of a vesting order becomes effective when a vesting order is subsequently passed by virtue of s. 43 of the Transfer of Property Act. **M MUTHIAH CHETTIAR v. DORAISWAMI PILLAI**, (1927) M. W. N. 791; 27 L. W. 182 641

— **s. 51**—Voidable lease by guardian—Repudiation by third person for minor, whether effective—Alienee's right to improvements made bona fide.

A transaction entered into by the guardian of a minor, cannot be repudiated by a third person on behalf of the minor, unless he takes proceedings in Court on behalf of the minor and is allowed by the Court to act as next friend.

Where an alienation made by the guardian of a minor is set aside, the purchaser is entitled to reimbursement of the expenses *bona fide* incurred by him in improving the property before he had any legal and valid notice of the claim on behalf of the minor to set aside the transfer. **M VENKATARAMAN v. PONNUSAMI PADAYACHI**, A. I. R. 1927 Mad. 1023 131

— **s. 52**—*Lis pendens*—Transferee, how far bound by decree—Mortgage pending litigation—Compromise decree—Mortgage-debt and part of mortgaged properties allotted to stranger—Mortgagee, whether bound by such decree.

During the pendency of a litigation concerning certain properties between A and B, A mortgaged a portion of them to C. The litigation was then compromised and under the compromise decree half of the properties mortgaged to C was given to A and the other half to B, and it was further provided that B should discharge the whole of the mortgage-debt due to C. In a suit by the representatives of C to enforce the mortgage against the mortgaged properties in the hands of the representatives of A and B:

Held, Per Sulaiman and Mukerji, J.J. (Lindsay, J., dissenting), that the mortgage was enforceable only against the half of the mortgaged properties which was held by A's representatives and was not enforceable against the other half given to B under the compromise decree.

The rule of *lis pendens* is enacted for the benefit of the 'other party' to the litigation and not for the benefit of the party making the transfer.

Though a transferee *pendente lite* is a representative of the transferor and bound by the decree so far as it goes against his transferor he cannot for all purposes be treated as if he were a party to the suit.

Per Lindsay, J.—A transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and, if he is bound by the decree, he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part. **A SHYAM LAL v.**

Transfer of Property Act--contd.

SOHAN LAL, 25 A. L. J. 777; A. I. R. 1928 All. 3; J. L. T. 40 All. 33 255

— **s. 53**—Alienation partly without consideration, validity of—Setting aside alienation—Charge for consideration paid, whether can be given.

When the question is whether an alienation was for the purpose of defeating or delaying the creditors, if it is proved satisfactorily that only a small portion of the consideration recited in the document did really pass, it is open to the Court to come to the conclusion that the transaction was intended to defeat or delay creditors. In such a case the proper order of the Court should be to set aside the transaction as a whole, because the transaction which is intended to defeat or delay creditors cannot be good in part and bad in part, and in so setting aside the alienation, the Court cannot allow a charge in favour of the alienee even to the extent of the consideration which actually passed.

When a person buys property or gets a mortgage of property for a consideration which is far short of that mentioned in the document, it cannot be said that he is a *bona fide* alienee or mortgagee. **M RAJAHBHADDHAR MUDALIAR v. THIRUVENGADA MUDALIAR**, A. I. R. 1928 Mad. 20 651

— **s. 53**—Transfer in good faith and for consideration, validity of—Presumption of intention to defeat creditors, when arises—Purchaser, whether bound to see to application of purchase-money.

Nothing in s. 53 of the Transfer of Property Act bars the right of any transferee in good faith and for consideration. A transfer cannot be presumed to have been made with the intent to defeat or delay creditors and, therefore, to be voidable at the option of the creditors, if it was not made gratuitously or for a grossly inadequate consideration, even though its effect has been to delay creditors.

It is no part of the duty of a purchaser to see what is done with the purchase-money. **PAT DEOKI NANDAN SINGH v. JAWAD HUSSAIN** 355

— **s. 55 (1) (g)**—Implied covenant to discharge encumbrances, whether runs with land.

The covenant under s. 55 (1) (g), Transfer of Property Act, imposing liability on a vendor of immoveable property to discharge all encumbrances in the property existing at the time of sale except where the property is sold subject to encumbrances does not run with the land. **M VISALAKSHI AMMAL v. VEERASWAMI NAICKER**, A. I. R. 1927 Mad. 1072 866

— **s. 58 (c)**—Mortgage by conditional sale—Construction—Apparent sale-deed with proviso for redemption whenever executant pays, effect of—Time for payment, whether essential to constitute mortgage by conditional sale—Expressions 'such payment' and 'on a certain date' in s. 58 (c), scope of.

A document which was for the greater part of its length an out-and-out sale-deed, contained a proviso at the end "provided that whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on a stamp-paper with regard to these lands in favour of the individual No 1, get it registered, give possession of the lands, etc., and return all the documents relating hereto."

Held, that the document was clearly an ostensible sale with a condition that on payment being made, the buyer shall transfer the property to the seller

Transfer of Property Act—contd.

and was, therefore, a mortgage by conditional sale within s. 58 (c) of the Transfer of Property Act.

The fixing of a certain date for payment is not an essential feature of a mortgage by conditional sale.

The expression 'such payment' in s. 58 (c), Transfer of Property Act, refers only to the payment of the mortgage amount and the expression 'on a certain date' must be construed as referring to the default and not to the payment. *M. PADMANABHA AYYAR v. SITARAMA AYYAR*, 26 L. W. 586; A. I. R. 1928 Mad. 28; 51 M. L. J. 96. 158

—s. 60—*Usufructuary mortgage by members of joint family—Suit for redemption by purchaser of equity of redemption from one brother against purchaser of equity of redemption from other brother—Partial redemption, whether permissible.*

Two brothers who were members of a joint Hindu family executed a mortgage of certain specific items of family property to the defendants. The plaintiff who had purchased a half share in the equity of redemption from one of the brothers brought a suit for redemption against the defendants who had purchased the share of the other brother:

Held, that it was open to the Court to allow the defendants to retain one-half of the property and decree redemption of the other half. *M. KANIYUR GANAPATHI BHATTA v. EERU BHANDARY*, A. I. R. 1927 Mad. 1039; 27 L. W. 206. 196

—ss. 60, 67 (d), 82—*Mortgagee, whether bound to distribute his debt rateably upon mortgaged property.*

As between a mortgagee and the holders of the equity of redemption, the former is not bound to distribute his debt rateably upon the mortgaged properties but may recover the debt from any portion of the mortgaged properties. *S. ABDUL RAHIM v. ABDUL HUSSAIN*. 872

—s. 100—*Chit fund—Security-bond—Words creating charge—Provision for execution of mortgage-deed on demand—Charge, creation of, whether prevented.*

The introduction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed, does not determine the question whether the instrument creates a present charge or not. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it the less a present charge.

A prize holder in a *kuri-chit* in furnishing security according to the rules of the *chit* executed a deed stamped as a mortgage by which he undertook, when required by the stake-holder, to give him a mortgage on his property; but there was a later clause in the deed which provided that "we and the properties mentioned in the partition deed are liable for any arrears of future subscription":

Held, that the deed created a charge on the immovable properties in respect of such arrears. *M. MANKADA KOVILAGATH RAO v. OFFICIAL RECEIVER, SOUTH MALABAR*, 39 M. L. T. 401; 53 M. L. J. 720; A. I. R. 1927 Mad. 1069. 508

—s. 106, application of, in Punjab—Monthly tenant—Notice of ejectment—Notice not expiring with end of tenancy month, validity of.

Transfer of Property Act—concl'd.

There is no authority for the strict application in the Punjab of the technicalities required by s. 106 of the Transfer of Property Act and unless specifically provided for by the contract, a notice for ejectment of a lessee holding on a monthly rent need not expire with the end of a month of the tenancy.

A lease was executed on the 9th October, 1923, for 11 months on a monthly rent terminable at any time by two months' previous notice. Two months' notice was given on the 21st July, 1924. In a suit for ejectment it was contended that the notice was not valid inasmuch as it did not expire with the end of the month of the tenancy:

Held, that the notice was a valid one. *L. RAM NATH v. BADRI NATH*. 537

—s. 114. See LANDLORD AND TENANT. 477

Trespasser. See PENAL CODE, 1860, ss. 143, 441. 691

Trial by Jury. See PENAL CODE, 1860, s. 391. 341

Trusts Act (II of 1882), ss. 49, 61—*Trustee—Investment of funds—Jurisdiction of Court to interfere with trustee's discretion on summary petition.*

A District Judge has no jurisdiction to interfere with the discretion of a trustee in the investment of trust funds on a summary petition. He can do so only in a properly instituted suit. *L. TARA CHAND v. HARNAM SINGH*. 672

U. P. Land Revenue Act (III of 1901), ss. 118,

119—*Partition by Revenue Court—Party in possession of dwelling house—Right to retain possession on payment of ground rent of land allotted to another—Partition of building and orchards—Civil Court, whether can interfere.*

Under s. 118 of the U. P. Land Revenue Act, the Court is bound to permit the co-sharer who is actually in possession of a dwelling house to retain it on the condition that he pays a reasonable ground rent and under s. 119 the Court may apply the same principle to an orchard.

When the Revenue Court actually makes the partition both of the land on which houses are situated and of orchards, the Civil Court has no right to interfere with the partition made by the Revenue Court in accordance with the aforesaid sections.

A Revenue Court has jurisdiction to partition a house site although it cannot divide the house which stands on it.

The Civil Court cannot question the final allotment made at the partition simply because some intermediate orders made in the course of partition have not been properly carried out. *O. HANUMAN PRASAD v. MIR IRSHAD ALI*, 1 Luck. Cas. 576; A. I. R. 1927 Oudh 526. 149

—s. 147—*Citation to appear, legal nature of—Disobedience, whether offence—Penal Code. (Act XLV of 1860), s. 174.*

A citation to appear issued under s. 147 of the U. P. Land Revenue Act, 1901, is not a mere invitation but an order to the defaulter to appear at the time and place named therein within the meaning of s. 174 of the Penal Code and intentional disobedience of it is an offence under that section. *O. CHANDRIKA SINGH v. EMPEROR*, 4 O. W. N. 1211; 29 Or. L. J. 94; A. I. R. 1928 Oudh 122. 685

U. P. Town Areas Act (II of 1914), ss. 22, 26—*Right to sweepings and refuse—Power of District*

U. P. Town Areas Act—concl'd.

Magistrate to interfere with rights of private owners—Jurisdiction of Civil Court.

Under the provisions of s. 26 of the U. P. Town Areas Act, although the District Magistrate has power to make an order prohibiting any body from depositing or storing manure, refuse or other offensive matter in a manner prejudicial to public health, comfort or convenience, he has no power to make an order directing that collections of such matter belonging to other persons may be made by the town area authorities, whether they do or do not return a portion of their sale-proceeds to the rightful owner.

Where a District Magistrate makes such an order he assumes an authority for which there is no justification whatever and his order can be questioned in a Civil Court. *O AMIR AHMAD v. TOWN AREA MAGISTRATE, LAHARPUR* 820

Usurious Loans Act (X of 1913), s. 3, applicability of.

The Usurious Loans Act can have no application to a mortgage executed in 1911, long before it was enacted. *N GANGADHAR RAO v. PARASHRAM* 38

Usury Laws Repeal Act (XXVIII of 1855), s. 2—Interest—Power of Court to reduce interest on equitable grounds.

A Muhammadan woman and her son who was 45 years of age executed a mortgage to the plaintiff for Rs. 827 agreeing to pay interest thereon at 25 per cent. per annum and with a further stipulation that if the debt was not paid within one year the interest should be compounded yearly. The plaintiff giving credit for Rs. 1,600 received as interest sued for Rs. 4,224 further interest and Rs. 827, the principal. The trial Court allowed simple interest alone on equitable grounds:

Held, that the circumstances of the case did not warrant the inference of any undue influence, that the plaintiff was entitled to compound interest as agreed upon and that the Court had no power to reduce the same. *R NABIN CHANDRA DEB v. MI ROBEYA*, 5 R. 619; *A. I. R. 1928 Rang.* 7 181

Vendor and purchaser. *See EVIDENCE ACT, 1872.* s. 92. 358

See LIMITATION ACT, 1908, SCH. I, ART. 97. 804

—*Agreement by purchaser to discharge prior encumbrance—Breach of agreement—Damages—Liability of purchaser's representatives—Contract Act (IX of 1872), s. 37.*

The plaintiffs whose properties were under a mortgage sold half of the same to the defendants' father. The latter agreed as part of the consideration to discharge the prior mortgage and free the plaintiffs' half share from the encumbrance. He failed to do so. The mortgagee sued for foreclosure and the entire property was foreclosed. In a suit for damages by the plaintiffs:

Held, (1) that there was a breach of contract on the part of the defendants' father and that the defendants, as his legal representatives were liable to pay damages for the same;

(2) that the amount of damages was the value of the half of the properties which the plaintiffs lost under the foreclosure decree. *O BISHUN DAYAL v. GAYA PRASAD*, 4 O. W. N. 1262; *A. I. R. 1928 Oudh* 148 831

—*More agreement, whether can convey title, Where the law requires a conveyance for the*

Vendor and purchaser—concl'd.

purpose of transfer of title this cannot be done by a mere agreement. An agreement by a person giving up his right to a property and acknowledging another's right of primogeniture cannot, therefore, convey his title to the latter. *C BHUPENDRA NARAYAN SINHA BHADUR v. RAJESWAR KRASAD BHAKHT*, 32 O. W. N. 16; *46 C. L. J. 307* 117

—*Void and voidable transactions—Bona fide purchaser, position of.*

Where property has been transferred under a voidable contract some title passes to the transferee which remains till the contract is avoided. On the other hand, in cases of void transfers no title whatsoever passes to the transferee. If a person who has taken property under a voidable contract transfers it to a stranger who purchases it for consideration and in good faith, such a stranger would be completely protected.

A person who has acquired property under a voidable title can himself give a good title to that property to a bona fide purchaser or mortgagee from him, who deals for value and has no notice of the defects in the title. *A SHIKAR CHAND v. JAGMANDAR DAS*, 25 A. L. J. 873; *A. I. R. 1928 All.* 29 519

Wajib-ul-arz—Contract of pre-emption for fixed period, effect of. *See AGRA PRE-EMPTION ACT, 1922,* s. 4, cls. (1), (2), (3) 372

Will. *See EVIDENCE ACT, 1872, s. 115* 20

—*Construction—Absolute estate with clause that if devisee does not appoint successor estate shall descend to testator's heirs—Validity of disposition—Gift over—Defeasance clause—Executory devise—Condition prescribing succession unknown to law—Principles relating to construction of Wills—'Malik', meaning of.*

A testator after making dispositions of certain property in favour of his son's widow M, and his grandson's widow P, provided as follows: 'On the death of M or P, the survivor will become the proprietor of the entire property or of that property which exists then (that is, at the time of the death of the lady who dies first) with power of transfer and then she will have all the powers of sale mortgage, gift and bequest; after the death of the last survivor, the property which she will leave without nominating a successor will devolve on the legal heirs of the declarant (that is, the testator), but as against the said Musammats and their successors whom they will nominate no one will have any claim.' In a suit by the heir of the testator against the heirs of P who survived M and died without appointing any successor:

Held, (1) that P took an absolute estate under the Will;

(2) that there was no executory gift in favour of the heirs of the testator, and that even if there was such a gift it was invalid in law;

(3) that the estate taken by P was not an estate defeasible in the event of her not making a Will;

(4) that the testator had by the latter portion of the Will merely endeavoured to lay down a line of succession contrary to the succession known to the law, which he had no power to do;

(5) that the heirs of P were entitled to the estate on P's death in preference to the heir of the testator.

Per Stuart, C. J.—Where a testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an

Will—contd.

absolute estate, it is necessary to decide what were his real intentions. Did he mean to grant an absolute estate? If he has done so, he cannot reduce the powers of the owner; and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint. But if, on the other hand, it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute. This is the law both in England and in India.

Per Wazir Hasan, J.—It is a universal rule of construction that the "grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

"In construing Wills in all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i. e.*, to construe the Will. In so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair.' But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality 'unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent to carry out of the testator's true intentions."

Rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country.

"A Court cannot speculate upon what the testator may have intended to do or may have thought that he has actually done. It cannot give effect to any intention which is not expressed or plainly implied in the language of the Will.

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case.

If a testator makes an absolute gift of property

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to A, any gift over of what may be left undisposed of by A is repugnant and void.

Per Misra, J.—The word '*malik*' when used in a Will or a gift imports full proprietary rights unless there is something in the context to qualify it.

Where clear words have been used in a Will indicating that the donee has been made '*malik*' and complete powers of transfer have been conferred upon him, it is not further necessary in order to give effect to the full powers conferred upon the donee that there must also be a provision in the Will to the effect that the estate conferred upon him is a heritable one. *O JAGMOHAN SINGH v. SHEORAJ KUAR*, 4 O. W. N. 1125; A. I. R. 1928: Oudh 49

Construction—Will and gift, distinction between—Will giving life-estate to A with remainder to B—Nature of B's estate—Death of B before A—B's son, whether entitled to succeed on A's death.

H executed a deed by which he gave the whole of his property to A with the reservation that H would have full power to deal with the property so long as he was alive and that after his death his wife should have the same power during her lifetime. It was also recited in the deed that A was the duly adopted son of H. A pre-deceased the widow of H.

Held, (1) that the deed was neither a deed of gift or adoption nor a deed appointing an heir, but a Will;

(2) that A acquired a heritable and vested interest in the property on the death of H and that A's son was, therefore, entitled to succeed on the death of the widow of H in preference to the collaterals of H. *L. JONH SINGH v. MAHLA*, 28 P. L. R. 601; A. I. R. 1928: Lah. 55

WORDS AND PHRASES:—

Acting in the discharge of official duty. See CH. P. O., 1898, s. 197 222

Actual rent. See BENGAL TENANCY ACT, 1885, s. 74 571

Agricultural income. See INCOME TAX ACT, 1922, s. 2 353

Agriculturist. See C. P. O., 1908, s. 60 (1) (c) 45, 49

Ajautuka. See HINDU LAW 885

Ancestral land. See COURT FEES ACT, 1870, ss. 1 2, 28 817

See CUSTOM 905

Annually. See MADRAS MOTOR VEHICLES RULES, 1923, s. 30 (1) 110

Any direction. See PENAL CODE, 1860, s. 339 111

Arms. See ARMS ACT, 1878, ss. 4, 19 (e) 707

Aulad. See CUSTOM 846

Ayavaharika debt. See HINDU LAW. 392

Bakasht. See LANDLORD AND TENANT 272

Building site. See BOMBAY LAND REVENUE CODE, 1879, ss. 3 (9), 66, 148 239

Chhayahrad. See PATNI 117

Coercion. See CONTRACT ACT, 1872, s. 72 468

Darabast hakuk. See PATNI 117

Delivery. See ARMS ACT, 1878, s. 22 689

Devadayam. See INAM 891

Engagement. See MADRAS IMMIGRATION CESS ACT, 1865, s. 1 377

Final. See COURT FEES ACT, 1870, s. 5 66

Forest produce. See FOREST ACT, 1878, ss. 2, 39, 41 780

Good faith. See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 55, 60 61

WORDS AND PHRASES:—

Jautuka.	<i>See</i> HINDU LAW.	885
Kattu Kuthagal.	<i>See</i> MADRAS ESTATES LAND ACT, 1904, s. 6	505
Khudkasht ralyat.	<i>See</i> BENGAL PATNI TALUKS REGULATION, 1819, s. 11	71
Labelled.	<i>See</i> BIHAR AND ORISSA FOOD ADULTERATION ACT, 1919, ss. 3 (1), 14 (2)	587
Loss.	<i>See</i> RAILWAYS ACT, 1890, s. 72	252
Malguzarl.	<i>See</i> BENGAL TENANCY ACT, 1885, s. 74	571
Malik.	<i>See</i> WILL	593
Market value.	<i>See</i> LAND ACQUISITION ACT, 1894, ss. 11, 23 (2)	31
Person.	<i>See</i> C. P. C., 1908, O. I., r. 11	854
Plying for hire.	<i>See</i> MADRAS LOCAL BOARDS ACT, 1920, ss. 166, 207 (d)	446
Public road.	<i>See</i> MADRAS LOCAL BOARDS ACT, 1920, s. 3 (18)	705
Quashing of proceedings.	<i>See</i> Cr. P. C., 1898, ss. 423, 439, 561	694
Report.	<i>See</i> Cr. P. C., 1898, s. 190 (1) (b)	577
Sab sudha.	<i>See</i> IMPARTIBLE RAJ	399
Saver.	<i>See</i> PATNI	117
Sealed.	<i>See</i> BIHAR AND ORISSA FOOD ADULTERATION ACT, 1919, s. 3 (1), 14 (2)	587
Sell.	<i>See</i> MADRAS ABKARI ACT, 1886, s. 55 (1)	716
Timber.	<i>See</i> FOREST ACT, 1878, ss. 2, 39, 41	790
Unavoidable reason.	<i>See</i> LANDLORD AND TENANT	25

Workmen's Compensation Act (VIII of 1923), ss. 3, 10—*Accident to workmen—Employer, Liability of—Notice to employer.*

To bring a case under the Workmen's Compensation Act, two conditions must be satisfied; the accident must be one arising out of the employment, and it must also be in the course of the employment.

A Railway coolie was returning by an electric train from some place where he had been sent to do some work. He was standing near a carriage door which was left open by the Company. The train while going up a bridge received a jerk and the coolie fell out of the train and died. In a suit for compensation under the Workmen's Compensation Act:

Held, that if the carriage with the open door was a dangerous place, it was a dangerous place provided by the masters of the coolie, the Railway Company, and they were liable to pay compensation as the accident was in the course of and arose out of the employment of the coolie.

A notice given by the family of a deceased workman after six days of the accident cannot be said not to have been given as soon as practicable after the accident. *B. G. I. P. Ry. v. KASHINATH CHIMNAJI*, 29 Bom. L. R. 1544; A. I. R. 1928 Bom. 1

Wrongful institution of civil suit—*Action for damages, whether lies. See* TORTS

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